Filed 5/6/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THOMAS M. SIEBEL, Plaintiff and Appellant, v. CAROL L. MITTLESTEADT, et. al., Defendants and Respondents.	H025069 (Santa Clara County Super. Ct. No. CV790935)

Plaintiff Thomas M. Siebel sued defendants Carol L. Mittlesteadt and E. Rick Buell, II, for malicious prosecution based on defendants' legal representation of a former employee of Siebel Systems, Inc. (SSI), where Siebel was the Chief Executive Officer (CEO). The trial court granted summary judgment to defendants on the ground that Siebel had failed to achieve a favorable termination of the employee's action against him, the parties having settled their dispute while the case was in the appellate court.

On appeal, Siebel contends that summary judgment was improperly granted because (1) the underlying action *was* terminated in his favor and (2) defendants failed to meet their burden to show that every claim in the underlying action was supported by probable cause. Defendants, on the other hand, maintain that the entire action must be dismissed because they will be unable to defend themselves without disclosing information protected by the attorney-client privilege. We agree with Siebel that he obtained a favorable termination of the underlying action and that probable cause was lacking as to the wrongful termination claims against him. Accordingly, we must reverse the judgment.

Procedural Background

The genesis of the present controversy is a 1996 lawsuit brought by Debra Christoffers against her former employer, SSI, and its president and CEO, Thomas M. Siebel. After being terminated from SSI, Christoffers sued both the company and Siebel for wrongful termination to avoid paying compensation (first cause of action), sex discrimination in violation of the FEHA and the California Constitution (second and third causes of action), wrongful termination in violation of the public policy against sex discrimination (fourth cause of action), violation of Labor Code section 970 (fifth cause of action), and wrongful termination in violation of the public policy expressed in Labor Code section 970 (sixth cause of action). Christoffers also alleged two fraud claims against both defendants (seventh and eighth causes of action), two contract-based claims against SSI (ninth and tenth causes of action), and four claims against SSI related to unpaid compensation. Generally, Christoffers alleged that Siebel had induced her to leave her previous employer with false promises of large commissions and lucrative stock options, and that once she joined SSI, Siebel discriminated against her based on her sex, refused to pay her commissions, and terminated her to avoid paying her earned compensation and to prevent the vesting of her stock options. It is the first six causes of action that are the basis of Siebel's malicious prosecution action.

Siebel successfully demurred to Christoffers' second cause of action, sex discrimination in violation of the Fair Employment and Housing Act (FEHA). The court overruled Siebel and SSI's demurrer to the first, fifth, and sixth causes of action; subsequently, however, the court granted summary adjudication to Siebel on the first, fourth, fifth, and sixth causes of action and to SSI on the fifth and sixth causes of action. Shortly thereafter, Christoffers voluntarily dismissed the third cause of action along with the second and fourth. Thus, all of the first six causes of action were dismissed before trial.

The matter proceeded to trial against Siebel on only the fraud (seventh and eighth) causes of action, and against SSI on the claims of fraud, wrongful termination in violation of public policy to avoid paying compensation, and unpaid compensation. The jury specifically found that SSI had terminated Christoffers because it honestly believed that her job performance was deficient, that neither defendant had made a promise it had not intended to perform, and that neither defendant had concealed or suppressed a material fact. Thus, Christoffers was unsuccessful in her claims of wrongful termination and fraud. However, the jury did find that SSI had failed to pay Christoffers $193,000 in commissions. Christoffers was awarded that amount plus prejudgment interest, for a total award of $233,662.25. The jury also rendered a verdict on a cross-complaint filed by SSI, finding no misappropriation of trade secrets and finding liability but no damages for breach of contract, breach of the duty of loyalty, and conversion.

After trial SSI and Siebel moved for attorney fees under Government Code section 12965 on the ground that Christoffers' sex discrimination claims had been frivolous and maintained in bad faith. The matter was heard by a different judge,[1] who was unable to conclude from reading the record that Christoffers' action was frivolous, unreasonable, or without foundation. As the prevailing party on her unpaid-compensation claim against SSI, Christoffers was awarded costs and attorney fees attributable to that portion of the action. (Lab. Code, § 218.5.) Because Christoffers had failed to recover from Siebel personally, he was granted his costs.

Both parties appealed. While the appeals were pending, however, Christoffers settled the case with Siebel and SSI. The parties agreed that they would dismiss their appeals. SSI would pay Christoffers $351,829.92, approximately 86 percent of the

---

[1] The Christoffers lawsuit was filed and heard in San Mateo County. After trial, however, one of the defense attorneys became a judge in that county, and the post-trial motions were heard in Santa Clara County.

damages and costs she had been awarded, and Christoffers would pay SSI $51,829.92, the amount the court had awarded to Siebel for his litigation costs. The parties further stipulated to the following specific releases. Christoffers and her attorneys released Siebel, SSI, and their attorneys from any liability or obligations arising from the case. Siebel, SSI, and their attorneys similarly released Christoffers, but *not* Christoffers' attorneys, Buell and Mittlesteadt. The agreement further stated that it did not modify "the final termination of the Action entered in favor of Siebel for purposes of pursuing claims against Buell or Mittlesteadt, or otherwise prevent Siebel from pursuing any claims against Buell or Mittlesteadt that he may have related to the Judgment in this Action."

On October 5, 1999, in accordance with the settlement agreement, the parties in the Christoffers action stipulated to dismissal of their appeals. In July 2000, Siebel brought the present lawsuit for malicious prosecution against Buell and Mittlesteadt. According to the complaint, Buell had repeatedly advised Mittlesteadt and Christoffers that Christoffers' sex discrimination claims were without foundation and should be dropped, and he had expressed the opinion to Siebel and SSI's counsel that these allegations were "bogus." Nevertheless, upon associating as counsel in the case, Buell "willfully and purposely prosecuted these claims" solely to coerce a settlement. Likewise, Mittlesteadt "knew that the [discrimination] charges set forth above were without merit, objectively baseless, and were [*sic*] fabricated in order to extract a substantial settlement at a critical juncture for SSI given its pending IPO." In addition, the complaint alleged, Mittlesteadt had directed the action against Siebel personally in order to intimidate him into a prompt settlement, for fear that SSI would be labeled in the industry as "hostile to female employees" and thus impaired in its ability "to recruit and employ talented female personnel."

Siebel further noted that the first, second, fourth, fifth, and sixth causes of action in Christoffers' complaint had been resolved in his favor before trial, in part because Siebel was not Christoffers' employer. Only the third cause of action (unconstitutional

sex discrimination) had remained, but Christoffers had voluntarily dismissed that claim before trial, because her counsel had "recognized that the claim was devoid of merit and that a judgment or decision in favor of Siebel was inevitable." In the course of litigating all of these "baseless" six causes of action, Siebel had expended "substantial attorneys' fees and costs" as well as personal time. Siebel sought punitive as well as compensatory damages.

Defendants moved for summary judgment on three grounds: (1) Siebel would not be able to establish malicious prosecution because the essential element of a favorable termination was lacking; (2) public policy required dismissal of this action because defendants would not be able to defend it without violating the attorney-client privilege; and (3) Siebel would not be able to demonstrate that defendants lacked probable cause for filing and prosecuting the underlying action.

The trial court agreed with defendants on the first ground and therefore did not reach the remaining grounds. The court thereafter entered judgment for defendants and denied Siebel's motion for a new trial.

Discussion

1. Standard of Review

The parties express no confusion regarding the standard this court applies in reviewing a grant of summary judgment. On appeal, we conduct an independent review of the moving and opposing papers. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404.) As the moving party, defendants had the initial burden of showing that one or more elements of Siebel's cause of action could not be established or that there was a complete defense to the action. (Code Civ. Proc., § 437c, subds. (o), (p)(2)); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at pp. 853-854.) A moving defendant can meet this burden by affirmatively showing that "the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 854.) If the

defendant fails to meet this initial burden, it is unnecessary to examine the plaintiff's opposing evidence; the motion must be denied. (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 71-72; accord, *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) However, if the defendant makes a prima facie showing that justifies a judgment in his or her favor, the burden then shifts to the plaintiff to make a prima facie showing that there exists a triable material issue of fact. (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.)

2. Scope of the Issues

Because summary judgment is defined by the issues raised in the pleadings, we first identify the material allegations of Siebel's complaint. The sole cause of action for malicious prosecution was directed at only the first six causes of action of Christoffers' action against him: (1) wrongful termination to avoid paying compensation, in violation of the public policy expressed in *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137); (2) sex discrimination in violation of the Fair Employment and Housing Act, Government Code sections 12940, et. seq. (FEHA); (3) sex discrimination in violation of article I, section 8 of the California Constitution; (4) wrongful termination in violation of the public policy against sex discrimination; (5) inducing Christoffers to work for SSI by misrepresentations, in violation of Labor Code section 970; and (6) wrongful termination as a result of the Labor Code section 970 violation. In his complaint Siebel alleged that all of these claims were "patently frivolous and objectively baseless when filed" and that defendants had acted without probable cause or good faith in pursuing them. Siebel listed numerous reasons for his assertion that Christoffers' allegations were "objectively baseless," including the fact that he was not her employer and therefore could not be personally liable for discrimination or wrongful termination.

3. The Tort of Malicious Prosecution

A successful malicious prosecution action requires proof that the prior litigation was (1) commenced by or at the defendant's direction, (2) pursued to a termination in the

plaintiff's favor, (3) brought without probable cause, and (4) initiated with malice. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676; *Brennan v. Tremco, Inc.* (2001) 25 Cal.4th 310, 313; *Pattiz v. Minye* (1998) 61 Cal.App.4th 822, 826.) These elements " 'have evolved over time as an appropriate accommodation between the freedom of an individual to seek redress in the courts and the interest of a potential defendant in being free from unjustified litigation.' [Citation.]" (*Crowley v. Katleman*, *supra*, 8 Cal.4th at p. 693.) "The tort of malicious prosecution recognizes the right of an individual to be free from unjustifiable litigation or criminal prosecution. The action is designed to compensate the wronged individual for damage to reputation and to reimburse him or her for the costs of defending against unwarranted legal claims. [Citation.] Because malicious prosecution actions tend to have a 'chilling effect' on an ordinary citizen's willingness to bring disputes to court, the action has traditionally been regarded with disfavor and the tort's elements have been strictly construed and carefully circumscribed." (*Vanzant v. DaimlerChrysler Corp.* (2002) 96 Cal.App.4th 1283, 1288, citing *Sheldon Appel Company v. Albert & Oliker* (1989) 47 Cal.3d 863, 872 (*Sheldon Appel)*; *Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1813.)

Nevertheless, this traditional disfavor "should not be employed to defeat a legitimate cause of action." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 53.) "[W]hen *the litigation is groundless and motivated by malice* the balance tips in favor of the policy of redressing the individual harm inflicted by that litigation." (*Crowley v. Katleman*, *supra*, 8 Cal.4th at p. 695.) As our Supreme Court has recognized, "[t]he malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. . . . In recognition of the wrong done [to] the victim of such a tort, settled law permits him to recover the cost of defending the prior action . . . and for mental or emotional distress [citation]. [¶] The judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of already crowded dockets, but

by the unscrupulous use of the courts by individuals '. . . as instruments with which to maliciously injure their fellow men.' [Citation.]" (*Bertero v. National General Corp., supra,* 13 Cal.3d at pp. 50-51, fn. omitted; see also *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349 [policy disfavoring malicious prosecution suits should not be taken to extreme of nullifying tort and undermining protection from damage caused by unjustified prosecutions].)

4. Defendants' Showing

In their summary judgment motion, defendants addressed the second and third elements of Siebel's cause of action: They asserted that (a) Siebel would not be able to establish a termination in his favor and (b) there was probable cause to bring and pursue the Christoffers lawsuit.[2] Defendants further argued that the entire action should be dismissed because they would be unable to defend themselves without abridging Christoffers' attorney-client privilege, which Christoffers had refused to waive. In granting defendants' motion, the trial court relied on the first ground. Citing *Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409, the court agreed with defendants that the settlement of the Christoffers action precluded a showing of a termination in Siebel's favor. The court therefore did not reach the issue of probable cause or consider defendants' asserted inability to defend themselves without disclosing privileged information.

a. Favorable Termination

The parties agree that this element of a malicious prosecution action is established by a showing that the litigation of the underlying lawsuit ended with a resolution that reflects the merits of the action and the current plaintiff's innocence of the misconduct alleged in the prior suit. (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335; *Casa Herrera,*

---

[2] Defendants did not address the element of malice in their motion.

Inc. v. Beydoun, supra, 32 Cal.4th at p. 342.) The plaintiff "must plead and prove that the prior judicial proceeding which is the basis of the [malicious prosecution] suit terminated in plaintiff's favor. [Citation.] Plaintiff need not show a verdict or a final determination on the merits; legal termination will suffice. [Citation.] The termination, however, must reflect on the merits of the underlying action." (*Berman v. RCA Auto Corp.* (1986) 177 Cal.App.3d 321, 323.) Generally, the issue of favorable termination is a legal issue for the court to decide. (*Villa v. Cole*, *supra*, 4 Cal.App.4th at p. 1335; *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1149; cf. *Citi-Wide Preferred Couriers v. Golden Eagle Ins. Corp.* (2003) 114 Cal.App.4th 906, 914 [insurer's abandonment of case with stipulation that premiums had been fully paid was unconditional surrender and thus favorable termination as a matter of law].)

In this case the primary question is whether a settlement by the parties to the underlying lawsuit (Christoffers, Siebel, and SSI) *necessarily* precludes a malicious prosecution action against the original plaintiff's attorneys. Defendants maintain that the trial court was correct in relying on *Ferreira v. Gray, Cary, Ware & Freidenrich*, *supra*, 87 Cal.App.4th 409 to support its finding that Siebel had failed to achieve a favorable termination. Siebel, however, argues that *Ferreira* was wrongly decided and distinguishable on its facts.

In *Ferreira*, the plaintiff sued his former girlfriend and two of her family members for the return of gifts he had given her during their relationship. The girlfriend and her mother cross-complained, alleging multiple torts. After obtaining a favorable jury verdict and ensuing judgment on his complaint (and a predominantly favorable verdict on the cross-complaint), Ferreira settled the case with the defendants. The parties agreed that judgment would be entered for Ferreira on one of the cross-claims and otherwise in accordance with the verdict, but that Ferreira would accept $1 from each of the defendants in lieu of payment of the damages awarded by the jury. The defendants

agreed not to pursue an appeal of the judgment. In accordance with this agreement, an amended judgment was entered.

Eight months after acknowledging satisfaction of the judgment, Ferreira sued the defendants' attorneys for malicious prosecution. The trial court, finding no favorable termination, granted the attorneys' motion for summary judgment, and the Fourth District, Division One, affirmed. The appellate court rejected Ferreira's claim that the underlying jury verdict should determine the issue of favorable termination; the litigation did not end with a judgment based on that verdict, but was resolved--i.e., *terminated*--by the subsequent settlement. "Thus, while arguably Ferreira may have received a favorable *determination* at one point in the proceeding . . . the litigation *terminated* as a result of a negotiated settlement in which both sides gave up something of value to resolve the matter. This termination of the litigation did not reflect the merits of the underlying action, but rather, the compromise between the parties, and therefore, as a matter of law, there was not a favorable termination for purposes of a malicious prosecution action." (*Ferreira, supra,* 87 Cal.App.4th at p. 413; see also *Pender v. Radin*, *supra*, 23 Cal.App.4th at p. 814 [dismissal resulting from a settlement generally does not constitute a favorable determination because it reflects ambiguously on the merits of the action]; *Dalany v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822, 827-828 [stipulated judgment resulted from settlement demonstrating compromise by parties, not determination of the merits by parties or court].)

We have no occasion to take issue with the result or reasoning of *Ferreira*, as Siebel urges us to do, because the procedural posture of this case compels a different result. In *Ferreira* the parties agreed not only to a new disposition reflecting the merits of their dispute, but to an *amended judgment* reflecting these new terms. The litigation ended with that amended judgment, not the previous judgment entered upon the jury verdict. Here, although Siebel and Christoffers agreed to new rights and obligations with respect to each other, they did not contemplate or stipulate to a new judgment, but agreed

only to abandon their appeals and allow the *existing* judgment to become final. Indeed, the settlement agreement expressly stated that it did not modify "the final termination of the Action entered in favor of Siebel for purposes of pursuing claims against Buell or Mittlesteadt, or otherwise prevent Siebel from pursuing any claims against Buell or Mittlesteadt that he may have related to the Judgment in this Action." Thus, although both parties undoubtedly wished to put an end to their dispute, they did so *not* by stipulating to an amendment of the judgment, but by agreeing to "compromise certain sums [awarded] in the [judgment]" and to desist from their respective appeals to avoid "further costs, inconvenience and uncertainties." The underlying *judgment*, which encompassed a disposition entirely in Siebel's favor,[3] remained intact. (Cf. *Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 515 [appellate decision solely on procedural grounds does not override trial court determination of the merits].)

Accordingly, notwithstanding the broad applications the *Ferreira* holding invites, in this case the mere occurrence of a postjudgment settlement did not *in itself* effect a termination and therefore does not preclude Siebel's new action. In applying the concept of "favorable termination" we will not disregard the clear terms of the parties' settlement agreement.[4] In that agreement, Siebel released *Christoffers* from future claims related to her employment at SSI, but he expressly reserved the right to sue her attorneys. There could not be any right to sue if the settlement eliminated the judgment on which the

---

[3] It is noteworthy that part of the settlement called for Christoffers to pay $51,829.92 for Siebel's costs, the exact amount awarded Siebel in the judgment.

[4] A settlement agreement is, of course, a contract, which is " 'governed by the legal principles applicable to contracts generally.' " (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810-811.) They " 'regulate and settle only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof, and do not extend to matters which the parties never intended to include therein, although existing at the time.' " (*Folsom v. Butte County Assn. of Governments, supra,* 32 Cal.3d at p. 677.)

contemplated lawsuit must depend; Siebel would thus have placed himself in a "Catch-22" situation the negotiating parties could never have intended. Instead, the language of the agreement clearly indicates that the settling parties intended to allow the existing judgment to become final, thereby affording Siebel a "favorable termination" basis for any action he might bring against Christoffers' attorneys. Upon dismissal of their appeals and issuance of the remittitur, that judgment -- which unequivocally reflects Siebel's innocence of Christoffers' accusations-- did become a final adjudication of the parties' rights.[5]

Defendants further argue, however, that Siebel did not achieve a favorable termination as to the *entire* action, a prerequisite to maintaining a malicious prosecution lawsuit. (See, e.g., *Dalany v. American Pacific Holding Corp., supra,* 42 Cal.App.4th at p. 829; *Crowley v. Katleman, supra,* 8 Cal.4th at p. 686.) Defendants contend that the first six causes of action in the underlying lawsuit constituted a single primary right. Because all but counts two through four (the sex discrimination claims) were settled, they argue, there was no favorable termination of the *entire* action. Siebel, on the other hand, contends that the sex discrimination claims were severable from the remaining causes of action and clearly were terminated in his favor when Christoffers voluntarily dismissed them after receiving adverse rulings on the second and fourth causes of action.[6]

---

[5] It is unnecessary to address Siebel's contention that *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179 is more apposite than *Ferreira*. We agree with defendants that those two cases are not necessarily inconsistent. However, the facts from which we derive our conclusion in this case are procedurally unique. Furthermore, as defendants point out, the settlement in *Mattel* was of claims unrelated to the frivolous copyright infringement claim at which the subsequent malicious prosecution action was directed. Defendants also emphasize that the summary judgment on the merits with respect to that frivolous claim was allowed to stand "*as previously entered*." That is true in the case before us as well.

[6] The second cause of action, alleging sex discrimination in violation of the FEHA, was resolved in Siebel's favor when the court sustained his demurrer without leave to

We need not enter into the parties' debate over this question. Although we agree with Siebel that severable claims can form the basis of a malicious prosecution suit (see, e.g., *Sierra Club Foundation v. Graham, supra,* 72 Cal.App.4th at p.1153 [favorable termination may be established where severable claims are adjudicated in plaintiff's favor]; see also *Crowley v. Katleman*, *supra*, 8 Cal.4th at p. 685 [rejecting application of primary right theory to favorable termination requirement]), that principle is not essential to the resolution of this case. As defendants themselves emphasize, all of the claims on which Siebel's present action is based were resolved through the judgment, which was entered in Siebel's favor. Defendants do not separately contend that the dismissal of counts two through four was not on the merits, but rely entirely on the fact of settlement and the "merge[r]" of their disposition into the judgment. Moreover, to analyze the specific circumstances of Christoffers' decision to dismiss these claims would entail factual determinations that are beyond the scope of summary judgment.[7]

Defendants' additional suggestion that Siebel's action is time barred as to the third cause of action is not well taken. For this purpose they now assert that favorable termination occurred not at settlement, but when Christoffers dismissed the claim. On the contrary, even where a single cause of action has been resolved, an action for malicious prosecution must await a favorable termination of the *entire* proceeding. (*Jenkins v. Pope* (1990) 217 Cal.App.3d 1292, 1299.) The one-year statute of limitations for malicious prosecution begins to run upon entry of a judgment in the trial court, is tolled upon the filing of a notice of appeal, and resumes upon issuance of the remittitur,

---

amend. Siebel subsequently obtained summary adjudication of the fourth cause of action, for wrongful termination in violation of the public policy against sex discrimination. Christoffers thereafter voluntarily dismissed the second and fourth causes of action as well as the third cause of action for sex discrimination in violation of the California Constitution.

[7] Defendants' statement of undisputed facts did not identify the reasons for Christoffers' voluntary dismissal.

which completes the appellate process. (*Feld v. Western Land & Development Co.* (1992) 2 Cal.App.4th 1328, 1334; *Bob Baker Enterprises, Inc. v. Chrysler Corp.* (1994) 30 Cal.App.4th 678, 684.) Accordingly, Siebel's cause of action did not accrue until October 8, 1998, when the court entered judgment in Christoffers' case. Defendants do not challenge the timeliness of the case when measured by that accrual date.

b. Probable Cause

In order to establish the lack of probable cause to prosecute Christoffers' action against him, Siebel would have to show at trial that no reasonable attorney would have thought Christoffers' claims to be legally tenable. (*Sheldon Appel, supra,* 47 Cal.3d at p. 878.) This is ultimately a question of law for the court, not a jury, to make. (*Ibid.; Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164.)

"[T]he probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of that question of law calls for the application of an *objective* standard to the facts on which the defendant acted." (*Sheldon Appel, supra,* 47 Cal.3d at p. 878.) "Because the malicious prosecution tort is intended to protect an individual's interest 'in freedom from unjustifiable and unreasonable litigation' [citation], if the trial court determines that the prior action was objectively reasonable, the plaintiff has failed to meet the threshold requirement of demonstrating an absence of probable cause and the defendant is entitled to prevail." (*Ibid*.) An action may be deemed tenable "if it is supported by existing authority or the reasonable extension of that authority." (*Arcaro v. Silva & Silva Enterprises Corp.* (1999) 77 Cal.App.4th 152, 156; accord, *Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512, disapproved on another point in *Zamos v. Stroud* (2004) 32 Cal.4th 958, ___[12 Cal.Rptr.3d 54, 65].)

The *subjective* beliefs of the defendant attorney regarding the legal tenability of the action are not relevant to the question of probable cause, though they bear upon the

element of malice. The factual predicate of a claim, however, is by no means irrelevant to a probable cause determination. "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Sangster v. Paetkau, supra,* 68 Cal.App.4th at pp. 164-165.) Inherent in the probable cause analysis is whether there was "evidence sufficient to prevail in the action or at least information reasonably warranting an inference [that] there is such evidence." (*Puryear v. Golden Bear Ins. Co.* (1998) 66 Cal.App.4th 1188, 1195.)

A dispute over the defendant's knowledge or belief in the facts on which the action is based presents a factual question that is appropriately submitted to a jury. (*Sheldon Appel, supra,* 47 Cal.3d at pp. 879-880; see also *Citi-Wide Preferred Couriers v. Golden Eagle Ins. Co., supra,* 114 Cal.App.4th at p. 912 [defendant had right to have jury resolve threshold question of factual knowledge before trial court could determine probable cause].) " ' "What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, the latter for the jury." ' [Citations.]" (*Sheldon Appel, supra,* 47 Cal.3d at p. 877.) If it is proved that the defendant instituted the prior action knowing that the essential facts were untrue, or knowing that a claim was "manifestly unsupported" by any evidence or information permitting an inference that such evidence could be obtained for trial, a court may conclude that no reasonable attorney would find the claim to be legally tenable. (*Puryear v. Golden Bear Ins. Co., supra,* 66 Cal.App.4th at pp. 1195, 1198; *Sierra Club Foundation v. Graham*, *supra*, 72 Cal.App.4th at pp. 1153-1154; *Arcaro v. Silva & Silva Enterprises Corp., supra*, 77 Cal.App.4th at pp. 156-157.)

Of course, a litigant's misstatements are not necessarily attributed to the attorney in this situation. When the attorney initiates the action, he or she is "entitled to rely on information provided by the client." (*Morrison v. Rudolph, supra,* 103 Cal.App.4th at pp.

512-513.) Unless the attorney has notice that the client is providing material false information or factual mistakes, the attorney " 'may, without being guilty of malicious prosecution, vigorously pursue litigation in which he is unsure of whether his client or the client's adversary is truthful, so long as that issue is genuinely in doubt.' " (*Id.* at p. 513.)

In this case Siebel alleged that Christoffers' attorneys had initiated and pursued the litigation without any belief that the first six causes of action had any legal *or* factual basis. In his opposition to summary judgment he argued that the existing *legal* authority did not support Christoffers' first six claims in light of the facts known to defendants; thus, defendants knew that these six causes of action were without merit. Siebel did not, however, assert that the *facts* alleged in the complaint were untrue; it was the "allegations" that were, according to Siebel, "fabricated" in order to achieve a malicious objective. On appeal, he continues this line of reasoning, arguing that "Christoffers fabricated allegations that [Siebel had] discriminated against her, and that defendants knew it." Although Siebel contends that the basis of his challenge is the lack of "*factual* tenability," upon closer examination his position turns upon the lack of *legal* merit: defendants knew, based on the "abundant evidence" before the court, that the charges were objectively baseless. Neither the complaint nor the opposition identified untrue facts on which the claims were premised. Siebel instead asserted facts that were relevant only to whether defendants *knew* the claims had no merit.[8] That defendants knew Christoffers' lawsuit was "bogus" pertains to the issue of malice, not probable cause.

---

[8] The "false" claims were, according to Siebel's opening brief, belied by the following facts: Siebel had hired Christoffers at her previous employment, Gain Technology, Inc. (Gain) and had approved her being hired at SSI; Siebel had not discriminated against Christoffers or been biased against women at Gain; Siebel had not discriminated against any other women at SSI; even though Christoffers had alleged that Siebel did not like assertive, driven women, defendant Mittlesteadt knew that SSI's co-founder embodied these very characteristics; when Christoffers was hired, she received more favorable compensation terms than male employees in comparable positions; among the 10 employees in comparable positions, Christoffers was paid the second highest amount of

The appropriate focus of our analysis must therefore be whether the causes of action in Christoffers' complaint were "supported by existing authority or the reasonable extension of that authority." (*Arcaro v. Silva & Silva Enterprises Corp.*, *supra*, 77 Cal.App.4th at p. 156.) We decline to make that determination simply by adopting the trial court's discretionary decision not to award attorney fees under Government Code section 12965, subdivision (b). The court was making a discretionary call on a cold record, having received the case from San Mateo County after the trial; it was not called upon to undertake the same analysis that is required in this proceeding. (Cf. *Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1194-1196 [no collateral estoppel effect of summary denial of sanctions motion; sanctions decision may be influenced by factors extrinsic to a malicious prosecution case]; *Crowley v. Katleman, supra,* 8 Cal.4th at p. 689, fn. 12 [denial of sanctions does not necessarily reflect lack of bad faith].)

The third cause of action asserted sex discrimination in violation of the California Constitution. This cause of action survived Siebel's summary adjudication motion, though Christoffers later dismissed it voluntarily. We agree with defendants that in *this* case, the denial of summary adjudication of count three was "a reliable indicator that probable cause [was] present," because the court's statement that triable issues existed "impl[ied] that the judge [found] at least some merit in the claim." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383; see also *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 824 [denial of defense summary judgment motion based on existence of triable issue shows probable cause in subsequent malicious prosecution

---

draw during 1995 and 1996; Christoffers had characterized her problem with Siebel as a personality conflict; after Christoffers was fired, women were hired in sales positions at SSI; Christoffers and Mittlesteadt had a history of making baseless sex discrimination claims against her former employers; and Buell admitted to Siebel's counsel that the sex discrimination claims were "bogus."

action].) The asserted "exception" for claims based on fraud or perjury is inapposite here, because none of the facts Siebel offers suggests fraud or perjury.

Nevertheless, there remain three claims for which we can find no legal foundation. The first, fourth, and sixth causes of action all asserted wrongful termination in violation of public policy against Siebel as well as SSI. The first cause of action invoked the public policy against terminating employees to avoid paying earned compensation;[9] the fourth, the public policy against sexual discrimination; and the sixth, the public policy expressed in Labor Code section 970, which proscribes persuading someone to "change from one place to another" by means of misrepresentations about the job during the recruitment.[10] As to each of these causes of action the court granted Siebel summary adjudication because there was no evidence that he was Christoffers' employer and he could not be individually liable.

We can find no uncertainty or conflict in the law regarding liability for wrongful termination. At the time the complaint was filed in July 1996 there was no legal basis for a wrongful termination lawsuit against supervisors, managers, or officers of a corporate employer. Defendants maintain that the law was unclear, unsettled, or even in their favor as to whether supervisors could be individually liable for "employment-related torts."

---

[9] Labor Code section 201, subdivision (a) makes wages earned and unpaid due and payable immediately if "an employer" discharges an employee.

[10] Labor Code section 970 provides: "No person, or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either: [¶] (a) The kind, character, or existence of such work; [¶] (b) The length of time such work will last, or the compensation therefor; [¶] (c) The sanitary or housing conditions relating to or surrounding the work; [¶] (d) The existence or nonexistence of any strike, lockout, or other labor dispute affecting it and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought."

However, they overstate the holdings of the cases on which they rely. With respect to the first cause of action, for example, wrongful termination to avoid prompt payment of earned compensation, defendants point to *Gould v. Maryland Sound Industries, Inc. supra*, 31 Cal.App.4th 1137 (*Gould*), on which Christoffers' first cause of action was expressly based. Nowhere in the *Gould* opinion, defendants point out, does the appellate court indicate that the managers were improperly named as defendants. But defendants misrepresent *Gould* as being an action for wrongful termination against both the employer and two managers. The plaintiff sued the *company* for wrongful termination, but sued the managers only for defamation. Consequently, there was no reason for the appellate court to express disapproval of the pleading.

Likewise, with respect to the fourth cause of action for wrongful termination in violation of the public policy against discrimination, the cases cited by defendants pertain to individual liability for *discrimination*, not for wrongful termination.[11] Whether the law can be characterized as unclear or unsettled in July 1996 regarding supervisor liability for discrimination, the gravamen of count four was wrongful termination, not discrimination. For that cause of action there was no probable cause to name Siebel as a defendant, even if it was reasonable to charge him with the underlying acts of discrimination.

---

[11] Defendants cite, for example, *Monge v. Superior Court* (1986) 176 Cal.App.3d 503 [sex discrimination against company and employees]; *Jones v. Los Angeles Community College Dist*. (1988) 198 Cal.App.3d 794 [racial discrimination]; *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057 [racial discrimination]; *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043 [discrimination and constructive discharge]; *Saavedra v. Orange County Consolidated Transportation etc. Agency* (1992) 11 Cal.App.4th 824 [discrimination against agency and supervisor, wrongful termination against agency]; *Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14 [discrimination against employer and supervisor]; and *Matthews v. Superior Court* (1995) 34 Cal.App.4th 598 [sexual harassment against employer and supervisors]. None of these decisions explicitly considered the viability of a wrongful termination claim against an individual.

The same conclusion applies to the sixth cause of action for wrongful termination in violation of the public policy against inducing a person "to change from one place to another" to accept employment, a violation of Labor Code section 970. The trial court ruled by summary adjudication that Siebel could not be personally liable on the sixth cause of action because he was not Christoffers' employer. As to the fifth cause of action (the underlying Labor Code section 970 violation) as well as the sixth, the court granted summary adjudication for both Siebel and SSI on the ground that Christoffers did not move or relocate her residence when she accepted a position at SSI. Again defendants argue that the law was unclear as to whether an actual change of residence was required for Christoffers to assert a Labor Code section 970 violation or if instead it was enough to allege merely that she had changed *employers* based on Siebel's false representations about the job. Even if we were to agree that the law was unclear on this point,[12] it would

---

[12] Defendants point to the language of Labor Code section 970, which refers to a "change from one place to another" without using the word "residence." In 1972, however, the Supreme Court explained that "[t]he words 'to change from one place to another' import temporary as well as permanent relocation of residence, as contrasted with a mere change in the site of employment." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 239.) Defendants discount this explanation as dictum. In support of their view of the statutory language they offer a selective quotation from *Seubert v. McKesson Corp.* (1990) 223 Cal.App.3d 1514. *Seubert* states, however, that Labor Code section 970 "prevents employers from inducing employees *to move to, from, or within California* by misrepresenting the nature, length or physical conditions of employment. . . . The apparent purpose of sections 970 and 972 is to protect potential employees from being solicited to change employment by false representations concerning the nature or duration of employment. The statutory scheme is particularly addressed to preventing employers from inducing potential employees to *move to a new locale* based on misrepresentations of the nature of the employment." (*Id.* at p. 1522, emphasis added.) The statute applied in *Seubert* because the plaintiff was induced to move from Pennsylvania to California by false assurances regarding his sales position. (See also *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 637 [filed several months before Christoffers' complaint, describing violation as "false representations to induce relocation"]; *Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 553 [substantial evidence that defendants misrepresented length of employment in order to

justify only the claim for the actual statutory violation (the fifth cause of action), not the claim for wrongful termination in violation of public policy expressed by the statute.

Defendants argue, however, that probable cause was demonstrated in the trial court's overruling of Siebel and SSI's demurrer to Christoffers' complaint. We disagree. The court overruled the demurrer as to the first, fifth, and sixth causes of action without stating reasons. In their argument supporting the demurrer SSI and Siebel claimed that no fundamental public policy supported the first cause of action (notwithstanding *Gould*), and that the fifth cause of action could not be sustained because she did not move her residence. The only reference to the sixth cause of action in the argument supporting demurrer was the assertion that this wrongful termination claim was "merely a restatement of [Christoffers'] Fifth Cause of Action bearing a different label [and therefore] should be dismissed as well." The opposition to the demurrer responded only to these grounds. Assuming the court overruled the demurrer based on its view of the issues raised by the parties, we can infer nothing about the court's opinion regarding the viability of wrongful termination actions against non-employer defendants.

We thus conclude that probable cause was lacking in at least three of the causes of action asserted against Siebel, those alleging wrongful termination. Because an action for malicious prosecution may lie where only one of several claims in the prior action lacked probable cause (*Crowley v. Katleman, supra*, 8 Cal.4th at p. 679; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 590), this element of Siebel's case withstood defendants' summary judgment motion. We express no opinion whatsoever regarding the viability of Siebel's allegation that defendants initiated the Christoffers lawsuit with malice or his claim that

---

persuade plaintiff to relocate to take the position]; *Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal.App.3d 148, 155 [though employer persuaded employee to move to California to work, employee failed to allege that employer made knowingly false representations].)

he suffered damages attributable to the prosecution of the underlying action. These issues did not arise in the summary judgment proceeding under review here.[13]

c. Attorney-Client Privilege

In their summary judgment motion defendants urged the trial court to dismiss this action because they would not be able to defend themselves without violating the attorney-client privilege. Having found a reason to grant their motion, the trial court did not rule on defendants' request. Defendants renew their contention on appeal, relying on *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451. According to defendants, "in order to mount a proper defense, it is absolutely necessary for [them] to disclose communications between themselves and Christoffers, which . . . are within the scope of the attorney-client privilege." Without such disclosure, for example, they will be unable to refute Siebel's allegation that they knew Christoffers' factual representations to be false, and they will be forced to reveal the basis for "certain tactical decisions made throughout the underlying action, *e.g.*, voluntary dismissal of the third cause of action."

Assuming defendants will encounter the asserted impediment to an effective defense, we nonetheless find no entitlement to summary judgment on this ground. A defendant can obtain summary judgment if he or she can show that "one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) The request for dismissal does not present either of these conditions, but entails an evidentiary matter that may or may not enter into future proceedings in this case. We are not considering an

---

[13] Also not before us is whether Siebel's action may be predicated on the lack of probable cause for the *continued* prosecution of the action as well as its initiation. Recently the Supreme Court decided that an attorney may be found liable for continuing to prosecute a lawsuit after discovering that the claims have no merit. (*Zamos v. Stroud, supra,* 32 Cal.4th 958, ___ [slip opn., p. 15].) This holding may affect evidentiary issues in this case, such as those arising from the alleged statements by Buell that he believed the Christoffers action to be "bogus."

argument that summary judgment must be granted because Siebel has no *unprivileged* evidence relevant to malice or damages. Nor, of course, do defendants contend that the asserted evidentiary barrier constitutes a complete defense to the action. Because defendants did not present affirmative undisputed evidence that either established a complete defense or showed that Siebel would be unable to prove his case, they were not entitled to summary judgment. Should this issue arise again in the appropriate procedural setting, the trial court will then have an opportunity to examine the applicability of *Solin* and the effect of the assertion of the attorney-client privilege with respect to the remaining factual issues of malice and damages.

Disposition

The judgment is reversed. Siebel is entitled to his costs on appeal.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Hon. Gregory H. Ward
Attorneys for Plaintiff and Appellant:	Blecher & Collins, Maxwell M. Blecher and Ralph C. Hofer; Greines, Martin, Stein & Richland, Robin Meadow and Laura Boudreau
Attorney for Defendants and Respondents:	Tony J. Tanke
Attorneys for Defendant and Respondent Carol L. Mittlesteadt:	Roeca, Haas, Hager, Russell S. Roeca and Daniel W. Hager
Attorneys for Defendant and Respondent E. Rick Buell, II:	Murphy Pearson, Bradley, Feeney, Timothy J. Halloran and Christine A. Huntoon

Siebel v. Mittlesteadt, et al.

H025069