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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PEACHES NONG JENSEN,

Plaintiff and Respondent,

v.

CHARON SOLUTIONS, INC., et al.,

Defendants and Appellants.

B276050

(Los Angeles County  
Super. Ct. No. BC469884)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kevin C. Brazile and Elizabeth Allen White, Judges. Affirmed in part, reversed in part and remanded.

Henry J. Josefsberg for Defendants and Appellants.

Law Offices of Yvonne M. Renfrew and Yvonne M. Renfrew  
for Plaintiff and Respondent.

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After their venture to subdivide and develop a parcel of residential real estate fell apart, one venturer sued the other and lost. The other then turned around and sued for malicious prosecution of the prior lawsuit, and a jury awarded \$1 million in compensatory damages and \$500,000 in punitive damages. The party facing that verdict now appeals. Both parties' briefs on appeal misrepresent the facts and the law. Our careful review of approximately 5,000 pages of record spawned by the parties' near-decade of nonstop litigation nevertheless leads us to conclude that there is no basis to disturb the trial court's and jury's rulings on liability or the jury's award of punitive damages. However, the trial court prejudicially erred in allowing the malicious prosecution plaintiff to seek over \$400,000 in attorney's fees while redacting, on the basis of attorney-client privilege, almost every line of content from the underlying fee bills. Accordingly, we affirm the finding of liability; remand the matter for a new trial on compensatory damages where the fee bills are not to be redacted on the basis of privilege; and, if upon retrial there is an award of compensatory damages of \$25,000, affirm the punitive damages award.

## **FACTS AND PROCEDURAL BACKGROUND**

### **I. Facts**

#### **A. *Formation of the LLC***

In 2000, Peaches Nong Jensen (Peaches)<sup>1</sup> and her longtime friend Perry Segal (Segal) agreed to develop a parcel of property on Cass Avenue in Woodland Hills, California (the property). Peaches owned the property and was living in a house on one half

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<sup>1</sup> We use Peaches' first name to avoid confusion because she is not the only party with the last name Jensen; we mean no disrespect.

of the property. Their agreement was to subdivide the property, build a home on the newly subdivided portion, and sell that home. Toward this end, Peaches and Segal formed P&P Holdings, LLC (the LLC) through their respective companies, Peachtree Financial Corporation (Peachtree) and Charon Solutions, Inc. (Charon). The companies were equal co-owners of the LLC, and each contributed approximately \$21,000 in starting capital. Although Peaches and Segal discussed transferring the property to the LLC, they never did so, and Peaches remained the sole owner of the property during all times pertinent to this appeal.

***B. Litigation Against Seller***

In March 2004, Peaches learned that the foundation of her home was defective and would require repairs costing more than \$300,000. She sued the person who sold her the property for concealing the defects in the property that led to the foundational damage; the seller cross-claimed for rescission. Peaches took out a loan to finance the litigation and secured it with the property. Segal moved to intervene in this litigation on the ground that he had an interest in the property, but the court rebuffed his request. Peaches and the seller eventually settled and dismissed their respective claims.

***C. Charon Withdraws from the LLC***

Upset because he was excluded from Peaches' litigation with the seller and because he felt Peaches should have consulted him before encumbering the property, Segal sent a letter to Peaches in December 2005 withdrawing Charon from the LLC, demanding a refund of his starting capital, and threatening to sue for \$1.5 million in damages. Peaches offered to return the starting capital, but Segal refused her offer.

#### ***D. Underlying Lawsuit***

##### **1. Complaint and cross-complaint**

In December 2008, Charon sued Peaches and Peachtree for: (1) fraud—intentional misrepresentation (Civ. Code, § 1710, subd. 1); (2) fraud—suppression of fact (Civ. Code, § 1710, subd. 3); (3) breach of fiduciary duty; (4) conversion of the property and the proceeds from the loan Peaches used to finance the litigation against the seller; (5) unjust enrichment for retaining Charon’s starting capital; and (6) declaratory relief seeking a declaration that the LLC “is the owner” of the property and Charon is the owner of the as-yet-not-subdivided portion of the property.<sup>2</sup>

Peaches and Peachtree filed a cross-complaint for (1) breach of contract, (2) negligence, and (3) fraud.

##### **2. Demurrers**

Peaches and Peachtree demurred to Charon’s complaint. As against Peaches, the trial court overruled the demurrer as to the two fraud claims, the breach of fiduciary duty claim, and the conversion claim. As against Peachtree, the court sustained the demurrer with leave to amend as to those same claims. As against Peaches and Peachtree, the court sustained the demurrer without leave to amend as to the unjust enrichment and declaratory relief claims, stating: “[T]here is no unjust enrichment and nothing to declare.”

Charon demurred to the cross-complaint. The trial court overruled the demurrer as to the breach of contract claim, but

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<sup>2</sup> The underlying lawsuit also named Peaches’ husband, Carl Jensen, as a defendant, but Carl later settled. He was never a party to the malicious prosecution lawsuit at issue in this appeal.

sustained the demurrer without leave to amend as to the remaining claims.

### **3. Trial**

#### ***a. Claims at issue***

Charon and Segal filed a first amended complaint against Peaches, realleging the claims that had survived demurrer—namely, (1) fraud—intentional misrepresentation, (2) fraud—suppression of fact, (3) breach of fiduciary duty, and (4) conversion. Because Charon and Segal did not name Peachtree as a defendant in the first amended complaint, the trial court dismissed it as a defendant. Peaches and Peachtree continued with their sole surviving cross-claim for breach of contract.

#### ***b. Voluntary dismissal***

On the morning jury selection was to begin, Charon and Segal voluntarily dismissed their conversion claim.

#### ***c. Nonsuit***

After Charon and Segal rested their case-in-chief, Peaches moved for a nonsuit under Code of Civil Procedure section 581c, subdivision (a). The trial court denied the motion, finding “there is sufficient evidence presented for the jury to decide.”

#### ***d. Verdicts***

The jury was provided with a special verdict form requiring it to make findings as to the elements of the various claims and cross-claim. As to each claim and cross-claim, the jury found some elements to be proven, and others not proven; as a result, the verdict was for Peaches on all of Charon’s and Segal’s claims, and was for Charon and Segal on the cross-claim.

## II. Procedural Background

### A. *Complaint*

In September 2011, Peaches and Peachtree sued Charon and Segal (as Charon’s “sole owner” and “alter ego”) for malicious prosecution of the underlying lawsuit. They sought compensatory damages (for out-of-pocket litigation expenses, Peaches’ emotional and mental suffering, and injury to Peaches’ and Peachtree’s professional reputations) as well as punitive damages.<sup>3</sup>

### B. *Anti-SLAPP Motion*

Charon and Segal moved to strike Peaches’ and Peachtree’s complaint under the anti-SLAPP statute (Code Civ. Proc., § 425.16).

After briefing and a hearing, the trial court granted the motion as to Peachtree (because Peachtree had been dropped from the underlying lawsuit prior to trial) but denied it as to Peaches. As to Peaches, the court ruled that her malicious prosecution action “clearly arises from protected activity” within the meaning of the anti-SLAPP statute because her “allegations directly relate to [Charon’s and Segal’s] filing of [the underlying lawsuit] and [their] right to petition. However, the court found that Peaches had shown a probability of prevailing on the merits of her claim. The court noted that the denial of Peaches’ nonsuit motion during trial in the underlying lawsuit established probable cause *as to the three claims that went to trial and survived the motion*, but ruled that Peaches had shown a

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<sup>3</sup> Peaches and Peachtree also sued Charon’s and Segal’s lawyers in the underlying lawsuit, but the trial court later dismissed them as defendants under the anti-SLAPP statute. They are not parties to this appeal.

probability of establishing lack of probable cause as to the unjust enrichment and declaratory relief claims that had been dismissed on demurrer without leave to amend, which was enough to support a malicious prosecution claim. The court also concluded that Peaches had made a sufficient preliminary showing of favorable termination as well as malice. Charon and Segal appealed the ruling and we affirmed. (*Jensen v. Charon Solutions* (Oct. 10, 2013, B240651) [nonpub. opn.].)

***C. Motion for Summary Judgment***

Charon and Segal next moved for summary judgment on 11 different grounds. The trial court denied the motion for the same reasons it denied their earlier motion to strike under the anti-SLAPP statute.

***D. Motion to Bifurcate the Trial***

Charon and Segal asked the court to bifurcate the trial by conducting a bench trial on the legal aspects of malicious prosecution before conducting a jury trial on the factual aspects. The trial court denied the motion as untimely.

***E. Trial***

At trial, Peaches presented evidence that she had incurred \$400,163.51 in out-of-pocket litigation expenses defending against Charon's and Segal's underlying lawsuit.

The trial court instructed the jury that it had found the legal aspects of Peaches' malicious prosecution action to be proven, and charged the jury with determining the factual aspects—chief among them, whether Charon and/or Segal had prosecuted the underlying lawsuit with malice.

The jury returned a general verdict in Peaches' favor, and awarded her \$1 million total compensatory damages. After a separate trial on the issue of punitive damages, the jury awarded

Peaches \$250,000 in punitive damages against each Charon and Segal.

***F. Motion for a New Trial***

Charon and Segal filed a motion for a new trial, arguing that the verdict was infected by instructional error, that the verdict was not supported by substantial evidence, and that the jury's compensatory damages award was excessive. The trial court denied the motion.

***G. Appeal***

Charon and Segal filed this timely appeal.

**DISCUSSION**

In this appeal, Charon and Segal challenge dozens of the trial court's rulings, but only provide argument, legal authority, and citations to the record for a subset of those challenges. We will address only that subset; the rest have been waived. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1029; *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685.) Properly before us are challenges to the trial court's denial of its summary judgment motion, to the trial court's refusal to bifurcate the trial, to some of the trial court's evidentiary rulings pertaining to liability, to the sufficiency of the evidence underlying two elements of the malicious prosecution claim, to some of the trial court's evidentiary rulings pertaining to compensatory damages, to the sufficiency of the evidence supporting the award of compensatory damages, and to the amount of punitive damages.

Critical to nearly all of these claims is the definition of the tort of malicious prosecution. To prevail on such a claim, a person must prove that (1) its adversary initiated a prior action that was "legally terminated in [the person's] favor," (2) the adversary brought the prior action "without probable cause," and



(3) the adversary did so “with malice.” (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740 (*Siebel*).)

## **I. Motion for Summary Judgment**

Charon and Segal argue that the trial court erred in denying their motion for summary judgment. We may not entertain this argument because any error in the summary judgment ruling is not prejudicial where, as here, there was a subsequent trial on the very same issues. (*Transport Ins. Co. v. TIG Ins. Co.* (2011) 202 Cal.App.4th 984, 1010-1011; *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 343.) This rule rests on the twin premises that a party is not prejudiced simply by having to stand trial (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833), and that a decision based on less evidence should not prevail over a decision based on more evidence (*Gackstetter v. Frawley* (2006) 135 Cal.App.4th 1257, 1269).

## **II. Liability Issues**

### **A. Bifurcation**

Charon and Segal assert that the trial court erred in denying their motion to bifurcate. Prior to trial, they asked the court to break the trial into two phases: (1) a bench trial on the legal questions of favorable termination and lack of probable cause elements, and, if necessary, (2) a jury trial on the factual question of malice. The court denied the request as untimely. We review a trial court’s ruling whether to bifurcate for an abuse of discretion. (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086, superseded on other grounds by Civ. Code, § 3294.)

Regardless of the timeliness (or untimeliness) of the motion to bifurcate, the trial court did not abuse its discretion in denying

it. The court properly recognized that the elements of favorable termination and lack of probable cause are legal questions for the court (see *Ross v. Kish* (2006) 145 Cal.App.4th 188, 198 [favorable termination is a legal question]; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817 (*Wilson*) [lack of probable cause “is a legal question to be resolved by the court”]), properly decided those legal questions itself at the conclusion of the evidence, and properly instructed the jury of its decision on those elements, leaving the jury to decide the purely factual element of malice (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 874-875 (*Sheldon Appel*) [malice is “a question of fact to be determined by the jury”]).

Consequently, Charon’s and Segal’s bifurcation argument boils down to the assertion that the trial court erred in conducting just one trial at which evidence was presented on all three elements rather than having one trial for the legal elements and, if necessary, a second trial for the factual element. Although courts usually try equitable or legal issues first and jury issues second (*Darbun Enterprises, Inc. v. San Fernando Community Hospital* (2015) 239 Cal.App.4th 399, 408-409 (*Darbun*); *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156-157), they are not *required* to do so. Courts may instead try the jury issues first (*Darbun*, at p. 409, fn. 4; *Estate of Fincher* (1981) 119 Cal.App.3d 343, 351), or, most pertinent here, may try the legal and jury issues simultaneously (*Forty-Niner Truck Plaza, Inc. v. Union Oil Co.* (1997) 58 Cal.App.4th 1261, 1268). (See generally Evid. Code, § 320 [noting court’s “discretion [to] regulate the order of proof”]; Code Civ. Proc., § 597 [noting court’s power to regulate the order of issues at trial].) The trial court’s decision to try all three elements simultaneously was within its

discretion. Indeed, a contrary decision would have risked the possibility of two back-to-back trials with overlapping evidence (e.g., *Silas v. Arden* (2012) 213 Cal.App.4th 75, 90 [lack of probable cause relevant to show malice]), a result inimical to the smart use of limited judicial resources. (Cf. Code Civ. Proc., § 1048, subd. (b) [court should bifurcate “when separate trials will be conducive to expedition and economy”].)

Charon and Segal raise two further arguments. They urge that Code of Civil Procedure section 597 obligated the trial court to decide the legal questions of favorable termination and lack of probable cause first. They are wrong. That section requires a court to first try issues involving “any . . . defense not involving the merits of the plaintiff’s cause of action but constituting a bar or ground of abatement to the prosecution thereof.” (Code Civ. Proc., § 597.) However, the legal questions of favorable termination and lack of probable cause “involve[] the merits” of Peaches’ malicious prosecution claim because, as noted above, they are *elements* of that claim. (*Siebel, supra*, 41 Cal.4th at p. 740.) Next, Charon and Segal assert that the trial court abused its discretion because it failed to exercise any discretion when it denied the motion as untimely. (E.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 847-848 [“A failure to exercise discretion also may constitute an abuse of discretion.”].) Of course, we may affirm on any basis in the record regardless of whether the trial court relied upon it. (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12.) What is more, any error in not bifurcating was not prejudicial because, as explained below, the trial court’s rulings on the two legal questions were supported by substantial evidence, such that bifurcation would have resulted in the wasteful conduct of two trials with no different outcome.

**B. Evidentiary rulings**

We review a trial court's evidentiary rulings for an abuse of discretion. (*People v. Clark* (2016) 63 Cal.4th 522, 597.)

**1. Exclusion of special verdict findings from the prior action, or independent proof to support those findings**

Charon and Segal argue that the trial court erred in (1) not allowing the jury to consider the prior jury's special verdict findings favorable to them—namely, that (a) Peaches and Charon were “in a special relationship of trust or confidence,” (b) Peaches “fail[ed] to disclose an important fact that Charon . . . did not know and could not reasonably have discovered,” and (c) Peaches owed “a fiduciary duty to Charon”; and (2) not allowing them to independently prove up a confidential relationship. They assert that this evidence is relevant to show that Charon and Segal had probable cause to file the underlying lawsuit. The trial court initially ruled that the special verdict findings were “relevant” to the issue of probable cause, but subsequently excluded both categories of evidence.

The trial court partially erred in its evidentiary ruling. Contrary to what Peaches argues, the prior jury's special findings are relevant to prove that Charon and Segal had objective probable cause, albeit only as to the elements the prior jury found in their favor. However, the jury's findings as to those elements do not conclusively establish, as Charon and Segal posit, that they had probable cause to bring the claims to which those findings are relevant; after all, the jury ultimately found other elements of those claims to be lacking in proof. The findings, and independent proof of a confidential relationship, are therefore relevant. They are also not hearsay, as Peaches further argues. The prior jury's special findings are not hearsay because they are

not being admitted for their truth (for example, as proof that Peaches and Charon *were, in truth*, in a special relationship of trust or confidence). (Cf. Evid. Code, § 1200, subd. (a) [evidence is “hearsay” only if it “is offered to prove the truth of the matter stated”].) Instead, the findings were offered to show that the prior jury made them, which tends to show the objective reasonableness of *Charon’s and Segal’s* belief that those elements were supported by probable cause. (Cf. *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1551 [trial court may not take judicial notice of “the truth of [a prior judge’s] factual findings”].) Thus, the trial court arguably abused its discretion in excluding the prior jury’s special findings. However, the court did not err in excluding Segal’s proposed testimony that he and Peaches had a “confidential relationship” because such testimony is a legal conclusion that invades the province of the jury. (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1558 [fiduciary duty is a “legal conclusion”]; *People v. Jones* (2013) 57 Cal.4th 899, 950 [experts may not testify to legal conclusions].)

However, the error in not admitting the prior jury’s special findings was not prejudicial. The absence of this evidence of probable cause did not prejudice Charon and Segal in proving probable cause underlying their two fraud claims, the breach of fiduciary duty claim, or the conversation claim because probable cause to establish those claims was, as discussed below, established as a matter of law under the interim adverse judgment rule. The absence of this evidence also did not prejudice Charon and Segal in proving probable cause underlying the unjust enrichment and declaratory relief claims because the particular special verdict findings (regarding the existence of a

trust relationship, the nondisclosure of an important fact, and the existence of a fiduciary duty) are unrelated to—and thus would not have changed—the reasons why the prior trial court dismissed those claims for lack of merit (namely, and as discussed below, that unjust enrichment is not a viable cause of action and that there was no proper subject for declaratory relief in this case).

**2. Exclusion of evidence that Charon and Segal had any interest in the Cass property**

Charon and Segal next assert that the trial court erred in excluding evidence that they had some ownership interest in the Cass property, which they further assert would have tended to prove probable cause. The trial court was initially inclined to allow Charon and Segal to introduce evidence of such ownership and agreed to hold a hearing on the issue, but the court reversed its ruling when Segal later admitted that he had no documentary evidence to substantiate any property interest.

On appeal, Charon and Segal seem to be asserting that this ruling rests on the trial court's mistaken and implicit finding that the merits of the claims in the underlying lawsuit turned on whether there was proof of an enforceable contract; this was wrong, Charon and Segal note, because that lawsuit rested on a number of non-contractual tort claims. We reject this argument for two reasons. First, the trial court's ruling did not rest on any finding regarding the nature of the complaint in the underlying lawsuit; the court merely excluded any evidence of ownership of the Cass property in light of Segal's concession that no documentary proof of such ownership existed. Second, the exclusion of this evidence cannot possibly be prejudicial in light of Segal's pretrial admission that he had no *documentary* evidence of ownership in the property and his mid-trial admission that he

had no *other* evidence of ownership. Even on appeal, Charon and Segal do not explain what further evidence they would have introduced that the trial court's ruling would have precluded.

**3. Admission of evidence regarding absence of probable cause on claims in underlying lawsuit for which probable cause was established as a matter of law**

At oral argument, Charon and Segal argued that the trial court erred in allowing Jensen to introduce evidence that they lacked probable cause to bring *all six* claims in the underlying lawsuit when, as discussed below, the interim adverse judgment rule dictated a finding that they had probable cause to bring three or four of those claims. This argument is waived because it was raised for the first time in oral argument. (*People v. Crow* (1993) 6 Cal.4th 952, 960, fn. 7.) It is also of no moment because Charon and Segal have failed to show how admission of this evidence prejudiced them. As discussed below, it was for *the court* (not the jury) to decide the issue of probable cause, and the admission of this evidence in no way affects the trial court's amply supported finding that Peaches established a lack of probable cause as to the other two claims in the underlying lawsuit, and this finding is enough to sustain the trial court's finding of this element of Peaches' malicious prosecution claim. Moreover, there is nothing to indicate that Peaches' introduction of this evidence affected the jury's finding of malice, which is a related but nonetheless distinct inquiry. To be sure, and as discussed below, the fact that some of Charon's and Segal's prior claims were supported by probable cause is relevant to the amount of compensatory damages Peaches can recover; but, also as discussed below, we are overturning that damages verdict for other reasons, so the error complained of here is of no concern.

**4. Exclusion of evidence that Peaches took out a personal loan on the Cass property**

Charon and Segal contend that the trial court erred in excluding evidence that Peaches borrowed against the Cass property, which they contend would have supported a finding that they had probable cause to sue Peaches for fraud. The trial court excluded this evidence. We need not decide whether the exclusion of this evidence was an abuse of discretion because it was not prejudicial. This evidence would, at most, be relevant to show probable cause for Charon's and Segal's fraud-based claims, and, as discussed below, the interim adverse judgment rule dictates a finding that Charon and Segal had probable cause for those fraud-based claims. The absence of this evidence therefore had no effect.

**5. Exclusion of evidence as to why Charon's and Segal's prior attorney voluntarily dismissed the conversion claim**

Charon and Segal assert that the trial court erred in not allowing their prior attorney to testify to her reasons for voluntarily dismissing their conversion claim on the morning of trial. Their assertion is correct. An attorney's reasons for voluntarily dismissing a claim bear on the question of whether the claim was favorably terminated. (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1056-1057 (*Contemporary Services*).) However, as described more fully below, the exclusion of this evidence was not prejudicial.

**C. Sufficiency of the evidence**

Although they do so in the context of their attack on the trial court's summary judgment ruling, Charon and Segal effectively challenge the court's findings—as reflected in its instruction to the jury—that Peaches had established that the



prior action was terminated in her favor and lacked probable cause. Because these issues are questions of law, our review of each ruling is de novo. (*People v. Garcia* (2016) 62 Cal.4th 1116, 1122.) (Charon and Segal do not challenge the sufficiency of the evidence underlying the jury’s finding of malice).

### **1. Favorable termination**

To establish that a prior action was terminated in a malicious prosecution plaintiff’s favor, she must do more than show that she prevailed. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 342 (*Casa Herrera*)). She must also show that the “termination [reflects] the merits of the action and [her] innocence of the misconduct alleged in the lawsuit” rather than a resolution on some “technical or procedural” ground. (*Id.* at pp. 341-342; *Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1854-1855.) The question of favorable termination looks to the ““judgment as a whole,”” and not to why individual claims are terminated. (*Siebel, supra*, 41 Cal.4th at p. 741; *Casa Herrera*, at p. 341; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 686 (*Crowley*) [requiring “favorable termination of the *entire* action” (italics in original)].)

Charon and Segal argue that the trial court erred in concluding and then instructing the jury that Peaches had established the favorable termination element because (1) the voluntary dismissal of their conversion claim was not a “favorable termination,” and (2) the prior trial court’s order sustaining the demurrer to their unjust enrichment and declaratory relief claims was not a “favorable termination” of those claims, such that (3) half of their six claims against Peaches were not terminated favorably to her and that there is thus no favorable termination of the “judgment as a whole.”

This argument is without merit because its second and third premises are not valid.

The second premise is not valid because the prior trial court's dismissal of the unjust enrichment and declaratory relief claims was "on the merits," not on any technical or procedural ground. Technical, procedural, and non-merits grounds include voluntary dismissal to avoid the cost of continued litigation (*Contemporary Services, supra*, 152 Cal.App.4th at p. 1057), voluntary dismissal due to settlement (*Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409, 413), or involuntary dismissal due to res judicata, laches, or the statute of limitations (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1527; *Casa Herrera, supra*, 32 Cal.4th at p. 342).

Here, the prior trial court sustained the demurrer without leave to amend because "there is no unjust enrichment and nothing to declare." This statement reflects a dismissal on the merits. The court's statement that "there is no unjust enrichment" accords with the law that "[u]njust enrichment is not a cause of action, . . . or even a remedy." (*Bank of New York Mellon v. Citibank, N.A.* (2017) 8 Cal.App.5th 935, 955; *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231.) And its statement that "there is . . . nothing to declare" accords with the law that declaratory relief requires "a proper subject of declaratory relief" (*Lee v. Silveira* (2017) 6 Cal.App.5th 527, 546); that "[t]he 'proper subjects' of declaratory relief are set forth in Code of Civil Procedure section 1060 and other statutes" (*Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410); and that the declaratory relief Charon and Segal sought—namely, a

declaration that the LLC “is the owner” of the property and that Charon is the owner of the as-yet-not-subdivided portion of the property—is not a “proper subject” of declaratory relief because Charon and Segal have no property or ownership interest in the Cass property and because they otherwise failed to establish why the fraud and breach of fiduciary duty they alleged would justify a transfer of title (rather than tort damages) (cf. Code Civ. Proc., § 1060 [declaratory relief appropriate to interpret “a written instrument” or to declare “rights or duties . . . over or upon property”]). Charon and Segal nevertheless assert that the prior trial court’s demurrer ruling was ambiguous and that the court’s refusal to grant declaratory relief was an exercise of its discretion to decline to award such relief (rather than due to any defect with that relief). Neither assertion is supported by the prior trial court’s actual words.

The third premise of Charon’s and Segal’s argument—namely, that there was no favorable termination as to the “judgment as a whole”—is also not valid. They concede that the jury’s rejection of the three claims that went to trial was a resolution on the merits. And we have concluded that the prior trial court’s sustaining of the demurrer as to two further claims without leave to amend was a decision on the merits. Thus, at least five of Charon’s and Segal’s six claims were terminated favorably to Peaches on the merits. This constitutes favorable termination in Peaches’ favor on the ““judgment as a whole”” (*Siebel, supra*, 41 Cal.4th at p. 741), and renders harmless the evidentiary error with regard to the first premise of Charon’s and Segal’s argument (that is, in not allowing their attorney to testify about the reasons underlying the voluntary dismissal of their sixth claim) because the favorable termination finding remains

valid even if only five of six claims are resolved on the merits in Peaches' favor.

## **2. Lack of probable cause**

To establish that a prior action was initiated without probable cause, a malicious prosecution plaintiff must prove that at least one claim in the prior action was not “legally tenable.” (*Sheldon Appel, supra*, 47 Cal.3d at p. 878; *Crowley, supra*, 8 Cal.4th at pp. 683, 686.) A claim is not “legally tenable” if “any reasonable attorney would agree that the [claim] is totally and completely without merit.” (*Sheldon Appel*, at p. 885.) The malicious prosecution plaintiff need not show that *every* claim in a multi-claim lawsuit lacks probable cause; she may go forward if *any* claim lacks probable cause, even if both claims derive from the same “primary right.” (*Crowley*, at pp. 683-684; *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1152-1153; *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333; *Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 459-461; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 593 [“each claim prosecuted must be supported by probable cause”].) This rule acknowledges that defending against even a single invalid claim “may well be . . . burdensome” (*Crowley*, at p. 687) and that “[g]roundless [claims] coupled maliciously and without probable cause with well-founded [claims] are no less injurious for the coupling” (*Sierra Club Foundation*, at p. 1153). However, as discussed more fully below, the malicious prosecution plaintiff may only recover damages arising from those claims brought without probable cause. (*Crowley*, at p. 690.)

Applying this law, the trial court properly concluded that Charon and Segal lacked probable cause to initiate the

underlying lawsuit because they lacked probable cause to initiate two of the claims in that lawsuit—namely, the unjust enrichment and declaratory relief claims dismissed on demurrer. As noted above, the prior trial court’s dismissal of these claims was on the merits and thus constitutes evidence that those claims were not legally tenable and thus lacked probable cause.

To be sure, Charon and Segal had (or arguably had) probable cause to prosecute the remaining four claims. As the trial court acknowledged in its anti-SLAPP and summary judgment rulings, Charon and Segal had probable cause to initiate the two fraud claims and the breach of fiduciary duty claim because the prior trial court’s denial of a nonsuit on those claims conclusively established probable cause as to those claims under the interim adverse judgment rule. (*Wilson, supra*, 28 Cal.4th at p. 824; *Hart v. Darwish* (2017) 12 Cal.App.5th 218, 226, review granted Sept. 13, 2017, S243062.) And Charon and Segal likely had probable cause to initiate the conversion claim they voluntarily dismissed right before trial because that claim had previously survived the demurrer brought by Peaches (although it did not survive the demurrer brought by Peachtree). (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 626 [surviving demurrer establishes probable cause], overruled in part on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512.)<sup>4</sup> However, the existence of probable cause for these three or four claims does not vitiate the trial court’s finding that Charon

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<sup>4</sup> The trial court’s anti-SLAPP ruling is irrelevant to our analysis because a trial court’s finding, in the course of ruling on an anti-SLAPP motion, that a claim is legally tenable is not admissible “at any later stage of the case, or in any subsequent action.” (Code Civ. Proc., § 425.16, subd. (b)(3).)

and Segal lacked probable cause to bring the underlying lawsuit: All that is needed is a single claim without probable cause, and here there were two.

### **III. Damages Issues**

#### **A. *Compensatory Damages***

##### **1. Evidentiary rulings**

##### **a. *Redaction of Peaches' attorney's billing statements***

Charon and Segal argue that the trial court erred in allowing Peaches to prove up the attorney's fees portion of her damages using her prior attorney's bills when she had "blacked out" everything in those bills except for the date of an entry and the amount billed.

Charon and Segal filed a pretrial motion to exclude *all* evidence of damages in light of the heavy redactions, but the trial court denied the motion while nevertheless voicing "concern" that the extensive redactions would hamper "the jury's ability to ascertain whether or not the fees are reasonable." While Peaches' prior attorney was testifying at trial, Charon and Segal specifically objected to the use of the redacted billing records, but the court did not "recall" its prior ruling and stated it "would not have" required Peaches' attorney to produce unredacted bills because the detailed information in those bills was privileged. When Charon and Segal objected that the absence of any billing records left them unable to cross-examine the attorney on whether his \$400,000-plus in legal fees included the prosecution of Peaches' cross-complaint, the trial court first stated it was "not aware [there] was a cross-complaint," but went on to rule that the complaint and cross-complaint "involve[d] the same fact[s]," so there was accordingly no harm from the near-total redaction. Peaches' attorney ended up testifying that "[a]ll of the work

[done] in the defense of [the underlying action] was for [Peaches]”; Charon and Segal had nothing upon which to test that assertion.

The trial court abused its discretion in allowing Peaches to introduce billing records that contained absolutely no detail other than the date and amount billed. We agree with the trial court that descriptions of work redacted from the bills may well have been covered by the attorney-client privilege. (*Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 297 [“billing information” that “inform[s] the client of the nature or amount of work occurring in connection with a pending legal issue” “lies in the heartland of the attorney-client privilege”]; see generally Evid. Code, §§ 952-954.) Indeed, Peaches’ attorney testified that he included so much detail in his bills precisely to ensure that they were privileged.

However, the privilege is meant to be a shield (against disclosure), not a sword (to be tactically asserted when trying to obtain affirmative relief). (*People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 646-647 (*Stender*).) To prevent the misuse of the privilege as a sword, courts will deem a party to have impliedly waived the privilege (1) when a “plaintiff has placed in issue a communication which goes to the heart of the claim in controversy,” and (2) when allowing that communication to remain undisclosed would be fundamentally unfair to the other party because “disclosure is essential for a fair adjudication of the action.” (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 604; *Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 40 (*Southern Cal. Gas*); *Chicago Title Ins. Co. v. Superior Court* (1985) 174 Cal.App.3d 1142, 1149; *Stender*, at p. 647; *Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 112, fn. 13;

*Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 569, disapproved on other grounds in *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252.)

Under this authority, Peaches impliedly waived her attorney-client privilege when she sought to establish more than \$400,000 in attorney's fees as damages but redacted everything in the bills except the fee amounts and the dates they were incurred. Peaches tendered the bills as evidence of the damages proximately caused by Charon's and Segal's underlying lawsuit, and the bills accordingly went to the heart of those elements. The near-complete redaction was also fundamentally unfair because it precluded Charon and Segal from conducting any meaningful cross-examination of Peaches' attorney. (E.g., *In re George G.* (1977) 68 Cal.App.3d 146, 156-157 ["To deny a litigant the right to cross-examine a witness who testifies against him is a denial of due process of law."]; *People v. Prince* (2007) 40 Cal.4th 1179, 1232-1233 [impairment of right to cross-examine can constitute fundamental unfairness]; cf. *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 454-455 [redaction permissible because it did not leave party "unable to challenge the reasonableness of the fees"].) This impairment was critical (and hence prejudicial) because it is undisputed that Peaches was *not* entitled to damages for attorney's fees incurred for:

- (1) representing her in prosecuting her cross-claim in the underlying lawsuit (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 60 (*Bertero*)); (2) representing her in defending the four claims for which Charon and Segal had probable cause to bring (*Crowley, supra*, 8 Cal.4th at p. 690); and (3) any remaining fees that were unreasonable (*Bertero*, at p. 51). Peaches' attorney



was able to testify, in essence, that all \$400,000-plus in fees stemmed from his representation of Peaches against the two claims on which there was no probable cause, and Charon and Segal were denied access to the contemporaneously created documents that would have enabled them to question the attorney's broad-brushed testimony. Disclosure of the unredacted bills on this long-completed matter was "essential for a fair adjudication" (*Southern Cal. Gas, supra*, 50 Cal.3d at p. 40), and the trial court abused its discretion in not so ruling.

Peaches raises two arguments in defense of the trial court's ruling. First, she contends that, once she proved she incurred *some* attorney's fees as a result of the prior lawsuit, Charon and Segal then bore the burden of proving to the jury which attorney's fees should be apportioned as damages and which should not. The law does require the malicious prosecution *defendant* to "shoulder the burden of apportion[ment]." (*Bertero, supra*, 13 Cal.3d at p. 60; *Crowley, supra*, 8 Cal.4th at p. 690; *Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 96-97.) But this burden arises only after the malicious prosecution plaintiff has proven "the extent of injury, including attorney fees, actually incurred *as a result of* a defendant's tortious conduct." (*Jackson*, at p. 97, italics added.) Consequently, it is not entirely clear whether Peaches had the burden of showing which attorney's fees were incurred (that is, proximately caused) by the prior lawsuit or whether Segal and Charon had the burden of apportioning those fees. But even if we assume that the burden of separating Peaches' attorney's fees along these three axes noted above falls on Charon and Segal, the near-total redaction of the attorney's fees bills made it effectively impossible for Charon and Segal to shoulder that burden. Allowing Peaches to proffer her attorney's

testimony affirmatively while denying Charon and Segal the power to test that testimony is fundamentally unfair no matter who had the burden of proof. Second, Peaches asserts that attorney's fees can be proven without documents (*Chodos v. Borman* (2014) 227 Cal.App.4th 76, 82-83; *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1324), and reasons that it was sufficient that her attorney was available for cross-examination. For the reasons we explain above, it was not sufficient.

Charon and Segal assert that this evidentiary error compels a ruling that Peaches is entitled to *no* attorney's fees. We disagree. As with all prejudicial evidentiary errors, the remedy is a remand for a new trial of the pertinent phase—here, a new trial on compensatory damages at which the privilege attaching to the attorney's bills has been waived.

***b. Exclusion of testimony by Charon's attorney regarding the reasonableness of Peaches' attorney's fees***

Charon and Segal next argue that the trial court erred in not allowing their attorney to testify as to the reasonableness of Peaches' attorney's work in the underlying lawsuit. However, the trial court made no such ruling. Instead, the court sustained Peaches' objection to Charon's and Segal's question of their prior attorney as to why there had been four depositions of Peaches. In ruling on this objection, the court explained that Charon's and Segal's attorney was the one who was responsible for the number of depositions, so the question did not have any bearing on whether *Peaches' attorney* was reasonably incurring fees. This ruling was sound, and we reject Charon's and Segal's attempt to inflate the ruling into something it was not—that is, a blanket ruling against the introduction of evidence challenging the

reasonableness of Peaches' attorney's representation in the underlying lawsuit.

## **2. Sufficiency of the evidence**

Charon and Segal challenge the sufficiency of the evidence supporting the jury's award of \$1 million in compensatory damages. In reviewing such a claim, we must uphold the award whenever possible and indulge "all presumptions . . . in favor of the judgment." (*Bertero, supra*, 13 Cal.3d at p. 61.)

A malicious prosecution plaintiff may recover damages for (1) reasonable attorney's fees, (2) injury to her "social and business standing in the community," and (3) "mental or emotional distress." (*Bertero, supra*, 13 Cal.3d at pp. 50-51.) Peaches offered evidence of all three. As noted above, however, the jury's award of attorney's fees is prejudicially tainted by the trial court's redaction of the attorney's bills. Because the general verdict precludes us from knowing which portion of the \$1 million in compensatory damages is attributable to attorney's fees rather than the other recoverable types of compensatory damages, we must reverse the entire compensatory damages award. This obviates any need to evaluate the sufficiency of the evidence supporting the \$1 million award.

### **B. Punitive Damages**

Charon and Segal lastly assert that the jury's award of \$250,000 in punitive damages against each of them is excessive because there was insufficient evidence that their financial condition could support such awards.

In evaluating whether a punitive damages award is excessive, we ask whether the amount of such damages "exceeds the level necessary to properly punish and deter." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110.) In making this

assessment, we look to (1) the reprehensibility of the defendant's acts, (2) the amount of compensatory damages, and (3) the wealth or financial condition of the defendant. (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 367-368 (*Nickerson*).) Our review is deferential, and we may reverse an award only if it is excessive as a matter of law or is clearly the "product of passion or prejudice." (*Adams*, at pp. 109-110; *Nickerson*, at p. 367.)

In this case, Peaches adduced sufficient evidence of Charon's and Segal's financial condition to support the \$250,000 punitive damages award against each. In his testimony, Segal painted a bleak financial portrait of Charon, relaying that it had a net worth of only \$7,000 to \$10,000; that its gross income had declined from \$375,000 in 2004 to \$40,000 in 2015; and that it was \$250,000 in debt. However, the jury also heard evidence that Charon had enough assets to borrow \$250,000 to finance the underlying lawsuit. Segal painted a similarly bleak portrait of his own financial condition, relaying that he had an annual income of \$8,000 from Charon, \$8,000 to \$9,000 from his solo law practice, and \$15,000 from work he did in New York; that he had only \$40,000 in accounts receivable; that his personal net worth was around \$80,000, which included his annual income, a car worth \$4,000 to \$5,000, and personal belongings worth \$10,000; and that he had personal debt of around \$11,000. However, the jury also heard evidence that Segal has a law degree. (E.g., *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 620-621 ["ability to earn income in the future" is pertinent to assess punitive damages].) If we credit the evidence showing Charon's borrowing power and Segal's earning potential and give credence to the jury's rejection of Segal's credibility, which we are required to do in evaluating the substantiality of evidence (*Nickerson, supra*, 63 Cal.4th

at p. 367; *People v. Manibusan* (2013) 58 Cal.4th 40, 87 [requiring deference to credibility determinations]), sufficient evidence supports the jury's punitive damages awards.

Although we are reversing the compensatory damages award, the error infecting that award has no effect on the punitive damages award. As long as the jury's award on remand is more than \$25,000 against each Charon and Segal, the punitive damages award is below the 10-to-1 cap for such damages (see *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426; *Nickerson, supra*, 63 Cal.4th at p. 367) and should remain undisturbed.

### DISPOSITION

The jury's compensatory damage award is reversed and remanded for a new trial on compensatory damages, for which the attorney-client privilege attaching to Peaches' attorney's billing statements is deemed waived. In all other respects the judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
HOFFSTADT

We concur:

\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
CHAVEZ