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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RUSSELL DIEHL,

Plaintiff and Appellant,

v.

RONALD VARI et al.,

Defendants and Respondents;

BLUE LOS CABOS,

Defendant.

G046028

(Super. Ct. No. 30-2011-00453320)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed in part and reversed in part.

Law Office of Mark Mazda and Mark Mazda for Plaintiff and Appellant.

Jeffer Mangels Butler & Mitchell, Robert Mangels, Mark S. Adams and Monica Vu for Defendants and Respondents.

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## INTRODUCTION

Ronald Vari, Maxine Kroll, and Blue Los Cabos (Blue), represented by the law firm of Stradling Yocca Carlson & Rauth, LLP (Stradling Yocca), sued Russell Diehl (Big Russ)<sup>1</sup> for causes of action arising out of a failed real estate deal. Judgment in the underlying action was entered in favor of Big Russ on all causes of action.

Big Russ later sued for malicious prosecution. Vari, Kroll, and Stradling Yocca (Respondents) filed a motion to strike the malicious prosecution complaint pursuant to Code of Civil Procedure section 425.16, commonly referred to as the anti-SLAPP (strategic lawsuit against public participation) statute (the anti-SLAPP motion). The trial court granted the anti-SLAPP motion, and Big Russ appeals.<sup>2</sup>

Big Russ conceded, in the trial court and on appeal, that his malicious prosecution complaint against Respondents was protected activity within the meaning of the anti-SLAPP statute. Because the first prong of the anti-SLAPP statute was met, in order to survive the anti-SLAPP motion, Big Russ was required to ““demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”” ( *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) Because the malicious prosecution complaint alleged many grounds of liability in a single cause of action, Big Russ needed only to establish that one of the underlying causes of action was brought or

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<sup>1</sup> Russell Diehl is referred to in the briefs as “Big Russ” to distinguish him from his son, Russell Diehl III, who is referred to as “Young Russ.” For clarity, we will use the parties’ method of referring to the members of the Diehl family. For ease of reference, we will also refer to Big Russ’s other son, Reed Diehl, by his first name. We intend no disrespect.

<sup>2</sup> Both in the trial court and on appeal, all parties have referred to Vari, Kroll, Blue, and Stradling Yocca without differentiation, and have addressed their arguments vis-à-vis the anti-SLAPP motion as to these parties in the aggregate. When appropriate, we will address the issues as to each Respondent separately instead of lumping them together.

maintained without probable cause and with malice, and was terminated on the merits in his favor.

Based on the record before us, Big Russ met the low burden of proof on two of the three elements of his claim for malicious prosecution—favorable termination on the merits and lack of probable cause—as to all Respondents. As for the element of malice, under the analysis of the Court of Appeal, Fourth Appellate District, Division Three’s opinion in *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 222 (*Daniels*), we conclude Big Russ made a prima facie showing of malice as to Vari, but not as to Kroll and Stradling Yocca. We therefore affirm the order granting the anti-SLAPP motion as to Kroll and Stradling Yocca, and reverse it as to Vari.

#### STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>3</sup>

Vari and Kroll formed Blue to build a condominium project in Cabo San Lucas, Mexico. They learned that Reed’s company, ARA Capital, was authorized to lend money to Americans to buy vacation homes in Mexico. Vari and Kroll talked with Reed by phone, and met him in person. Reed informed Vari and Kroll that he could provide them with a \$24 million line of credit, but they would need to provide him money to secure the financing. Vari and Kroll ultimately wired a total of \$2.5 million to Reed via another company called Amerivest Trust Group (Amerivest).

Vari and Kroll met Reed’s older brother, Young Russ, in Mexico on two occasions before they transferred their money through Amerivest. Vari and Kroll never met or communicated with Big Russ, and never entered into any contractual arrangement with him. However, Big Russ was a manager and member of Amerivest, and a director

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<sup>3</sup> Our statement of facts is drawn from Big Russ’s complaint, the declarations submitted in support of and in opposition to the anti-SLAPP motion, the documents of which the trial court could properly take judicial notice, and the reporter’s transcripts of the trial in the underlying lawsuit, which were lodged with the trial court and are part of the appellate record.

of ARA Capital. E-mails and letters sent by Reed to Vari, Kroll, and their attorneys indicated Big Russ was involved in the deal. Big Russ was copied on correspondence demanding that Reed return Vari and Kroll's funds, but never disavowed his involvement in the deal.

The Amerivest bank account to which Vari and Kroll's money was deposited was set up by Big Russ, and statements for the account were sent to Big Russ's residence. Big Russ admitted he wrote a check to his wife in the amount of \$20,000 from the Amerivest account.

Vari received statements from Diehl & Company, indicating the \$2.5 million paid to Reed was on deposit with it. Big Russ admitted at his deposition that Diehl & Company was his sole proprietorship. At trial, however, Big Russ claimed that Reed must have set up a separate Diehl & Company account or used the company's letterhead without Big Russ's permission, and that Diehl & Company did not receive any of Vari and Kroll's funds.

Reed was arrested and pled guilty to federal wire fraud charges. He agreed to a federal restitution order, by which Vari and Kroll obtained a \$2.5 million nondischargeable judgment against him.

Vari, Kroll, and Blue, represented by Stradling Yocca, sued Big Russ, among others, for breach of contract, conversion, fraud, breach of fiduciary duty, violations of the Uniform Fraudulent Transfer Act (Civ. Code, § 3439 et seq.), and money had and received. The case proceeded to a jury trial. After Vari, Kroll, and Blue rested their case-in-chief, Big Russ successfully moved for nonsuit of all of Blue's causes of action against him, as well as Vari and Kroll's causes of action for breach of contract and money had and received. Big Russ obtained a jury verdict in his favor on all remaining causes of action. Judgment was entered in Big Russ's favor; that judgment is now final.

In February 2011, Big Russ filed a complaint against Vari, Kroll, Blue, and Stradling Yocca, alleging a single cause of action for malicious prosecution. Respondents filed the anti-SLAPP motion.<sup>4</sup> The trial court granted the anti-SLAPP motion, and Big Russ timely appealed.

## DISCUSSION

### I.

#### *EVIDENTIARY OBJECTIONS*

Big Russ and his attorney, Mark Mazda, filed declarations in opposition to the anti-SLAPP motion. Respondents filed written objections to those declarations. The trial court did not rule on any specific objection, and Respondents did not request a ruling on the objections at the hearing on the anti-SLAPP motion, or after the minute order granting the anti-SLAPP motion was filed and served. Existing law provides that, in the anti-SLAPP context, evidentiary objections are waived if no ruling is obtained at the hearing on an anti-SLAPP motion. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291, fn. 17; *U.S. Western Falun Dafa Assn. v. Chinese Chamber of Commerce* (2008) 163 Cal.App.4th 590, 603, fn. 5.)

In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 531-532, the Supreme Court held that in the context of a motion for summary judgment, a party may file written evidentiary objections before the hearing on the motion, or make oral objections at the hearing; if the trial court fails to rule on those objections, they are preserved on appeal. Respondents argue that this rule applies in all contexts, including the present one. We are not convinced Respondents are correct, for two reasons. First, the holding of *Reid v. Google, Inc.* rests on a detailed analysis of the language and legislative history of Code of Civil Procedure section 437c, subdivisions (b)(5) and (d), which specifically address the

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<sup>4</sup> Blue is not a party to the anti-SLAPP motion; the case against Blue is still pending in the trial court, and has been stayed pending the outcome of this appeal.

waiver of evidentiary objections. (See *Reid v. Google, Inc.*, *supra*, at pp. 521-532.) No such reference to evidentiary objections or waiver thereof exists in the anti-SLAPP statute.

Second, in reaching its holding, the *Reid v. Google, Inc.* court specifically disapproved of the holdings of numerous cases reaching contrary holdings. (*Reid v. Google, Inc.*, *supra*, 50 Cal.4th at pp. 527, fn. 5, 532, fns. 7 & 8.) The court did not, however, disapprove of the holdings of *Soukup v. Law Offices of Herbert Hafif* and *U.S. Western Falun Dafa Assn. v. Chinese Chamber of Commerce*. From this, we can infer that the Supreme Court did not intend its holding with respect to summary judgment motions to necessarily apply to anti-SLAPP motions.

Nevertheless, we will consider, as part of our de novo review, any specific evidentiary objections Respondents have raised on appeal. Those objections will be addressed in context throughout this opinion.

We make two general observations here. In its minute order, without addressing any specific piece of evidence, the trial court noted: “The evidence offered to prove malice is inadmissible hearsay without applicable exceptions. Contrary to counsel’s assertion, he cannot present his declaration testifying to his personal knowledge of the events as a witness. This violates Rule of Professional Conduct 5-200.” The State Bar Rules of Professional Conduct, rule 5-200(E) provides: “In presenting a matter to a tribunal, a member: [¶] . . . [¶] Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.” When submitting a declaration under penalty of perjury, the attorney is testifying as a witness. Therefore, counsel was not precluded by the State Bar Rules of Professional Conduct from providing a declaration in opposition to the anti-SLAPP motion.

The trial court also found that the statements in Mazda’s declaration (again, without specifying any particular piece of evidence) were hearsay: “Further, the statements offered are hearsay without a valid exception. The statement allegedly made

by Vari is not a party admission, as that statement doesn't meet this exception to the hearsay rule." This reference to a statement made by Vari is too vague to allow much consideration—Mazda's declaration references multiple statements by Vari. At the hearing on the anti-SLAPP motion, Respondents' counsel argued that to come within the party admission exception to the hearsay rule, an out-of-court statement must be made by a party to a party, meaning that Attorney Mazda could not offer the statements in his declaration. To the extent the trial court accepted that argument in the above quoted excerpt from the minute order, it is error. Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." Nothing in section 1220, in any way, conditions its application on the identity of the recipient of the statement. In addition, statements Mazda declared that Vari made may not have been hearsay in the first place (i.e., not offered for their truth).

## II.

### *STANDARD OF REVIEW*

We review the trial court's order granting the anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) "[Code of Civil Procedure s]ection 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether

the plaintiff has demonstrated a probability of prevailing on the claim.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

Big Russ concedes that Respondents met their burden of establishing the cause of action for malicious prosecution arises from Vari and Kroll’s acts in furtherance of their rights of petition or free speech under Code of Civil Procedure section 425.16, subdivision (e). (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733-741 [malicious prosecution action based on an underlying civil litigation triggers the first prong of the anti-SLAPP statute].) We therefore turn to the question whether Big Russ demonstrated a probability of prevailing on his claim.

A litigant must plead and prove three elements to establish a cause of action for malicious prosecution: (1) the underlying lawsuit “was pursued to a legal termination” in favor of the malicious prosecution plaintiff; (2) the underlying lawsuit was brought without probable cause; and (3) the underlying lawsuit was initiated with malice. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871.) “We consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” [Citation.] However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation.]’ [Citation.]” (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 326.)

### III.

#### *BIG RUSS ESTABLISHED A PRIMA FACIE SHOWING THAT THE UNDERLYING ACTION WAS TERMINATED IN HIS FAVOR.*

Big Russ obtained a termination in his favor on the merits of all claims asserted against him by Vari, Kroll, and Blue. All claims for relief were adjudicated in

Big Russ's favor by nonsuit motions, by dismissal with prejudice during trial, or by a jury verdict in his favor.

Respondents argue that Vari and Kroll voluntarily dismissed their claims for breach of contract and money had and received, meaning there was no termination in Big Russ's favor on the merits of those claims. The simple fact is that the trial court granted nonsuit motions on each of those claims. Vari and Kroll did not oppose the nonsuit motions that were ultimately granted, and claim that the verdict forms they submitted to the court before trial did not include those causes of action, but this is not the same as dismissing those causes of action. No dismissal of any cause of action was ever filed by Vari or Kroll.

Respondents also argue Blue voluntarily dismissed its claims against Big Russ. Respondents contend Stradling Yocca learned before trial that Vari and Kroll had sold Blue, so they no longer had standing to pursue any claims on behalf of Blue, and, therefore, voluntarily dismissed Blue's claims. These contentions are not borne out by the appellate record. If Stradling Yocca had learned before trial started that Vari and Kroll no longer had an ownership interest in Blue, Respondents provide no explanation why they did not do anything about it until after Vari, Kroll, and *Blue* had rested their case. And even then, the issue arose because Big Russ moved for nonsuit against Blue, and the court dismissed Blue with prejudice from the case.

Even if Kroll, Vari, and Blue had voluntarily dismissed their claims, we would still conclude the action was terminated in Big Russ's favor. “A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] “It is not enough, however, merely to show that the proceeding was dismissed.” [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits.’ [Citations.] A voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a

favorable termination because it does not reflect on the substantive merits of the underlying claim. [Citations.]” (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 893-894.) At most, the record in this case shows that, after the presentation of all of their evidence at a jury trial, Vari and Kroll decided not to pursue two of their claims against Big Russ, and Blue decided to drop all of its claims against Big Russ. In our view, this is an implicit concession that those parties could not maintain their case against Big Russ and is a decision on the merits in Big Russ’s favor. We reject, as without merit, any contention that this was somehow a dismissal on technical grounds.

#### IV.

##### *BIG RUSS ESTABLISHED A PRIMA FACIE SHOWING THAT THE UNDERLYING ACTION WAS BROUGHT WITHOUT PROBABLE CAUSE.*

“[A] suit for malicious prosecution lies for bringing an action charging multiple grounds of liability when some but not all of those grounds were asserted with malice and without probable cause.” (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 671.) Therefore, Big Russ need only offer evidence of a lack of probable cause of a single cause of action by any of Respondents in order to establish his prima facie case on the anti-SLAPP motion. (*Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 584.)

“A plaintiff has probable cause to bring a civil suit if his claim is legally tenable. This question is addressed objectively, without regard to the mental state of plaintiff or his attorney. [Citation.] . . . Probable cause is present *unless any reasonable attorney would agree that the action is totally and completely without merit.* [Citation.] . . . [¶] Probable cause may be present even where a suit lacks merit.” (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382.)

““[P]robable cause is lacking ‘when a prospective plaintiff and counsel do not have evidence sufficient to uphold a favorable judgment or information affording an inference that such evidence can be obtained for trial.’” [Citation.] “In a situation of

complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.” [Citation.]” (*Daniels, supra*, 182 Cal.App.4th at pp. 222-223.) Continued prosecution of a claim after the lack of probable cause is discovered may support a malicious prosecution claim. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970.)

Initially, we reject Big Russ’s argument that the granting of his nonsuit motions on various causes of action establishes a lack of probable cause as to those causes of action. In *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at pages 742-743, the Supreme Court held that the cross-defendant’s success on a motion for summary judgment in the underlying case did not establish a lack of probable cause for purposes of a later malicious prosecution case: “[A] claim that appears ‘arguably correct’ or ‘tenable’ when filed with the court may nevertheless fail . . . for reasons having to do with the sufficiency of the evidence actually adduced as the litigation unfolds. . . . [E]very case litigated to a conclusion has a losing party, but that does not mean the losing position was not arguably meritorious when it was pled.” (Fn. omitted.)

Big Russ argues that there was no probable cause to assert a cause of action against him for breach of contract. The evidence established that Vari and Kroll never met or communicated directly with Big Russ, much less entered into a contract with him.

Respondents counter that Vari and Kroll had probable cause to sue Big Russ for breach of contract as an alter ego of the contracting party. The underlying complaint alleged the following regarding the contract Big Russ allegedly breached: “Defendants [(Reed, Big Russ, ARA Capital, Amerivest Trust Group, and Diehl & Company)] agreed to act as Plaintiffs’ investment banker for the Los Cabos Project and agreed, in writing, to secure a \$24,000,000 line of credit for Plaintiffs so that they would have sufficient funds to purchase Lots 3, 4 and 8 and complete construction on Lots 3, 4, 5 and 8. Defendants promised to obtain such a line of credit for Plaintiffs once a deposit of \$1,175,000 had been placed with Amerivest.”

On appeal, Respondents argue that a claim for breach of contract may be asserted against an alter ego, citing *Minton v. Cavaney* (1961) 56 Cal.2d 576. That case holds, “[t]he equitable owners of a corporation . . . are personally liable when they treat the assets of the corporation as their own and add or withdraw capital from the corporation at will [citations]; when they hold themselves out as being personally liable for the debts of the corporation [citation]; or when they provide inadequate capitalization and actively participate in the conduct of corporate affairs. [Citations.]” (*Id.* at pp. 579-580.) Respondents also contend there was evidence supporting the cause of action for breach of contract because (1) Big Russ conducted business as Diehl & Company, (2) he admitted Diehl & Company was his sole proprietorship, and (3) Vari received statements from Diehl & Company, indicating Vari and Kroll’s \$2.5 million was on deposit with and earning interest from Diehl & Company.

What is lacking, however, is (1) any evidence of a written or oral agreement between Vari, Kroll, or Blue, on the one hand, and Big Russ or any entity of which he was allegedly an alter ego, on the other, and (2) any evidence that Big Russ failed to follow corporate formalities, or engaged in any behavior such that the corporate veil should be pierced, allowing Big Russ to be sued as the alter ego of Diehl & Company (or any of the other entity defendants named in the underlying complaint). (See generally *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300 [requirements for application of alter ego doctrine].)

We conclude that any reasonable attorney would agree that the cause of action for breach of contract against Big Russ was totally and completely without merit, due to the absence of any evidence of (1) any communication between Big Russ and Vari, Kroll, or Blue, (2) any agreement or contract between Big Russ and Vari, Kroll, or Blue, (3) any agreement or contract between any of the entity defendants (Amerinvest, ARA Capital, or Diehl & Company) and Vari, Kroll, or Blue, (4) a unity of interest between Big Russ and any of the entity defendants such that there was no longer any

separation between the entity and Big Russ, or (5) an abuse of the corporate formalities by Big Russ to render an injustice against Vari, Kroll, or Blue.

Having concluded there was no probable cause for the breach of contract cause of action against Big Russ on the part of any of the plaintiffs in the underlying case, we need not address whether there was probable cause to bring any of the other causes of action.

## V.

*BIG RUSS ESTABLISHED A PRIMA FACIE SHOWING THAT VARI ACTED WITH MALICE,  
BUT FAILED TO ESTABLISH A SHOWING OF MALICE  
AGAINST KROLL OR STRADLING YOCCA.*

“[T]he “malice” element [of a malicious prosecution claim] . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of . . . the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive.’ Improper purposes can be established in cases in which, for instance (1) the person bringing the suit does not believe that the claim may be held valid; (2) the proceeding is initiated primarily because of hostility or ill will; (3) the proceeding is initiated solely for the purpose of depriving the opponent of a beneficial use of property; or (4) the proceeding is initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim. [Citation.] If the prior action was not objectively tenable, the extent of a defendant’s attorney’s investigation and research may be relevant to the further question of whether or not the attorney acted with malice. [Citation.]” (*Daniels, supra*, 182 Cal.App.4th at pp. 224-225.) Malice may be and normally is established through circumstantial evidence and inferences drawn from the evidence.

(*Id.* at p. 225.) “[M]alice formed after the filing of a complaint is actionable.” (*Id.* at p. 226.)

Because the malice element considers the subjective intent or purpose of the plaintiff in the underlying case, we must consider the evidence separately for each Respondent.

#### A. *Vari*

There was sufficient evidence of malice offered by Big Russ to defeat the anti-SLAPP motion as to Vari. Big Russ’s attorney, Mazda, declared that Vari had stated to Mazda, during the trial, that Big Russ should be held completely liable because he raised Reed; “he wanted Big Russ to suffer like he and Kroll had suffered at the hands of Reed”; and although “Big Russ had also suffered by losing approximately \$700,000 or his entire retirement funds to Reed, having to lose his job in the Middle East to come back for trial, and having to see his son go to jail, . . . Big Russ still had not suffered enough and that [Vari] wanted to see him suffer more.” Based on the low burden on the second prong of the anti-SLAPP statute, the record supports an inference that Vari brought and maintained the underlying action with malice.<sup>5</sup> The trial court erred by granting the anti-SLAPP motion as to Vari.

#### B. *Kroll and Stradling Yocca*

The result as to Vari does not mean, however, that Kroll and Stradling Yocca acted with malice. Without evidence of actual ill will toward Big Russ

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<sup>5</sup> Respondents objected to the admission of those statements by Vari on the ground of hearsay. Those statements were not hearsay when offered against Vari, because they were not “offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) And evidence of the declarant’s state of mind, including his or her intent, is not inadmissible hearsay when state of mind is an issue. (Evid. Code, § 1250, subd. (a)(1).)

on the part of Stradling Yocca, “[i]t would be improper to impute [the client]’s malice to [his or her] Attorneys.” (*Daniels, supra*, 182 Cal.App.4th at p. 225.) As to Kroll, Big Russ has not cited us to any authority for the proposition that malice can be imputed from one spouse to another. Indeed, the statements we find establish a prima facie case of malice against Vari were specific to him—Mazda’s declaration states Vari said, “*he* wanted Big Russ to suffer,” and “*he* wanted to see him suffer more.” (Italics added.) Big Russ contends that Kroll and attorneys from Stradling Yocca were present when Vari made the above quoted statements. But Mazda’s declaration does not state that Kroll and the attorneys agreed with those statements, verbally or otherwise. Presence when a statement is made, or even apparent acquiescence in that statement, does not establish a prima facie showing of malice by Kroll or Stradling Yocca, under the circumstances here.<sup>6</sup> Therefore, we next consider the other evidence that Big Russ contends establishes malice on the part of Kroll and Stradling Yocca.

The only evidence of alleged malice by Kroll individually (as opposed to the evidence presented against Respondents generally) is Big Russ’s contention that Kroll testified untruthfully at trial. Mazda’s declaration in opposition to the anti-SLAPP motion reads, in relevant part, as follows: “Kroll also lied in her testimony at trial—also to try and falsely implicate Big Russ, where he was not involved. Kroll testified that when she first met with Young Russ, she and Young Russ looked at the Internet and Young Russ showed her things on the Internet regarding his father, Big Russ. On cross-examination this was revealed to be a lie. Kroll admitted to this supposedly occurring in a certain conference room in the shared office suite that ARA Capital had in Cabo San Lucas, Mexico. But further testimony established that there was no computer or Internet connection in that room.” Notably, Big Russ does not offer the actual portions

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<sup>6</sup> Because Blue was not a party to the anti-SLAPP motion, we need not consider here whether Vari’s statements may be imputed to Blue.

of the reporter's transcript referenced in this passage.<sup>7</sup> In the absence of Kroll's actual testimony, we cannot determine that she lied under oath, much less what the purpose of that testimony was. It is possible that perjured testimony could provide evidence of malice, but the record in this case does not suffice. We conclude that Big Russ failed to establish a prima facie showing of malice against Kroll, and the anti-SLAPP motion was properly granted as to her.

Big Russ identifies a number of legal positions and actions taken by Respondents, and argues those establish a prima facie showing of malice as to Kroll and Stradling Yocca. We conclude those actions constitute strategy and tactics undertaken during the course of the litigation, which, on this record, do not individually or together establish malice. According to Big Russ, those actions are:

1. Big Russ asked Respondents to continue the trial for a few months because he was working in "the West Bank Palestine." Respondents refused to agree to the continuance, and Big Russ was forced to quit his job.
2. Reed offered to stipulate to a \$4.5 million nondischargeable civil judgment, if Vari, Kroll, and Blue would dismiss Big Russ from the case; the offer was refused. Instead, Vari, Kroll, and Blue ultimately stipulated to limit their recovery against Reed to \$2.5 million—the amount of his federal restitution order—because Reed was incarcerated and did not have a lawyer representing him at the time of trial.

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<sup>7</sup> Although a portion of the reporter's transcript for the underlying trial was lodged with the trial court that heard the anti-SLAPP motion and has been made part of the appellate record, Big Russ did not provide this court with the complete reporter's transcript, and did not provide any references to the reporter's transcript to support the claim that Kroll lied while testifying.

3. The investigator hired by Respondents was solely interested in trying to tie Big Russ to Reed's fraudulent conduct.
4. Vari contacted the FBI when he was unable to recover the \$2.5 million he, Kroll, and Blue had wired to Reed. In his formal statement to the FBI, Vari advised the FBI of how he was scammed by Reed, and detailed the various entities Reed used to perpetrate the scam, but Vari never told the FBI he thought Big Russ was involved in any way with the scam. Following an investigation by the FBI, Big Russ was never arrested, charged, or implicated in Reed's conduct; Respondents unsuccessfully asked the trial court in the underlying action to keep that information from the jury.

With regard to the foregoing, the record before us is insufficient to support an inference of malice. We do not have enough evidence to conclude the refusal to continue the trial was malicious. Decisions on how much to accept in settlement and from whom—again, on this record—do not support an inference of malice. Speculation about an investigator's intent or characterizing his mission is also insufficient. That Vari did not "finger" Big Russ to the FBI is not evidence of malice.

Big Russ contends Vari's testimony at trial proved that it was Young Russ, not Big Russ, who was sued in the underlying complaint, although Respondents never sought leave to amend the complaint to name the correct person, thus establishing malice on the part of Respondents. The distinction between Young Russ and Big Russ was obviously a source of great confusion throughout this litigation. We would find it hard to conclude that Respondents' errors constituted malice when Big Russ himself, although he claimed for the first time in the middle of trial that he had never been served with process or made a formal appearance, had nevertheless answered ready for trial and proceeded to defend himself against the claims of Vari, Kroll, and Blue. We agree with the trial court that to the extent Big Russ had a due process claim as the result of a lack of proper

service, he waived it or was judicially estopped from raising it. We also note that in the portions of the appellate record to which Big Russ has cited us, he has not established that Respondents “vigorously opposed motions that sought to get Big Russ dismissed from the case” because he was not the Russell Diehl named in the underlying complaint. Big Russ brought this issue before the trial court on three occasions, and, on each, the court denied the motions to dismiss without inviting argument from Respondents.

Additionally, Big Russ has not established that Respondents “opposed a motion that declared Young Russ was not sued in the case.” The trial court made a specific finding that “for our purposes, the Russell Diehl that’s named in the complaint is now Russell Diehl Sr.” Big Russ does not cite us to a portion of the record where he made a motion to declare Young Russ was not named in the complaint; such a motion would have been moot based on the trial court’s finding. In any event, there was no objection by Respondents to any of this in the portion of the appellate record to which Big Russ cites us.

Finally, we consider whether Stradling Yocca’s continued pursuit of the causes of action against Big Russ on behalf of Vari, Kroll, and Blue is sufficient to establish a prima facie showing of Stradling Yocca’s malice. As noted *ante*, Big Russ has provided sufficient evidence of a lack of probable cause as to the cause of action for breach of contract. Lack of probable cause alone, however, is not sufficient to establish malice. (*Daniels, supra*, 182 Cal.App.4th at p. 225.) Even if the plaintiff and his or her attorneys in the underlying action are not able to develop any competent evidence during discovery to support the claims, without more, malice cannot be established. (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 743.) However, where “the factual allegations [of the underlying complaint] were explicitly disproved by the presentation of prior sworn deposition testimony [by the defendant attorneys’ client],” the continuation of a lawsuit could constitute malice. (*Daniels, supra*, at p. 227, citing *Zamos v. Stroud, supra*, 32 Cal.4th at pp. 961-962.)

Here, the ultimate lack of success on the merits of Vari, Kroll, and Blue's causes of action against Big Russ demonstrates a lack of evidentiary support for the factual allegations in the underlying complaint; at trial, Vari and Kroll's testimony explicitly disproved at least some of the claims against Big Russ; the confusion relating to the naming of the correct Russell Diehl evidences a lack of a complete factual investigation by Stradling Yocca; and Vari expressed actual ill will toward Big Russ during the trial, in the presence of Stradling Yocca attorneys.

What the record in this case does not contain is an affirmative showing that Stradling Yocca had actual knowledge the causes of action against Big Russ were utterly lacking in merit before the trial began. All of the record citations supporting Big Russ's claim that Respondents knew Big Russ had no liability are citations to or about trial testimony. This is unlike the situation in *Zamos v. Stroud*, where the plaintiff in the underlying case had signed a declaration under penalty of perjury, before trial, that refuted the complaint's allegations. We reject any suggestion that an attorney must immediately dismiss a case during trial, or request to withdraw as counsel, if the testimony (admitted or excluded) is not as expected in order to avoid a later malicious prosecution case. Big Russ has not made a prima facie showing of malice by Stradling Yocca.

In *Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1115, the appellate court concluded the plaintiff had made a prima facie showing of malice on the part of the attorneys who sued the plaintiff in the underlying case. The appellate court distinguished the situation where an attorney is entitled to rely on the facts and allegations presented to the attorney by his or her client (as in *Daniels* and in the present case), from the situation where the nature of the underlying case (a federal securities fraud case) means that the client has no more knowledge of the facts than the attorney, and the attorney must therefore provide more evidence of information he or she relied on in order to defeat a prima facie showing of malice based on pursuing the case

despite a lack of probable cause. (*Cole v. Patricia A. Meyer & Associates, APC, supra*, at pp. 1114-1115.)

DISPOSITION

As to Kroll and Stradling Yocca, the order granting the anti-SLAPP motion is affirmed; as to Vari, the order granting the anti-SLAPP motion is reversed. Because both sides prevailed in part, no party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.