

MADISON V. OILCO, INC.
ORAL ARGUMENT PREPARATION
QUESTIONS FROM THE BENCH

PROBABLE CAUSE

- 1) The Superior Court found that the district attorney had probable cause to bring the case. Why isn't that enough? If you could not succeed on a malicious prosecution case against the district attorney, why should we rule that you could succeed on such a claim against Oilco here?
- 2) What about the suggestion that a court need not consider what knowledge a party instigating a prosecution actually possessed? Why is Oilco's knowledge at the time it communicated with the district attorney relevant?
- 3) What are the policy implications raised here?
- 4) What about the *Jacques Interiors* case?
- 5) Doesn't the record establish there was illegal capping going on here and Madison at least appeared to have some connection to it? I read the facts in the briefs and it sure sounds like there was shady activity going on. Forged documents, this "Legal Eagles" outfit, and members of the bar involved. Madison even admitted in deposition that his statements on tape sounded incriminating. (ROB 9-10.) How is that not enough to be probable cause for either the DA or Oilco?
- 6) The record includes the complete transcript of the underlying criminal case, all of the exhibits, Madison's deposition with exhibits. All of these things were presented in support of the summary judgment motion in the Superior Court. Yet you claim the record is somehow incomplete, that it is not enough to support the summary judgment? How is it incomplete? What is missing and what is the effect of any omissions you identify?
- 7) And if the record is incomplete, why didn't you take some discovery and procure the information you claim was necessary? Why didn't you make a motion for a continuance under CCP § 437c(h) if additional evidence was needed? Because you didn't make such a motion, haven't you waived any complaint that the record is somehow incomplete?

- 8) Why isn't *Sheldon Appel* controlling here? Under *Sheldon Appel*, isn't probable cause a pure question of law to be determined by the court and not the jury? If a cause of action is legally tenable, based on the record, isn't that sufficient to establish probable cause? Is there some reason we should not apply an objective test when determining whether there was probable cause? If we apply a different standard, won't we be creating the very type of confusion the Supreme Court tried to end in *Sheldon Appel*?
- 9) What about our decision in *Hufstedler*? That case appears to be very similar. There, an attorney was being sued for malicious prosecution, the record of the underlying action was fully developed, and we said his knowledge at the time his client filed the underlying suit was not relevant to the probable cause issue. Isn't Oilco in the same relative position as the attorney in *Hufstedler*, the underlying case record appears to be complete, there are no disputes about that record, and therefore Oilco's knowledge is also irrelevant? Doesn't *Hufstedler* tell us that the Superior Court was correct, that only the record in the underlying case mattered in making the objective determination of probable cause? Doesn't the combination of the district attorney's decision to prosecute and the trial court's denial of the motion for acquittal establish probable cause?
- 10) In *Downey*, we explained *Sheldon Appel* and said the objective probable cause determination based on either (a) the facts known to the attorney at the time he brought he underlying case or (b) subsequent events in the litigation that demonstrate, "as a matter of law, that the prior action was objectively tenable." Isn't that second prong exactly what happened here? So we do we care what happened before?
- 11) How would applying a more lenient standard here, as you ask, be consistent with the Supreme Court's admonition that malicious prosecution claims are disfavored as a matter of policy because of their potential "chilling effect" on people filing meritorious suits?
- 12) Do you challenge the Superior Court's determination that based on the record of the underlying case, it was a legally tenable claim? If so, on what basis?

MALICE AND INSTIGATION OF PROSECUTION

- 1) What is the basis for attacking the Superior Court's determination that Oilco did not act with malice? What facts support the conclusion that genuine issues of material fact exist precluding summary judgment on the malice issue? Isn't Oilco correct that there is no cause of action for "malicious reporting" and isn't that really what you are complaining about?
- 2) How was the information provided by Oilco to the district attorney false? How did Oilco instigate this prosecution? To win, don't you have to establish that Oilco reported false information to the district attorney? What evidence did you introduce to establish that Oilco made a false report to law enforcement?
- 3) Even if Oilco had made a false report to the DA, wasn't Madison's prosecution really based on his own incriminating statements and actions while under surveillance, actions he admitted looked "bad?" Doesn't this independent basis for the prosecution mean that Oilco cannot be held liable as a matter of law?

MADISON V. OILCO, INC.
ORAL ARGUMENT PREPARATION
QUESTIONS FROM THE BENCH
ANALYSIS AND SUGGESTED ANSWERS

PROBABLE CAUSE

- 1) The Superior Court found that the district attorney had probable cause to bring the case. Why isn't that enough? If you could not succeed on a malicious prosecution case against the district attorney, why should we rule that you could succeed on such a claim against Oilco here?

The Superior Court incorrectly focused only on the district attorney's actions to determine whether probable cause exists. Madison's claim is against Oilco, not the district attorney. Oilco fed false information to the district attorney to try to stop Madison and other attorneys from representing people injured by Oilco. The Superior Court should have tested Oilco's liability independently.

Oilco is the named defendant, and it is undisputed that a party may be civilly liable even if the party itself did not initiate the prosecution.¹ The purpose of the probable cause requirement is to measure the culpability of the defendant as a threshold requirement for the imposition of liability in a malicious prosecution claim. The existence of probable cause on the part of a third party not named in the litigation should be irrelevant to determining the culpability of the named defendant.

- 2) What about the suggestion that a court need not consider what knowledge a party instigating a prosecution actually possessed? Why is Oilco's knowledge at the time it communicated with the district attorney relevant?

Oilco and the Superior Court suggest that this Court should completely do away with any examination of what knowledge a party instigating prosecution possessed. This Court should not

¹ (*Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363 [234 Cal.Rptr. 44].)

remove this threshold requirement as Oilco has suggested. If Oilco's theory is followed, there will never be a finding of liability for reporting false information to a district attorney if that district attorney's subsequent investigation yields even a scintilla of probable cause. Under such a standard, courts will lose much of their ability to curb the use of the criminal justice system as leverage to avoid civil liability, which is exactly what Oilco attempted to do in this case. There is no rationale for adopting a test in this context that immunizes this disgraceful conduct when an alternative interpretation exists. Consistent with precedent, this Court can reverse the summary judgment based on the Superior Court's failure to address the threshold question of Oilco's knowledge at the time it instigated the prosecution. The record did not establish, as a matter of law, that Oilco had probable cause. The district attorney's subsequent conduct should not control where the record is incomplete as to what knowledge the party instigating prosecution had at that time.

By allowing the Superior Court to avoid the issue of Oilco's true culpability by relying only on whether the district attorney had probable cause, the Superior Court effectively makes it impossible to bring suit against someone who falsely accuses or instigates an action against another, provided that the district attorney is later able to develop probable cause. The issue of probable cause must be determined not by focusing on what the district attorney knew before seeking an indictment, but what Oilco knew at the time it began its attack on Madison and the other attorneys representing plaintiffs injured in the explosion. The Superior Court should have looked into Oilco's actions.

The Superior Court has given its seal of approval to Oilco's conduct – a company is free to use criminal prosecutions to interfere with civil lawyers representing people the company injured. By failing to evaluate Oilco's actions in instituting the underlying action, the Superior Court has gutted the malicious prosecution cause of action and left Madison with no remedy for Oilco's actions.

- 3) What are the policy implications raised here?

The Superior Court's analysis offers little protection to persons facing suits based on unknown, disputed or untrue information provided to a prosecutor or civil attorney by a party who would never be held accountable for the information it provides.

- 4) What about the *Jacques Interiors* case?

Jacques Interiors dealt with this issue of whether subsequent events made a defendant immune from suit. The court determined subsequent investigation did not shield the defendant because he, without probable cause and with malice, put the law into motion. Similarly, Oilco submitted information to the District Attorney that put the law into motion without probable cause and with malice.

- 5) Doesn't the record establish there was illegal capping going on here and Madison at least appeared to have some connection to it? I read the facts in the briefs and it sure sounds like there was shady activity going on. Forged documents, this "Legal Eagles" outfit, and members of the bar involved. Madison even admitted in deposition that his statements on tape sounded incriminating. (ROB 9-10.) How is that not enough to be probable cause for either the DA or Oilco?

Respondents spend a great deal of time talking about these "facts" in the record, some of the characters involved, and some of the activity of the alleged cappers. They, of course, spend little time discussing Oilco's own culpability in the refinery explosion that started it all or Oilco's efforts to avoid compensating victims of the explosion by attacking the attorneys who dared to challenge Oilco.

When it initiated the prosecution of Madison, Oilco really only knew that he was Smith's co-counsel seeking to recover damages for victims of the Oilco refinery blast. Few of the "facts" Oilco discusses actually involve Madison. Madison was co-counsel in suits filed against Oilco where Oilco or its insurers would have to pay, Madison participated in meetings where

allegedly unlawful referrals were “discussed,” and Madison made some statements that “sounded bad.”² The meetings and the statements essentially took place after Oilco had initiated prosecution. When Oilco chose to target Madison and use its informant network to give false information to the district attorney, it basically knew only that Madison was a lawyer representing people who wanted damages from Oilco and that he worked with Smith, who they already disliked and who they apparently suspected might be involved in questionable activities. Being someone’s co-counsel is not a crime. Under an objective standard, that hardly counts as probable cause to initiate a criminal prosecution against Madison. Here, Oilco draws out the whole story in an effort to distract from the real issue of their knowledge when they instigated the prosecution.

- 6) The record includes the complete transcript of the underlying criminal case, all of the exhibits, Madison’s deposition with exhibits. All of these things were presented in support of the summary judgment motion in the Superior Court. Yet you claim the record is somehow incomplete, that it is not enough to support the summary judgment? How is it incomplete? What is missing and what is the effect of any omissions you identify?

The record of the underlying case does not include all the information needed to answer the questions regarding what Oilco knew when it instigated the suit. As discussed in Appellant’s Opening Brief,³ in the criminal trial, the trial court excluded almost all of the testimony regarding Oilco’s involvement in instituting the criminal case.⁴ Even with most of

² (Respondents’ Opening Brief at p. 25.)

³ (Appellant’s Opening Brief at p. 22.)

⁴ During cross-examination of Monroe by Johnson at a discovery hearing held immediately before trial, the trial court would not allow inquiry into Oilco’s control over Monroe’s activities in investigating alleged misconduct leading to the criminal charges. The court also disallowed inquiry into Oilco’s control over information it provided to the District Attorney’s office.

the testimony excluded, the judge in the underlying criminal case expressed his sense that Oilco had improperly used the criminal prosecution mechanism to harass the attorneys representing those injured in the refinery explosion.⁵ The underlying record simply does not tell us what Oilco knew and when they knew it. To answer that question, the threshold question in this case, the court must go beyond the underlying record. Oilco's motion for summary judgment relied exclusively on the underlying record, the Superior Court relied exclusively on it. That record did not include information regarding what Oilco knew, and therefore that record was insufficient to support entry of summary judgment.

- 7) And if the record is incomplete, why didn't you take some discovery and procure the information you claim was necessary? Why didn't you make a motion for a continuance under CCP § 437c(h) if additional evidence was needed? Because you didn't make such a motion, haven't you waived any complaint that the record is somehow incomplete?

Oilco, as movant, had the burden of establishing its entitlement to summary judgment. Oilco chose to submit the underlying record and say it was entitled to summary judgment on that basis. The underlying record does not establish that there are no genuine issues of material fact regarding what Oilco knew when it instigated the suit and whether it had probable cause to instigate the suit. Madison does not bear the burden on that issue, Oilco does. By pointing out the deficiencies in the

(CT p. 579.) The trial court also excluded testimony regarding Oilco's involvement in hiring Monroe, a private investigator who was not licensed, to show that the information he gathered was not amassed according to proper procedure under California law. (CT p. 863.)

- ⁵ The trial judge stated that "I can't pretend that I'm happy with what I've heard so far in this case. I am concerned that Oilco has endeavored to hobble plaintiffs' attorneys in the lawsuit against them, utilizing law enforcement to do that. This case does not smell good to me." (CT p. 1160.)

underlying record, Madison establishes that Oilco did not meet its burden. The Superior Court's ruling based on the underlying record was not justified because the underlying record left open many questions of fact regarding what Oilco knew when it instituted the underlying action.

Oilco's assertion regarding a continuance under 437c(h) is unfounded. This argument would shift the burden to Madison to defeat the motion for summary judgment before Oilco ever meets its burden of establishing entitlement to summary judgment. Madison is not required to seek additional discovery unless and until Oilco submits sufficient evidence that summary judgment is proper. Oilco submitted only the incomplete and inconclusive underlying record. On that basis, summary judgment was improper.

- 8) Why isn't *Sheldon Appel* controlling here? Under *Sheldon Appel*, isn't probable cause a pure question of law to be determined by the court and not the jury? If a cause of action is legally tenable, based on the record, isn't that sufficient to establish probable cause? Is there some reason we should not apply an objective test when determining whether there was probable cause? If we apply a different standard, won't we be creating the very type of confusion the Supreme Court tried to end in *Sheldon Appel*?

We're not asking the Court to change the standard or apply a different standard. We are asking that the standard be applied properly to Oilco and not to the district attorney. The Superior Court asked the wrong question -- was there probable cause for the district attorney to prosecute. Consistent with *Sheldon Appel*, the right question is -- was there probable cause based on what Oilco knew for it to instigate the prosecution. That question should have been left for the jury if questions of material fact existed, as we contended. Because the Superior Court's decision is based on this misplaced inquiry, it should be reversed.

In *Sheldon Appel*, the plaintiff sued a law firm. A client of the law firm had filed a lis pendens that clouded title to plaintiff's property. In evaluating this claim, the Supreme Court initially

found there was no dispute regarding the law firm’s knowledge of the facts before filing the action. The court then determined that the claim was legally tenable and probable cause existed. In its evaluation, the Supreme Court eliminated the review of the attorney’s subjective intent, and instead only asked whether an objective person would have concluded that the claim was tenable.

This shift to an objective standard did not change the initial question a court must ask –are there questions of fact for the jury to decide regarding the state of the defendant’s knowledge. The *Sheldon Appel* court specifically discussed the very situation presented by this case: “When there is a dispute as to the state of the defendant’s knowledge and the existence of probable cause turns on resolution of that dispute ... the jury must resolve the threshold question of the defendant’s factual knowledge or belief.” In such a situation, as in this case, where a party can show that the defendant may have known that the allegations forming the basis of the action were untrue, the jury is to determine whether there was probable cause.⁶

By only focusing on the district attorney’s later-developed probable cause, the Superior Court failed to address the threshold issue. Instead, the motion should have turned on whether a dispute existed as to Oilco’s knowledge when it instituted the underlying action. If such a dispute exists, as Madison contends, summary judgment is precluded, and the court would not even reach the objective probable cause evaluation discussed in *Sheldon Appel*. Here, questions of fact exist because the underlying record was not fully developed regarding Oilco’s actions in instituting the underlying action. The facts on which Oilco acted when it instituted the underlying

⁶ (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) The Supreme Court stated “Thus, when ... there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding.” (*Id.*)

action are not clear and are precisely the questions of fact only the jury can decide consistent with *Sheldon Appel*.

- 9) What about our decision in *Hufstedler*? That case appears to be very similar. There, an attorney was being sued for malicious prosecution, the record of the underlying action was fully developed, and we said his knowledge at the time his client filed the underlying suit was not relevant to the probable cause issue. Isn't Oilco in the same relative position as the attorney in *Hufstedler*, the underlying case record appears to be complete, there are no disputes about that record, and therefore Oilco's knowledge is also irrelevant? Doesn't *Hufstedler* tell us that the Superior Court was correct, that only the record in the underlying case mattered in making the objective determination of probable cause? Doesn't the combination of the district attorney's decision to prosecute and the trial court's denial of the motion for acquittal establish probable cause?⁷

Hufstedler, Kaus & Ettinger v. Superior Court specifically addressd a situation where the defendant is the attorney who files the action in the underlying case as agent for a client. *Hufstedler*, like *Sheldon Appel*, involved a malicious prosecution action against a bank and its attorney, Hufstedler. The Courts in both *Sheldon Appel* and *Hufstedler* evaluated the malicious prosecution actions based on the attorney's conduct without focusing on any other party's actions in instituting the suits. The *Hufstedler* decision included language that appears to limit application of the decision to Hufstedler, the attorney.⁸

In both *Sheldon Appel* and *Hufstedler*, the record of each underlying case explains the attorney's actions in filing those cases. Here, unlike in *Hufstedler*, the malicious prosecution defendants are "once-removed" from the underlying action. In such a situation, a court has to make that threshold evaluation regarding the defendant's actions. To do so, a court has to find

⁷ (*Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55 [49 Cal.Rptr.2d 551].)

⁸ (*Hufstedler, supra*, 42 Cal.App.4th at p. 61 fn. 5.)

out if the underlying record by itself is sufficient for determining the issue of probable cause in instituting the action.

Hufstedler does not establish the existence of probable cause in this case. Here, unlike *Hufstedler*, the underlying record was not “fully developed” because it was completely deficient regarding Oilco’s actions. Oilco overstates the holding in *Hufstedler* claiming that court determined “the record from the underlying case constitutes ‘all the evidence needed’ to make an objective determination on the issue of probable cause.”⁹ That is clearly a statement by the court regarding the specific case before it. *Hufstedler* did not establish a general rule that a court should never go beyond the underlying case record.¹⁰ The undisputed facts in this case do not establish that Oilco had “an objectively reasonable basis for instituting the underlying action” under *Hufstedler*.¹¹

This Court should not remove this threshold requirement as Oilco has suggested. If Oilco’s theory is followed, no liability may be established for reporting false information to a district attorney if that district attorney’s subsequent investigation yields even a scintilla of probable cause. Under that standard, courts will be virtually powerless to prevent corrupt conduct similar to Oilco’s conduct in the future. There is no rationale for adopting a test in this context that immunizes this most despicable conduct. Here, Oilco engaged investigators and informants to drum up a criminal prosecution in a deliberate attempt to avoid liability for its actions relating to the refinery explosion. An alternative interpretation consistent with precedent is available and is equally compelling, which will permit the Court to require Oilco to answer for its conduct. The Court should allow a jury to evaluate Oilco’s conduct based on all the facts.

⁹ (Respondent’s Brief at p. 22, citing *Hufstedler, supra*, 42 Cal.App.4th at p. 65.)

¹⁰ (See, *Hufstedler, supra*, 42 Cal.App.4th at p. 65.)

¹¹ (*Hufstedler, supra*, 42 Cal.App.4th at p. 62.) This analysis is also applicable to the recent (first district) case of *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151 [80 Cal.Rptr.2d 66].

- 10) In *Downey*, we explained *Sheldon Appel* and said the objective probable cause determination based on either (a) the facts known to the attorney at the time he brought he underlying case or (b) subsequent events in the litigation that demonstrate, “as a matter of law, that the prior action was objectively tenable.”¹² Isn’t that second prong exactly what happened here? So we do we care what happened before?

Downey does not do away with the need, in a case like this involving a defendant who is not the attorney bringing a claim, to answer the threshold question regarding the defendant’s actions in instituting the underlying action. That is particularly true where the record is not complete regarding the defendant’s knowledge. In this case, the Superior Court should have determined whether, at the time that Oilco instituted the underlying action, the facts were sufficient to support a finding that the institution of the action was objectively legally tenable.

As explained in our reply brief, the recent *Puryear* case makes it clear that this threshold inquiry is still vital part of the malicious prosecution analysis.¹³ In *Puryear*, plaintiff brought a malicious prosecution action against defendant. Citing *Sheldon Appel*, the court focused on the reasonableness of the defendant’s actions based on a determination regarding whether the facts known to the defendant were such that it was reasonable to conclude that the institution of the suit was legally tenable.¹⁴ The *Puryear* court focused on the term “legally tenable,” and required that the party who instituted the underlying action have “sufficient facts to warrant that action.”¹⁵ The record in this case does not contain sufficient facts for Oilco

¹² (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498 [78 Cal.Rptr.2d 142].)

¹³ (*Puryear v. Golden Bear Ins. Co.* (1998) 66 Cal.App.4th 1188 [78 Cal.Rptr.2d 507].)

¹⁴ (*Puryear, supra*, 66 Cal.App.4th at p. 1194, quoting *Sheldon Appel, supra*, 47 Cal.3d at p. 878.)

¹⁵ (*Puryear, supra*, 66 Cal.App.4th at p. 1195.)

to establish, as a matter of law, that its determination to initiate criminal prosecution of Madison was legally tenable. It was obviously not legally tenable and was motivated by a desire to impair multiple plaintiffs' access to the courts.

- 11) How would applying a more lenient standard here, as you ask, be consistent with the Supreme Court's admonition that malicious prosecution claims are disfavored as a matter of policy because of their potential "chilling effect" on people filing meritorious suits?

We are not asking for application of a more lenient standard. We are asking the Court to require the Superior Court to ask the right question, the threshold question regarding Oilco's knowledge in instigating the suit.

Even the idea of a "chilling effect" traceable to malicious prosecution claims should not be the basis for effectively doing away with such claims wherever a district attorney later establishes probable cause. A viable cause of action for malicious prosecution can exist where an innocent party was wrongfully accused through questionable evidence provided by the defendant. That is what happened in this case, and summary judgment should not have been entered on the basis of the district attorney's actions without any examination of Oilco's actions or knowledge.

- 12) Do you challenge the Superior Court's determination that based on the record of the underlying case, it was a legally tenable claim? If so, on what basis?

As the trial judge himself observed, the case was extremely weak and was obviously motivated by Oilco's desire to avoid taking responsibility for the injuries inflicted on the victims of the refinery explosion.¹⁶ This statement, combined with Oilco's obvious improper motivations and the jury's acquittal determination do raise real issues regarding whether probable

¹⁶ (CT p. 1160.)

cause did exist even after the district attorney made the decision to prosecute.

While the entire trial involved many issues and defendants, the alleged case against Madison is quite weak. In its briefing, Oilco only described for this Court a few facts it claimed were enough to establish that the claim was legally tenable. Madison was co-counsel in litigation against Oilco, he participated in meetings where allegedly unlawful referrals were “discussed,” and he made some statements that “sounded bad.”¹⁷ This is after the prosecutor conducted his investigation, and little was added to Oilco’s initial knowledge that it did not like Madison litigating against Oilco and trying to recover damages for people Oilco injured. Being someone’s co-counsel is not a crime and does not establish by itself any participation in a conspiracy. No citation is given for the “meetings” or any explanation of what “discussions” Madison was involved in. And statements that sound “bad” is hardly objective evidence to support a criminal prosecution.

Of course, the Superior Court’s determination does not address the threshold issue of whether, based on what it knew at the time, Oilco’s initiation of criminal prosecution of Madison was legally tenable. The record is simply insufficient to support such a conclusion had it even been addressed.

MALICE AND INSTIGATION OF PROSECUTION

- 1) What is the basis for attacking the Superior Court’s determination that Oilco did not act with malice? What facts support the conclusion that genuine issues of material fact exist precluding summary judgment on the malice issue? Isn’t Oilco correct that there is no cause of action for “malicious reporting” and isn’t that really what you are complaining about?

The Superior Court again failed to make the proper inquiry regarding the issue of malice. The Superior Court never looked into Oilco’s subjective motive and purpose in instituting the

¹⁷ (Respondents’ Opening Brief at p. 25.)

underlying action. The malice element “is directly concerned with the subjective mental state of the defendant in instituting the prior action.”¹⁸

Oilco’s attempts to label the claim as one for “malicious reporting” is misleading.¹⁹ The case law makes it clear that if a “party without probable cause and with malice, instigates or procures the action, he is liable.”²⁰ Nothing is gained by trying to place confusing labels on the fact pattern.²¹ Case law certainly provides for a claim for malicious prosecution against those who falsely report facts to the authorities.²² Clearly, courts recognize that a malicious prosecution claim can reach a defendant who does not “sign the complaint.”

- 2) How was the information provided by Oilco to the district attorney false? How did Oilco instigate this prosecution? To win, don’t you have to establish that Oilco reported false information to the district attorney? What evidence did you introduce to establish that Oilco made a false report to law enforcement?

The record was not fully developed in the underlying matter as to Oilco’s actions creating questions of fact for the jury to decide regarding Oilco’s malicious intent. The evidence in the record, however, creates an issue for the jury on Oilco’s motive and the falsity of the information it provided to the district attorney.

¹⁸ (*Sheldon Appel, supra*, 47 Cal.3d at p. 878.)

¹⁹ (Respondent’s Brief at p. 28.)

²⁰ (*Jacques Interiors, supra*, 188 Cal.App.3d at p. 1372.)

²¹ Oilco citations on this point are incorrect, as discussed in the reply brief.

²² (*Jacques Interiors, supra*, 188 Cal.App.3d at p. 1372, quoting *Centers v. Dollar Markets* (1950) 99 Cal.App.2d 534, 544 [222 P.2d 136].)

There is no question that Oilco sought out the prosecutor and made allegations against Madison. As discussed in the Reply Brief, in April, 1994, John Smith's ("Smith") law office was searched after the District Attorney's office received information provided by James Monroe ("Monroe"), an investigator for Oilco and Acme Insurance Company.²³ The information to establish probable cause to search was provided by David McLeod, Oilco's attorney.²⁴ In this search, the District Attorney's office found no evidence that Smith was performing any illegal acts, and Smith was not charged with any crime. Neither was Madison. Despite the fact that no evidence was found, the District Attorney's office again investigated Smith and Madison in August, 1994, after Lawrence Strauss ("Strauss") had discussed the matter with Monroe, who was then exclusively working for Oilco and Acme Insurance Company as a private investigator.²⁵

The Oilco connection is clear. Oilco provided the district attorney with information through its informants, and the record in the underlying matter further suggests that this information was false. The underlying record was not fully developed as to Oilco's actions in instituting the action, but the evidence shows that information was being passed to the district attorney's office through Oilco's informants, and the prosecution of Smith and Madison was based almost exclusively on the information Oilco provided to the District Attorney.

²³ (CT p. 288-306.)

²⁴ (CT p. 303.)

²⁵ (CT pp. 697, 791, 1009, 1011.)

- 3) Even if Oilco had made a false report to the DA, wasn't Madison's prosecution really based on his own incriminating statements and actions while under surveillance, actions he admitted looked "bad?" Doesn't this independent basis for the prosecution mean that Oilco cannot be held liable as a matter of law?

There is no independent basis. But for Oilco's conduct undertaken without probable cause and with a malicious motive and intent, there would have been no prosecution. In the absence of their deliberate attempt to avoid responsibility for the victims of the explosion, Madison would never have been prosecuted. There is no evidence in the record that, absent Oilco's deliberate effort, the district attorney would have independently undertaken such an investigation. Oilco's effort to win post hoc validation for its conduct ignores its necessary position as the instigator of the prosecution. Oilco's crucial role is further magnified when one considers the extremely weak nature of the case against Madison. Obviously, but for Oilco's conduct, the prosecution would not have proceeded.

MADISON V. OILCO, INC.
ORAL ARGUMENT PREPARATION
RESEARCH UPDATE
AND ORGANIZATION OF APPELLATE AUTHORITY

OPENING BRIEF AUTHORITY

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