

PROFESSIONAL LIABILITY UPDATE

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MALICIOUS PROSECUTION

California Law

by Jessica B. Rudin and Jennifer A. Becker

The Fourth District has decided that two traditional elements of malicious prosecution actions will be stringently applied. In one case the court held that a voluntary settlement after a verdict negates the favorable termination element. In another case, which has been accepted for review by the California Supreme Court, the court ruled that summary judgment or other dispositive motion in the underlying case establishes probable cause as a matter of law.

Ferreira v. Gray, Carey, Ware & Freidenrich, et al. (2001) 87 Cal.App.4th. 409

Frank Ferreira was involved in a tumultuous romantic relationship with Debra Rushing. He twice sued Rushing and her mother for return of gifts he allegedly gave in contemplation of marriage. The first action settled but the second action was tried and resulted in verdicts both in favor of and against Ferreira. After the verdicts, the parties settled. Ferreira then sued Rushing's attorneys, Gray, Carey, et al., for malicious prosecution as to claims which were determined in his favor. The trial court granted Gray, Carey's motion for summary judgment on the grounds that there was no favorable termination of the underlying action.

negotiated settlement negates the favorable termination element of a malicious prosecution action. The general rule applies to post-verdict settlements as well as settlements before trial. While a verdict is a favorable determination, a subsequent settlement terminating litigation cannot be construed as favorable.

Ferreira is the first appellate decision to address the effect of a post-verdict settlement on a malicious prosecution action. The decision clarifies this issue and furthers the public policy of encouraging settlement and discouraging malicious prosecution.

The Court of Appeal affirmed, reiterating the general rule that a

***Wilson v. Parker, Covert & Chidester* (2001) 87 Cal.App.4th 1337 (rev. granted 6/20/01)**

Raul Wilson and the Mexican Political Association (“MPA”) were enjoined from harassing middle school teachers. Wilson and the MPA filed a motion to dismiss the lawsuit as a Strategic Lawsuit Against Public Participation (“SLAPP”). This motion was denied but on appeal the underlying injunction was reversed. Wilson and the MPA filed a malicious prosecution action against the teachers. The teachers successfully demurred on the basis that the dismissal of the SLAPP motion established probable cause as a matter of law.

A quartet of published decisions – ***Lucchesi v. Giannini & Unjack*** (1984) 158 Cal.App.3d 777; ***Crowley v. Kattleman*** (1994) 4 Cal.4th 666; ***Hufstedler, Kaus & Citing v. Superior Court*** (1996) 12 Cal.App.4th 55; and, ***Roberts v. Sentry Life Insurance*** (1999) 76 Cal.App.4th 375 – created ambiguity regarding whether defeating a motion for summary judgment (or similar dispositive motion) establishes probable cause as a matter of law.

The ***Wilson*** court affirmed the trial court’s ruling of dismissal, reasoning

that a SLAPP motion is analogous to a motion for summary judgment. The court adopted the reasoning of the ***Roberts*** court that held denial of summary judgment establishes probable cause as a matter of law. ***Roberts*** departed from ***Lucchesi***, which held denial of summary judgment could not establish probable cause because it falls short of a hearing on the merits. Although ***Lucchesi*** was decided when malicious prosecution required both subjective and objective probable cause, it remained viable because of its citation in a footnote in ***Crowley***, a Supreme Court decision.

The ***Wilson*** court acknowledged the confusion arising out of the conflict between ***Lucchesi*** and ***Roberts***, but endorsed ***Roberts***. It noted that the Supreme Court did not review or depublish ***Roberts***, implicitly accepting its reasoning.

Comment: The ambiguity arising out of the ***Lucchesi*** and ***Roberts*** decisions may be resolved: the California Supreme Court has accepted the ***Wilson*** decision for review.

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