

No. A119954 & A120861
Consolidated

**In the Court of Appeal
Of the State of California
First Appellate District
Division 5**

MICHAEL M. CAMINERO

Plaintiff and Appellant,

v.

JENNY CHUNG

Defendant and Respondent.

APPELLANT'S OPENING BRIEF

Appeal from
Alameda County Superior Court Case No. RG06-266561
The Honorable Stephen Dombrink

PAUL KLEVEN (SB# 95338)
LAW OFFICE OF PAUL KLEVEN
1604 Solano Avenue
Berkeley, CA 94707
Telephone: (510) 528-7347
Facsimile: (510) 526-3672
PKleven@KlevenLaw.com

Attorneys for Appellant
Michael M. Caminero

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INTRODUCTION AND SUMMARY OF ARGUMENT

In striking Michael M. Caminero's complaint for malicious prosecution on the ground that there was no favorable termination of the underlying sexual harassment case, the trial court denied him the chance to regain the reputation that Jenny Chung destroyed when she levied her false, malicious charges against him.

Caminero was so determined to clear his name that he refused to participate in any way in a settlement reached by other parties that would not have cost him any money. Following the settlement, Chung voluntarily dismissed her claims against Caminero, even though none of the other defendants had required his dismissal in order to resolve the case.

Unfortunately, the trial court erroneously believed the settlement had been reached at a mediation which actually had ended months before settlement, refused to consider admissible evidence regarding the prior judgment as a whole, and concluded contrary to all evidence that Caminero's dismissal was necessary to achieve the settlement.

This Court should reverse the judgment against Caminero and the mandatory imposition of attorney fees, and allow him to prove that Chung's claims were false and malicious.

STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment that disposes of all issues between the parties and is appealable pursuant to Code of Civil Procedure¹ section 904.1, subdivision (a)(1), and from an order awarding attorney fees and costs made after a judgment, which is appealable pursuant to section 904.1, subdivision (a)(2).

STATEMENT OF THE CASE

On April 24, 2006, plaintiff and appellant Michael M. Caminero filed a Complaint for Damages for malicious prosecution against defendant and respondent Jenny Chung, Sanela Kapic, and their attorneys. (Appellant's Appendix, Volume 1 ("1-AA") 1-19.) Caminero alleged

¹ Unless otherwise indicated, all future statutory references are to the Code of Civil Procedure.

that he had been damaged by false sexual harassment claims filed in 2003 against him and other defendants by Chung and Kapic, which the two women had voluntarily dismissed as to Caminero despite his refusal to participate in a settlement agreement reached with the other defendants. (Complaint ¶¶ 11-16, 34-38, 1-AA 3-4, 9.)

Pursuant to section 425.16, Alameda County Superior Court Judge Judith Ford on May 4, 2007 granted a motion to strike the complaint as to the attorneys, but denied a similar motion as to Kapic. (1-AA 93-98.) On June 4, 2007, Chung filed her own motion to strike (1-AA 20-61), which the Honorable Stephen Dombrink granted on October 1, 2007. (2-AA 563-564.) Chung moved for attorney fees and costs following the October 11, 2007 entry of Judgment of Dismissal (2-AA 566), which the court granted on December 14, 2007. (2-AA 653-655.)

Caminero timely appealed from both the judgment and the order granting attorney fees (2-AA 651-652, 656-657), and this Court consolidated the two appeals on April 17, 2008. (2-AA 658.)

STATEMENT OF FACTS

1. FRIENDLY RELATIONSHIP BETWEEN COWORKERS CHUNG AND CAMINERO FROM SEPTEMBER 2001 TO MARCH 2003

In 2001, Michael Caminero was working as a contractor at Alameda County Behavioral Health Care Systems ("ACBHCS"), directly employed by Spherion Technology ("Spherion"). (Supplemental Declaration of Plaintiff Michael M. Caminero in Opposition to Chung's Special Motion to Strike (C.C.P. § 425.16) ("Supp. Caminero Dec.") ¶ 1, 1-AA 494.) Caminero's position as a Network/Data Communication Technician was at the bottom of the organizational chart, and he had no supervisory responsibilities. (Supp. Caminero Dec. ¶ 2, 2-AA 494; Deposition of Natalie Courson ("Courson Dep."), Exhibit 1; 2-AA 433.)

Chung started working at ACBHCS in September 2001. (Declaration of Defendant Jenny Chung In Special Motion To Strike Pursuant to Code of Civil Procedure Section 425.16 ("Chung Dec.") ¶ 2, 1-AA 36.) Chung's cubicle was close to Caminero's and the two quickly became friends, attending numerous social gatherings outside of ACBHCS - such as drinks after work, bowling, job fairs and retirement parties - along with other co-

workers. (Supp. Dec. Caminero ¶ 4, 2-AA 495; Declaration of Julie Fairless ... ("Fairless Dec.") ¶¶ 3-5, 8 and Exhibit B, 2-AA 514-516, 523; Declaration of Andy Csepely ... ("Csepely Dec.") ¶¶ 3-5, 8, 2-AA 525-526; (Deposition of Jenny Chung ("Chung Dep.") 31-32, 1-AA 102-103.)

During 2002, Chung periodically sent Caminero e-mails containing information in which she thought he might be interested. (Chung Dep. 176-178, 442-447, Exhibits 28-32, 1-AA 141-143, 168-173, 208-212.) In December 2002, Chung gave Caminero a Christmas card with a handwritten message stating, "Michael, Hope you and your wife have a great Christmas and a Happy New Year.... Your buddy, Jenny ☺". (Chung Dep. 417, 420-421, Exhibit 23, 1-AA 159-161, 206-207.)

2. MARCH 2003 CLAIM OF SEXUAL HARASSMENT

But on March 21, 2003, Chung had an argument with Caminero during which she claimed that he "yelled" at her for something that was not her fault, causing her to feel "horrible." (Chung Dep. 37-40, 1-AA 105-108.) Within ten minutes of the argument, Chung complained to their supervisor, Natalie Courson, about Caminero's

outburst, and further claimed for the first time that Caminero had been making sexual comments to her regularly for well over a year. (Chung Dec. ¶¶ 2-6, 1-AA 36-37; Chung Dep. 40-41, 72, 90-91, 1-AA 108-109, 113, 119-120; Courson Dep. 188-189, 193, 2-AA 428-430.)

Chung complained that Caminero and ACBHCS employee Richard Avellar had harassed both her and another coworker, Sanela Kapic, who had started work there in November 2002. (Chung Dec. ¶¶ 5-9, 1-AA 37-38; First Amended Complaint ("Harassment Case") ¶¶ 20-22, 1-AA 51-52; Deposition of Sanela Kapic ("Kapic Dep.") 86, 1-AA 224; Courson Dep. 157, 2-AA 418.)

Specifically, Chung charged that several times per week, beginning October 31, 2001 and continuing until March 21, 2003, Caminero had regularly engaged in sexually harassing conduct, such as making offensive comments and provocative gestures, out in the open where "anyone around should have been able to see it.... and hear it." (Chung Dep. 58-59, 71-72, 76, 94-95, 104-105, 132-134, 141, 155, 1-AA 110-114, 121-127, 132, 137.) Chung claimed the comments were made in a normal voice, not a whisper, "so anyone within earshot should have been able to hear it." (Chung Dep. 155, 1-

AA137.)

Before March 21, 2003, Chung had never told Caminero that anything he was doing offended her (Chung Dep. 86-88, 1-AA 116-118; Deposition of Michael Caminero ("Caminero Dep.") 202, 1-AA 282), and had continued to be friendly with him. (Chung Dep. 31-32, 1-AA 102-103; Declaration of Larry Regas ("Regas Dec."), 2-AA 464-465; Fairless Dec. ¶¶ 4-8 and Exhibit B, 2-AA 515-516, 523; Csepely Dec. ¶¶ 4-8, 2-AA 525-526.)

Caminero vehemently denied all of Chung's allegations. (Caminero Dep. 34-37, 46, 61, 67, 129, 136-137, 175-179, 195-199, 208-219, 222-234, 237-240, 1-AA 261-267, 269-281, 283-310; Supp. Caminero Dec. ¶¶ 3, 6, 2-AA 494-495.) Coworkers who sat in open cubicles within 5-15 feet of Chung and Caminero had never observed any of the alleged harassment, and several, including those in cubicles next to Chung's, declared further that it would have been "impossible" for the harassment to have occurred without their knowledge. (Regas Dec., 2-AA 464-465; Fairless Dec. ¶¶ 3, 6-8, 2-AA 514-516; Csepely Dec. ¶¶ 3, 6, AA 525-526; Deposition of Renee Marzett ("Marzett Dep.") 26, 28-29,

33-36, 40-51, 99-100, 109-110, 157-158, 2-AA 323-341,
351-356; Declaration of Denise Stokes ... ("Stokes
Dec.") and Exhibits C-E, H-L, 2-AA 466-487.)

Before and after March 21, 2003, Chung researched harassment cases, including representative verdicts and settlements, on the Internet, and discussed the value of those case with her friend and coworker Regas, telling him "'They're going to pay.'" (Chung Dep. 216-217, 602-604, 624-625, 1-AA 153-154, 186-189, 191-192; Regas Dec., 2-AA 464-465.)

3. CHUNG'S MAY 2003 FILING OF HARASSMENT CASE

Chung and Kapic filed suit in May 2003, alleging claims for sexual harassment and related torts against ACBHCS; Caminero; Caminero's employer, Spherion; ACBHCS employee Richard Avellar; and Capic's employer, Diversified Personnel. (1-AA 47-58 ("Harassment Case").) Caminero and Spherion were both initially represented in the Harassment Case by Seyfarth Shaw, LLP associate Francis J. Ortman, III (Supplemental Declaration of Francis J. Ortman, III ... ("Supp. Ortman Dec.") ¶ 1, 2-AA 500), but Chung and Kapic dismissed their claims against Spherion on December 12,

2003. (1-AA 60.)

**4. CHUNG'S DISMISSAL OF HARASSMENT CASE AGAINST
CAMINERO, DESPITE HIS REFUSAL TO PARTICIPATE
IN SETTLEMENT AGREEMENT**

A mediation was conducted in the Harassment Case on July 26, 2004, but Caminero refused either to participate in the mediation, engage in any settlement talks, or execute a mutual release in the case. (Supp. Caminero Dec. ¶¶ 6-11, 2-AA 495; Supp. Ortman Dec. ¶¶ 2-5, 2-AA 500-501.) Caminero also refused to authorize Spherion to participate in any settlement or pay any money on his behalf. (Supp. Caminero Dec. ¶¶ 6, 10, 2-AA 495; Supp. Ortman Dec. ¶¶ 5, 8, 2-AA 500-501.) Caminero's position caused conflicts between him and his employer, Spherion, undermining Ortman's ability to continue representing him. (Supp. Caminero Dec. ¶ 9, 2-AA 495; Supp. Ortman Dec. ¶ 5, 2-AA 501; see also 8/4/04 letter from Ortman, 2-AA 648-649.)

The case did not settle at the mediation. As Jora Trang, an attorney for Chung and Kapic, explained in an August 29, 2004 letter to counsel:

As you are all aware, we have been experiencing on-going difficulties in reaching a mutual settlement agreement because Mr.

Caminero has refused to agree to waive his potential right to file a lawsuit for malicious prosecution.

(2-AA 435.)

Trang further stated that she would voice her concerns regarding Caminero's to waive his rights at an upcoming Case Management Conference and ask for an Emergency Judicial Settlement Conference. (2-AA 435.)

In a Case Management Statement filed on August 31, 2004, Trang reported that the mediation "ended unsuccessfully on 8/19/04," and asked for a settlement conference because "the Settlement has been stalled and complicated by defendant, Michael Caminero's, refusal to waive his right to sue for malicious prosecution."

(Case Management Statement ¶¶ 11, 19, 2-AA 459-460.)

On October 1, 2004, Chung and Kapic's lead attorney, Robert E. Lazo, filed a declaration requesting a brief continuance of another upcoming Case Management Conference, explaining under oath:

The parties are deciding between two settlement proposals that are circulating among them now....

Since the last Case Management Conference, the parties have been working diligently toward resolving the issue of whether the entire case will be resolved or whether Defendant Caminero will remain a party. This week the Defendants communicated to Plaintiffs that they will not

oppose Caminero's remaining in the case, provided there are certain changes in the terms and amount of the settlement. Defendants sent Plaintiffs a draft settlement agreement reflecting the new proposal.... I am informed and believe that defense firm Seyfarth, Shaw will be filing a substitution of attorney any day now, as they can no longer represent Defendant Caminero due to a potential conflict of interest between Defendants Caminero and Spherion.

(Declaration of Robert Lazo re Case Management Conference ("Lazo Dec.") ¶¶ 1-2, 4, 2-AA 461-462.

Between October 2004 and February 2005, Chung, Kapic, ACBHCS, Diversified and Avellar entered into a confidential Settlement Agreement and Release ("Settlement Agreement").² Caminero was not involved in any negotiations leading to the Settlement Agreement, and neither he nor his employer, Spherion, was a party to it. (Supp. Caminero Dec. ¶¶ 6-7, 9-11, 2-AA 495; Supp. Ortman Dec. ¶ 7, 2-AA 501; Settlement Agreement.) Caminero had no knowledge of the terms of the Settlement Agreement (Supp. Caminero Dec. ¶ 11, 2-AA 495), which from the outset included language

² Despite its confidentiality provisions, the Settlement Agreement was submitted in support of Chung's motion, and ultimately filed under seal by the trial court following an ex parte application. Pursuant to California Rules of Court, rule 8.160, the Settlement Agreement and application are being filed separately.

intended by Chung, Kapic and their attorneys to shield themselves from Caminero's intended malicious prosecution action. (8/29/04 letter, 2-AA 435; Settlement Agreement, Recitals, p. 1.)³

Although Chung and Kasic released their claims only as to Diversified Personnel, ACBHCS and Avellar, and not as to Caminero, they agreed to dismiss their case as to all remaining defendants, including Caminero. (Settlement Agreement ¶¶ 1-2.) The two attorneys for Diversified Personnel, ACBHCS and Avellar have confirmed that the dismissal of Caminero was not required by any of the other defendants in order to effectuate the settlement. (Declaration of J. Randall Andrada ... ("Andrada Decl.") ¶¶ 1-2, 2-AA 508-509; (Declaration of Joseph J. Minioza ... ("Minioza Decl.") ¶¶ 1-2, 2-AA 511-512.) No money was paid on behalf of Caminero by any of the other defendants, including his employer, Spherion, which also did not require his

³ The Recitals included: "Whereas, Plaintiff's Action was instituted by them in good faith and base on probable cause that Defendant MICHAEL CAMINERO engaged in acts of sexual harassment against them; and Whereas, the Action was settled and did not result in a termination of the Action in favor of defendant MICHAEL CAMINERO; and Whereas the Action was not instituted by the Plaintiffs with malice."

dismissal from the case. (Supp. Ortman Dec. ¶¶ 4, 7, 2-AA 501; Andrada Dec. ¶ 2, 2-AA 508-509; Minioza Dec. ¶ 2, 2-AA 511-512.)⁴

Chung and Kapic dismissed the remainder of the Harassment Case on April 26, 2005. (1-AA 60.)

ARGUMENT

A. A TRIAL COURT CONSIDERING A MOTION TO STRIKE CANNOT RESOLVE FACTUAL DISPUTES, AND MUST DENY THE MOTION IF THE PLAINTIFF CAN ESTABLISH A PRIMA FACIE CASE

Under the "anti-SLAPP" statute, Code of Civil Procedure section 425.16, subdivision (b)(1), a trial court must follow a two-step process in considering a motion to strike, determining initially whether the defendant has made a threshold showing that the challenged claim is one arising from protected activity and, if so, whether the plaintiff has demonstrated a

⁴ Moira C. McQuiad, an attorney for Chung and Kapic in the Harassment case, filed a declaration stating that the mediation "resulted" in the Settlement Agreement and that Caminero's dismissal "was necessary to achieve overall settlement" (Declaration of Moira C. McQuaid ... ("McQuiad Dec.") ¶¶ 12-13, 1-AA 40-43) but the trial court sustained Caminero's objections to her declaration. (AA 563-564.) Chung also declared that she was "told that the dismissal of all defendants, including Caminero, was a necessary and conditional term of the settlement." (Chung Dec. ¶ 11, 1-AA 38.)

probability of prevailing on that claim. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965; § 425.16, subd. (b) (1).)

Once a court has reached the second step of deciding whether a plaintiff has met the burden of showing a probability of prevailing:

the issue is whether plaintiffs presented evidence in opposition to defendants' anti-SLAPP motion that, if believed by the trier of fact, was sufficient to support a judgment in plaintiffs' favor. Whether plaintiffs have established a *prima facie* case is a question of law.

(*Zamos*, 32 Cal.4th at 965.)

In resolving that issue, the trial court "considers the pleadings and evidentiary submissions" (§ 425.16, subd. (b) (2)), but must not weigh the credibility of witnesses or the "comparative probative strength of competing evidence." (*Zamos*, 32 Cal.4th at 965.) On appeal, the reviewing court conducts an independent review of the entire record in order to decide whether the trial court correctly resolved the applicable questions of law. (*HMS Capital, Inc. v. Lawyers Title Company* (2004) 118 Cal.App.4th 204, 212.)

B. THE TRIAL COURT IN THIS CASE ERRONEOUSLY GRANTED THE MOTION TO STRIKE DESPITE SIGNIFICANT FACTUAL DISPUTES AS TO WHETHER CAMINERO'S DISMISSAL HAD BEEN NECESSARY TO EFFECTUATE THE SETTLEMENT OF THE HARASSMENT CASE

In its October 1, 2007 Order After Hearing, the trial court granted Chung's motion to strike Caminero's complaint on the grounds that he could not establish a favorable termination of the Harassment Case, and so could not show a probability of prevailing on his malicious prosecution claim. (2-AA 563-564.)

Apparently relying solely on the terms of the Settlement Agreement specifying that Caminero would be dismissed, the court concluded that "the dismissal was necessary to effectuate the overall settlement." (2-AA 563.) The court found that Evidence Code section 1119, regarding the confidentiality of mediation proceedings, rendered any testimony from attorneys about the terms of the Settlement Agreement inadmissible, and that the termination was not favorable to Caminero even if Chung was the party who wanted to include language regarding his dismissal. (2-AA 563-564, citing *Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335-1336.) The court further found that Caminero was estopped to claim that

"his co-defendant did not have authority to consent to his dismissal," because he "accepted the benefits of the defense provided by the employer Defendants." (2-AA 564; August 9, 2007 Reporter's Transcript On Appeal ("8/9/07 RT") 2-13.)

C. IN A MALICIOUS PROSECUTION CASE, A VOLUNTARY DISMISSAL OF THE UNDERLYING CASE IS PRESUMED TO BE A FAVORABLE TERMINATION, UNLESS OTHERWISE PROVED TO A JURY

The three elements required to establish a claim for malicious prosecution are well-established:

"[I]n order to establish a cause of action for malicious prosecution ..., a plaintiff must demonstrate 'that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor ...; (2) was brought without probable cause ...; and (3) was initiated with malice.'"

(*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341, quoting *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871, quoting *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.)

A favorable termination of the prior case is required because it "'tends to indicate the innocence of the accused.'" (*Casa Herrera*, 32 Cal.4th at 341.) In deciding whether the underlying case terminated favorably, the court must consider the earlier judgment

as a whole; no trial is required as long as the termination reflects on the merits, demonstrating that either the court or the prosecuting party did not believe the case would succeed. (*Casa Herrera*, 32 Cal.4th at 341-342; *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750.)

A voluntary dismissal of the prior case is "presumed to be a favorable termination, unless otherwise proved to a jury." (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399.) Such a dismissal reflects on the merits because of the "'natural assumption that one does not simply abandon a meritorious action once instituted.'" (*Lackner*, 25 Cal.3d at 751.) On the other hand, a dismissal pursuant to settlement is not considered favorable because it "'reflects ambiguously on the merits of the action as it results from the joint action of the parties.'" (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1336.)

In cases where the entire earlier case had been dismissed based on a settlement in which a malicious prosecution plaintiff did not participate, the dismissal will "not be viewed as a favorable

termination as long as it was a necessary condition to achievement of the overall settlement." (*Villa*, 4 Cal.App.4th at 1336.)

1. The Trial Court Ignored the Presumption, Erroneously Resolving A Factual Dispute Based Solely On Ambiguous Language In The Settlement Agreement

In concluding that Caminero's dismissal was not a favorable termination of the Harassment Case, the trial court made a number of factual and legal errors.

At the outset, there was no evidence contradicting the presumption that Chung's voluntary dismissal of Caminero was a favorable termination as to him.

(*Lackner*, 25 Cal.3d at 751; *Sycamore Ridge*, 157 Cal.App.4th at 1399.) The only evidence cited by the court - a reference to the dismissal in the Settlement Agreement (2-AA 563; Settlement Agreement ¶ 2)⁵ - did not even recite that the dismissal was necessary, much

⁵ Although the trial court overruled Caminero's hearsay objection to Chung's vague statement regarding what she "was told" about why Caminero was dismissed (1-AA 38, 2-AA 542, 2-AA 564), the court did not purport to rely upon her statement in support of this finding, and it had sustained Caminero's objection to attorney McQuaid's statement to the same effect. (1-AA 42, 2-AA 559, 2-AA 564.) Chung's statement was clearly inadmissible hearsay, and the trial court abused its discretion in overruling Caminero's objection.

less prove it, despite the efforts of Chung's attorneys to include language undermining the malicious prosecution claim they knew Caminero planned to file.

(2-AA 435.)

Even if the language referring to Caminero's dismissal in the Settlement Agreement did support a finding that the dismissal was necessary to effectuate the settlement, the conflict between the language and the presumption, and the conflict between the language and other evidence establishing that the dismissal was not necessary to the settlement, precluded the court from making its finding. The court's resolution of these conflicts violated three separate legal principles: (1) in ruling on any motion to strike under section 425.16, a court cannot resolve factual disputes, but must credit the evidence in favor of the plaintiff (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 964-965); (2) in deciding whether a prior termination was favorable to a malicious prosecution plaintiff, the court must consider the earlier judgment as a whole, not just the language of the agreement (*Casa Herrera*, 32 Cal.4th at 341); and (3) in making that decision, "If there is a conflict in the circumstances explaining

the dismissal of the case . . . , the trier of fact should decide that conflict." (*Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1811, citing *Weaver v. Superior Court* (1979) 95 Cal.App.4th 166, 185.)

2. The Trial Court Further Erred, and Abused Its Discretion, In Refusing To Consider The Judgment As A Whole Based On A Misapplication of Evidence Code Section 1119, And In Ignoring The Admission of Chung's Own Attorney That Caminero's Dismissal Was Not Necessary to the Settlement

The trial court in this case not only ignored the presumption, but also ignored all of the other evidence regarding the judgment as a whole and the circumstances surrounding Caminero's dismissal.

It appears that the court did not consider any of this evidence because it mistakenly believed that all settlement discussions had occurred at a mediation, explaining that the "testimony of attorneys about what was said at the mediation is not admissible. Evidence Code § 1119." (2-AA 563.) Chung had implied in her moving papers that the settlement occurred at a mediation (1-AA 27, 1-AA 42), but had not objected to any evidence based on section 1119, and had in fact filed her own declarations regarding the settlement

discussions. (Chung Dec. ¶ 11, 1-AA 38; McQuaid Dec. ¶ 12, 1-AA 42.)

Caminero produced evidence, generated by Chung's own attorneys in the Harassment Case, establishing that the mediation had ended long before any settlement was reached. A mediation was conducted on July 26, 2004, but "ended unsuccessfully on 8/19/04," according to Chung's attorney, Trang. (2-AA 459.) In his October 1, 2004 declaration, Chung's lead attorney stated, "[t]his week the Defendants communicated to Plaintiffs that they will not oppose Caminero's remaining in the case." (Lazo Dec. ¶ 2, 2-AA 462.) Attorneys for the settling defendants confirmed that Caminero's dismissal was not necessary to effectuate the settlement. (Andrade Dec. ¶ 2, 2-AA 509; Minioza Dec. ¶ 2, 2-AA 512.)⁶

The trial court's failure to consider admissible evidence regarding the circumstances surrounding Caminero's dismissal was an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 715.)

⁶ Caminero's attorney, Ortman, did discuss statements apparently made during the July 26, 2004 mediation (Supp. Ortman Dec. ¶ 2, 2-AA 500-501), and Andrade said the mediation resulted in settlement (Andrade Dec. ¶ 2, 2-AA 508), contradicting Chung's attorneys.

While section 1119 precludes participants in a mediation from disclosing confidential communications made during the course of mediation, there is no reason to believe the communications referred to by Lazo were made during a mediation. The communications in fact occurred more than a month after Trang said the mediation had ended on August 19, 2004 (Ev. Code § 1125, subd. (a) (5)), and the Settlement Agreement was not signed until after these later communications. (Settlement Agreement p. 8 *et seq.*)

Even if section 1119 did apply, Chung has not treated those ongoing settlement negotiations as confidential under section 1119, or for any other reason, and long ago waived any right to object to their admissibility.⁷

The trial court's failure to consider this admissible evidence was a clear legal error, requiring reversal. (*HMS Capital, Inc. v. Lawyers Title Company* (2004) 118 Cal.App.4th 204, 212.)

3. The Trial Court' Reliance on Villa Was

⁷ But see *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351 (no implied waiver of mediation confidentiality).

Misplaced, Because Caminero's Employer Did Not Sign The Settlement Agreement, Caminero's Attorney Did Not Sign It, And No Settling Attorney Required Caminero's Dismissal

The trial court's reliance on *Villa v. Cole* (1992) 4 Cal.App.4th 1327, was also misplaced. (2-AA 653-654.) In *Villa*, claims against a police officer and his employer, the City of Alameda, had been settled by the City even though the officer did not agree to the settlement. (*Villa*, 4 Cal.App.4th at 1331-1333.) An attorney representing the City and the officer negotiated a settlement in which the settling defendant, the City, required the dismissal of all defendants to ensure that it would not have to provide further representation to the officer or indemnify him. (*Villa*, 4 Cal.App.4th at 1332-1333.)

The Court concluded that the City "could not realize the benefits of settling the litigation unless the action against [the officer] was simultaneously terminated," and that the officer's dismissal could not be treated as a favorable termination because it had been necessary to achieving the settlement. (*Villa*, 4 Cal.App.4th at 1335-1336.) The Court further concluded that the officer could not repudiate the actions of his

attorney in settling the case because "a party may not voluntarily accept the benefits of a settlement negotiated and accepted on the party's behalf by an attorney, and at the same disavow the settlement"
(*Villa*, 4 Cal.App.4th at 1336-1337.)

The trial court in this case seems to have mistakenly believed that the settling defendants employed Caminero, provided his defense and, as in *Villa*, were therefore entitled to negotiate on his behalf and require his dismissal. (2-AA 653-654.) Once again, the error may have been caused by Chung, who falsely claimed in her moving papers that ACBHCS "picked up Mr. Caminero's defense" after she dismissed the case against his employer, Spherion. (1-AA 27.)

In fact, the settling defendants - ACBHCS, Diversified Personnel, or Avellar - did not employ Caminero, had not provided his defense, did not indemnify him, would not have to indemnify him in the future and, most importantly, did not care whether he remained in the case. ((Lazo Dec. ¶ 2, 2-AA 462; Supp. Ortman Dec. ¶¶ 5-8, 2-AA 501; Andrada Dec. ¶ 2, 2-AA 509; Minioza Dec. ¶ 2, 2-AA 512.) No attorney negotiated any settlement on behalf of Caminero, and

certainly no one purported to negotiate or sign the Settlement Agreement - replete with language contrary to Caminero's interests - on his behalf. (*Id.*, see also 2-AA 435, Settlement Agreement, Recitals, p. 1.)

The trial court's further statement that the termination could not be considered favorable to Caminero even if Chung, as opposed to a settling defendant, wanted to include language in the Settlement Agreement dismissing Caminero, demonstrates a misunderstanding of *Villa*. (2-AA 563.) The dismissal in *Villa* was not considered to be voluntary and unilateral because it was required by the settling defendants and therefore did not necessarily reflect the plaintiff's opinion that his claim against the officer lacked merit. (*Villa*, 4 Cal.App.4th at 1336.) In this case, Chung's unilateral decision to dismiss Caminero, without being required to do so by the settling defendants, necessarily reflected her opinion that her case against him would not succeed. (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750-751; *Villa*, 4 Cal.App.4th at 1336.)

4. Factual Disputes Surrounding The Judgment

**In The Harassment Case Precluded Trial Court
From Striking Caminero's Complaint**

As in *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, Caminero's absence from any settlement reached in the underlying action precluded a determination as part of a motion to strike that it was less than favorable. In *Fuentes*, though police officers were represented by counsel during settlement negotiations they did not participate in the settlement, and a somewhat confused plaintiff simply dismissed them. (*Fuentes*, 38 Cal.App.4th at 1810-1811.) The Court reversed summary judgment in favor of the plaintiffs, holding that the factual issue of whether the termination had been favorable had to be resolved by a jury, and distinguishing *Villa* because the officer in that case had conceded that dismissal was necessary to the settlement. (*Fuentes*, 38 Cal.App.4th at 1810-1812.)

In this case, Caminero has not conceded that his dismissal was necessary, and was not represented by any attorney involved in the settlement. There was no doubt as to his position - he wanted no part of any settlement because he insisted on his right to clear his name, by a malicious prosecution action if

necessary, even if he had to defend himself. (Supp. Caminero Dec. ¶¶ 6-11, 2-AA 495; Supp. Ortman Dec. ¶¶ 2-8, 2-AA 500-501; 2-AA 648-649.) Rather than continue to pursue her case against Caminero, Chung and her attorneys voluntarily and unilaterally dismissed it, without receiving a penny on his behalf, knowing that he planned to sue them. (2-AA 435, 2-AA 459-460, 2-11 461-462.) It is difficult to imagine a termination that more emphatically reflects a plaintiff's opinion that her case could not succeed. (*Casa Herrera*, 32 Cal.4th at 341-342; *Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750.)

Settlement of the Harassment Case did not benefit Caminero in the way that the settlement of a motor vehicle case would benefit a defendant. Even though he did not participate or pay any money, the settlement lent credibility to what he has consistently maintained are false, malicious accusations, as demonstrated by the need to file this appeal to establish that the Harassment Case even terminated in his favor, and continue to cause him damage. (Supp. Caminero Dec. ¶ 12, 2-AA 495-496.)

Considering the significant factual disputes, the

trial court erred in concluding that it could resolve the issue of favorable termination on a motion to strike, and this Court should reverse.

D. CAMINERO ALSO PRESENTED A PRIMA FACIE CASE THAT CHUNG INITIATED THE HARASSMENT CASE WITHOUT PROBABLE CAUSE, AND WITH MALICE

The trial court's determination on the favorable termination issue made it unnecessary for the court to address the remaining elements of a malicious prosecution action; *i.e.*, whether Chung brought the Harassment Case without probable cause, and instituted it with malice. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341.) Assuming this Court will address those issues rather than simply remanding for further proceedings,⁸ and assuming the truth of Caminero's evidence, he has clearly met his burden of establishing a prima facie case of malicious prosecution. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

1. Jury Must Decide Whether Chung Knew Her Allegations Were False, And Therefore Filed the Harassment Case Without

⁸ See *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 656 (no reason to delay justice by remanding to allow ruling by trial court).

Probable Cause

Whether there was probable cause to support Chung's underlying action is ultimately a question of law for the court, but where the facts supporting the claim "'are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause.'" (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d. 863, 877, quoting *Ball v. Rawles* (1892) 93 Cal. 222, 227.) Specifically, when there is evidence that a malicious prosecution defendant "may have known that the factual allegations on which his action depended were untrue," a jury must determine the state of that defendant's knowledge before the court can consider whether the facts constituted probable cause. (*Sheldon Appel*, 47 Cal.3d at 881; see also *Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Insurance Corporation* (2003) 114 Cal.App.4th 906, 912-913.)

In denying co-defendant Kapic's earlier anti-SLAPP motion, Judge Ford properly concluded:

Plaintiff [Caminero] provides evidence establishing a prima facie showing of the element of "lack of probable cause."

Plaintiff's own declaration and the declaration of Regas state that plaintiff did not engage in any of the conduct that Defendant Kapic accused him of committing. This is sufficient to make out a *prima facie* showing that defendant Kapic lacked probable cause to file suit against Plaintiff.

(1-AA 98.)

As discussed at length in Statement of Facts, section 2 *supra*, Caminero produced evidence from a number of witnesses, including his own declaration, categorically denying the harassment claims made by Chung. (Supp. Caminero Dec. ¶¶ 3, 6, 2-AA 494-495; Regas Dec., 2-AA 464-465; Fairless Dec. ¶¶ 3, 6-8, 2-AA 514-516; Csepely Dec. ¶¶ 3, 6, AA 525-526; Marzett Dep.) 26, 28-29, 33-36, 40-51, 99-100, 109-110, 157-158, 2-AA 323-341, 351-356; Stokes Dec. and Exhibits C-E, H-L, 2-AA 466-487.)

From this evidence, a reasonable jury could conclude that Chung knew when she filed the Harassment Case that she was simply fabricating the allegations, and Caminero is entitled to a jury determination on the state of Chung's knowledge before a court rules on the probable

cause issue. (*Citi-Wide Preferred Couriers*, 114 Cal.App.4th at 912-913.) If Chung knew that her claim was groundless, she could not have had an actual and honest belief in its validity, and could not have initiated it with probable cause. (*Citi-Wide Preferred Couriers*, 114 Cal.App.4th at 912-913.)

Chung's claim that she was merely following the advice of counsel (1-AA 33-34), "does not change the analysis." (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1383.) To prevail on that defense, a malicious prosecution defendant bears the burden of establishing that she consulted an attorney in good faith and disclosed all facts to the attorney:

if the defendant acted in bad faith or withheld facts from counsel he or she knew or should have known would have defeated the cause of action, probable cause is not established.

(*Palmer*, 109 Cal.App.3d at 1383.)

Caminero's evidence, if believed by the trier of fact, was sufficient to establish that Chung was not acting in good faith and withheld the true facts regarding her harassment claims, which she

knew or should have known would have defeated the claims in the Harassment Case.

2. A Jury Must Also Decide Whether Chung Was Acting With Malice

The evidence not only establishes a prima facie case that Chung lacked probable cause, but also a prima facie case of malice, as Judge Ford had further concluded in denying the motion to strike filed by co-defendant Kapic. (1-AA 98.)

Unlike the issue of probable cause, the malice element is a pure question of fact for the jury, and relates to the "subjective intent or purpose with which the defendant acted in initiating the prior action."

(*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d. 863, 874.) While the lack of probable cause is a factor in determining malice, there must also be evidence that the action was filed with ill will or some other improper, ulterior motive, which can "range anywhere from open hostility to indifference." (*Downey Venture v. LMI Insurance Company* (1998) 66 Cal.App.4th 478,

494.)

Since parties rarely admit improper motives, malice must normally be "proven by circumstantial evidence and inferences drawn from the evidence" (*HMS Capital, Inc. v. Lawyers Title Company* (2004) 118 Cal.App.4th 204, 218), such as the inference that the person filing suit did not believe the claim to be valid, or filed suit to force a settlement that was unrelated to the merits of the claim. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383.)

Once again, Caminero is entitled to present his evidence to a jury to resolve the disputed factual issues regarding malice, which cannot be determined on a motion to strike. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965; *Sheldon Appel*, 47 Cal.3d. at 874.) Assuming the truth of Caminero's evidence, Chung clearly did not believe the claim to be valid, and a jury could infer that she filed suit for an improper motive, to force a settlement.

In addition to placing Chung's harassment allegation in dispute, Caminero produced evidence

that Chung and Kapic did computer research regarding the value of harassment cases, and that Chung boasted to a coworker, "They're going to pay." (Chung Dep. 216-217, 602-604, 624-625, 1-AA 153-154, 186-189, 191-192; Regas Dec., 2-AA 464-465.)

A jury considering that evidence and drawing reasonable inferences could conclude that Chung acted with malice in filing the Harassment Case.

E. REVERSAL OF THE ORDER GRANTING THE MOTION TO STRIKE REQUIRES A REVERSAL OF THE ORDER AWARDING ATTORNEY FEES

While a party moving successfully to strike a complaint pursuant to section 425.16 is entitled to attorney fees (\$ 425.16, subd.(c)), such fees are awarded only to a party who has prevailed on a motion to strike. (*S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 379; *Liu v. Moore* (1999) 69 Cal.App.4th 745, 753.)

The reversal of an order granting the motion to strike necessarily requires reversal of the order granting attorney fees, and Caminero asks the Court to reverse not only the order granting

the motion to strike, but also the subsequent order awarding attorney fees to Chung.

CONCLUSION

Jenny Chung voluntarily dismissed her sexual harassment case against Michael Caminero even though no other defendant required that dismissal, and despite the certain knowledge that he planned to sue her for malicious prosecution. Considering the judgment as a whole, Chung's unilateral decision to abandon her lawsuit against Caminero amply demonstrated her belief that her case against him would not succeed.

The trial court erred in striking Caminero's complaint after resolving factual issues against him, and this Court should reverse.

DATED: June 12, 2008 LAW OFFICES OF PAUL KLEVEN

By: _____
PAUL KLEVEN

CERTIFICATE OF COUNSEL

I certify that this Appellant's Opening Brief
contains 6299 words, as calculated by my
WordPerfect 11 word processing program.

PAUL KLEVEN