


# Appellate Reports and Shorter takes

## Interim adverse judgment bars malicious-prosecution claim, even if trial court later finds action was brought in bad faith

By Jeffrey I. Ehrlich

**Malicious prosecution; probable cause; anti-SLAPP; interim adverse judgment rule:**
***Parrish v. Latham & Watkins***
(2017) _ Cal.5th _ (Cal. Supreme)

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

In this case the Court held that the interim adverse judgment rule applies when a trial court had initially denied summary judgment, finding that a lawsuit had sufficient potential merit to proceed to trial, but concluded after trial that the suit had been brought in "bad faith" because the claim, even if superficially meritorious, in fact lacked evidentiary support.

Specifically, in the underlying action FLIR Systems, represented by Latham & Watkins, were sued by their former employees Parrish and Fitzgibbons ("Parrish") for misappropriation of trade secrets. Both sides moved for summary judgment. The trial court denied both motions. The case proceeded to trial, and Parrish prevailed. The trial court ultimately awarded Parrish attorney's fees under the California Uniform Trade Secrets Act, finding that FLIR's claim was made in bad faith.

Parrish then filed a malicious-prosecution claim against FLIR and Latham. (FLIR settled, but the case against Latham proceeded.) Latham filed an anti-SLAPP motion, arguing that Parrish could not establish a probability of success under the interim adverse judgment rule, in light of the denial of its summary-judgment motion. The Supreme Court held that the rule required that the motion be granted.

The rule holds that "a trial court judgment or verdict in favor of the plaintiff or prosecutor in the underlying case, unless obtained by means of fraud or perjury, establishes probable cause to bring the underlying action, even though the judgment or verdict is overturned on appeal or by later ruling of the trial court." The rule rests on the belief that, if a claim succeeds at a hearing on the merits, then, unless that success has been procured by certain improper means, the claim cannot be totally and completely without merit. The rule was developed in cases resolved at trial, but has been extended to the denial of defense summary judgment motions, directed verdict motions, and similar efforts at pretrial termination of the underlying case.

The rule does have its limits. It applies only to rulings regarding the merits of the claim, not those that rest solely on technical or procedural grounds. And even where a ruling is based on the court's evaluation of the merits of the claim, the ruling does not establish the existence of probable cause if the ruling is shown to have been obtained by fraud or perjury.

Parrish argued that the rule should not apply here because after initially denying the defense motion for summary judgment, the trial court made a post-trial finding that FLIR had brought the suit in "bad faith." The Court rejected this argument, noting that the finding of "bad faith" was not tantamount to the finding of fraud or perjury necessary to avoid operation of the rule.

**Civil Procedure; law-and-motion; incorporation of previously-filed documents**: *Roth v. Plikaytis* (2017) _ Cal.App.5th _ (Fourth Dist., Div. 1)

Plikaytis prevailed on a breach of contract action against Roth. She obtained an award of attorney's fees, but for far less than she sought. Her motion had incorporated by reference a prior motion for fees, which had been denied as premature. The trial court refused to consider the previously filed documents. The appellate court reversed, finding that this was an abuse of discretion.

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Rule 3.1110 of the Rules of Court addresses the general format for motions. Rule 3.1110(d) states that "[a]ny paper previously filed must be referred to by date of execution and title." Rule 3.1113 provides rules for the memorandum in support of the motion, and rule 3.1113(j) states that "[t]o the extent practicable, all supporting memorandums and declarations must be attached to the notice of motion." Consistent with these rules, a litigant *may* incorporate previously filed documents and, where practicable, should file them with the motion. But a litigant is not required to do so absent a rule precluding incorporation by reference. (*Cf*. rule 3.1345(a) & (c) [requiring separate statement for certain discovery motions and stating "[m]aterial must not be incorporated into the separate statement by reference"].)

The court acknowledged rule 3.1110(d), but stated it had not seen this type of supporting material in a fee case, the prior motion had been denied, and the record was large. These reasons do not justify the court's refusal to consider the previously filed materials. Refiling materials to support fee motions may be typical, and even prudent, but it is not required. "Denied motions are part of the record. And even assuming record size imposes an additional burden, to aid the court Plikaytis did provide courtesy copies. At a minimum, if the court felt Plikaytis's efforts were insufficient to rely on incorporation by reference, it could have permitted her to refile the documents. Simply refusing to review the materials was an abuse of discretion."

**MICRA; statute of limitations; premises liability; professional services**: *Johnson v. Open Door Community Health Centers* (2017) _ Cal.App.5th _ (First Dist., Div. 4.)

Johnson visited one of Open Door's medical clinics on November 3, 2011, to review test results. Before the consultation, she was weighed on a scale located next to the wall in the hallway outside the treatment room. As she walked out of the treatment room after the consultation, she tripped on the scale, which she claims had been moved into the hallway during her consultation. She fell and suffered serious injuries. She did not file her lawsuit for almost two years after the fall. The trial court granted summary judgment in favor of Open Door, finding that MICRA applied, and therefore Johnson's claim was untimely under the one-year MICRA statute of limitations. Reversed.

In *Flores v. Presbyterian Intercommunity Hosp.* (2016) 63 Cal.4th 75, 86, the Court rejected a proposed rule that "professional services" include all acts associated with the provision of medical care. Instead, the Supreme Court directed courts to "draw a distinction between the professional obligations of hospitals in the rendering of medical care to their patients and the obligations hospitals have, simply by virtue of operating facilities open to the public, to maintain their premises in a manner that preserves the well-being and safety of all users." (*Id*., at p. 87.)

Johnson's claim was that Open Door negligently left a hazardous item in her path. "Under these circumstances, the nature of the object does not matter – the scale could have just as easily been a broom or a box of medical supplies – what is material is that the duty owed by Open Door was not owed exclusively to patients."

Because Johnson's injuries resulted from an alleged breach of defendant's obligation, simply by virtue of operating facilities open to the public, to maintain its premises in a manner that preserves the well-being and safety of all users, the trial court erred in the applying of MICRA's one-year statute of limitations.

**Torts; primary assumption of risk; hot-air balloons; common carriers**; **gross negligence**: *Grotheer v. Escape Adventures, Inc.* (2017) _ Cal.App.5th _ (Fourth Dist., Div. 2.)

Grotheer, a non-English-speaking German citizen, took a hot-air balloon ride in the Temecula wine country and suffered a fractured leg when the basket she was riding in with several other passengers crashed into a fence upon landing. She sued the tour company, the pilot, and the winery, alleging that they negligently or recklessly operated the balloon by (1) failing to properly slow its descent during landing and (2) failing to give the passengers safe landing instructions before the launch. Grotheer alleged the hot air balloon company is a common carrier, and as such, owed its passengers a heightened duty of care. (Civ. Code, § 2100.) The trial court granted summary judgment for the defendants based on the doctrine of primary assumption of risk. The appellate court affirmed, but on different grounds.

A common carrier of persons is anyone "who offers to the public to carry persons." (Civ. Code, § 2168.) Carriers who charge for their services are subject to a heightened standard of care. They must use the utmost care and diligence for [passengers'] safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." (Civ. Code, § 2100.)

Precedent teaches that the key inquiry in the common carrier analysis is whether passengers expect the transportation to be safe because the operator is reasonably capable of controlling the risk of injury. Hence, prior cases have held that a roller-coaster operator is a common carrier, while a bumper-car operator is not. The distinction is that bumper car riders maintain a large degree of control over the car's speed and

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direction; whereas roller-coaster riders have none.

Unlike operators of roller coasters, ski lifts, airplanes, and trains, balloon pilots do not maintain direct and precise control over the speed and direction of the balloon. A pilot directly controls only the balloon's altitude, by monitoring the amount of heat added to the balloon's envelope. A pilot has no direct control over the balloon's latitude, which is determined by the wind's speed and direction. A balloon's lack of power and steering poses risks of mid-air collisions and crash landings, making ballooning a risky activity. The risks posed by roller coasters, trains, and airplanes can be virtually eliminated through engineering design and operator skill, whereas the latter cannot be mitigated without altering the fundamental nature of a balloon.

"Because no amount of pilot skill can completely counterbalance a hot air balloon's limited steerability, ratcheting up the degree of care a tour company must exercise to keep its passengers safe would require significant changes to the aircraft and have a severe negative impact on the ballooning industry. For that reason, we conclude Escape is not a common carrier as a matter of law."

The court further held that the doctrine of primary assumption of risk applies to crash landings of balloons caused by the failure to steer the balloon safely. It held that Grotheer could



not escape the impact of the doctrine by asserting that the pilot acted with gross negligence. "In this context, such extreme conduct might be, for example, launching without sufficient fuel, in bad weather, or near electrical towers; using unsafe or broken equipment; or overloading the passenger basket. In the absence of evidence of such conduct, we hold the primary assumption of risk doctrine bars Grotheer's piloting claim."

Grotheer also claims her injury was caused, at least in part, by the tour operator's failure to give safety instructions. The trial court rejected this theory of liability when it concluded ballooning was an inherently risky activity and, as a result, the tour operator owed Grotheer no duty at all to protect her from injury. This ruling was too broad. The doctrine of primary assumption of risk doctrine does not absolve operators of *any obligation* to protect the safety of their customers. As a general rule, where an operator can take a measure that would increase safety and minimize the risks of the activity *without also altering the nature of the activity*, the operator is required to do so.

Here, while the operator was required to give safety instructions, Grotheer was unable to show how its failure was a substantial factor in causing her injury. The record shows that the landing was a forceful, violent crash. The accounts of the crash satisfied defendants' burden of demonstrating the violence of the crash, not any lack of instructions, was the proximate cause of Grotheer's injury. The burden then shifted to Grotheer to explain how things may have played out differently had everyone been instructed on proper body positioning during landing. She produced no such evidence. Accordingly, her claim was properly dismissed on summary judgment.


Ehrlich

*Jeffrey I. Ehrlich is the principal of the* Ehrlich Law Firm, *with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of* Advocate *magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*

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