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Calif. High Court Affirms Latham Malicious Prosecution Win

By **Kat Greene**

Law360, Los Angeles (August 10, 2017, 8:23 PM EDT) -- The California Supreme Court on Thursday shut down a malicious prosecution case against Latham & Watkins LLP, rejecting the contention of two former executives that a trade secrets suit the firm helped bring against them was baseless despite an earlier adverse ruling against the pair in the case.

William Parrish and Timothy Fitzgibbons had been accused by their former employers Flir Systems Inc. and Indigo Systems Corp. of stealing trade secrets to launch their own venture in a suit anchored by Latham, court records show. They were eventually cleared, but not before a summary judgment ruling that didn't go in the executives' favor.

Upholding a June 2015 appeals court ruling, the state high court said it didn't see a reason to overturn its existing "interim adverse judgment rule," in which an earlier success in a case establishes the existence of probable cause and forecloses a future malicious prosecution case, even if that early success is later overturned on appeal or by a later trial court ruling, according to Thursday's decision.

After a bench trial, the judge overseeing the underlying trade secrets case found the suit was brought in bad faith, but the high court said Thursday that ruling "does not vitiate the trial court's earlier finding that Flir and Indigo's suit had some arguable merit."

"The trial court's finding of objective bad faith in the underlying action was not a finding that the action completely lacked merit," the court said.

The malicious prosecution case was filed in April 2012 and tossed in September 2012 when a judge ruled that Parrish and Fitzgibbons waited too long to sue the law firm, based on a one-year statute of limitations.

However, in April 2014, the state Court of Appeal established that Parrish's case was actually subject to a two-year window based on a ruling in another case, Roger Cleveland Golf v. Krane & Smith et al.

The California Supreme Court declined to assess the limitations issue after reaching its conclusion on the interim adverse judgment rule, according to Thursday's decision.

In August 2014, a Second Appellate District panel revived the suit, ruling that Latham completely changed its theory when confronted with damaging information. Latham offered no evidence anyone at the firm investigated whether Flir's claims had any factual basis, the appeals panel ruled, and the firm later sought an injunction preventing Parrish and Fitzgibbons from even trying to develop their technology.

Latham filed a petition for rehearing. After initially denying Latham's petition, the court, on its own motion, granted rehearing in September 2014, according to court records.

Then, in its June 2015 decision, a three-judge panel for California's Second District Court of Appeal shot down the former employees' contention that the trial court's finding of bad faith after a bench trial in the underlying case negated its prior ruling denying summary judgment.

"We conclude this hindsight approach is inconsistent with a core principle of the interim adverse judgment rule — namely, that an interim ruling on the merits establishes probable cause in the underlying action, even though that ruling is later reversed by the trial court, a jury, or an appellate court," the appellate court had written in a published opinion.

The appeals court said the trial court's bad-faith finding was based on a more complete record developed at trial and didn't establish a lack of probable cause.

Parrish and Fitzgibbons are, respectively, the former CEO and chief technical officer of Indigo Systems, a company that developed infrared cameras and night-vision equipment. They stayed on with Flir after it acquired Indigo but eventually left to launch their own startup.

Flir sued Parrish and Fitzgibbons in Santa Barbara Superior Court in 2006, alleging they hatched a plan to work with competitor Raytheon Co. while they were still on Flir's payroll. A trial judge found that the suit was brought in bad faith for an anti-competitive motive, and an appeals court upheld the ruling in 2009.

Meanwhile, Parrish and Fitzgibbons settled their case against Flir for $39 million in June 2010.

Michael J. Avenatti of Eagan Avenatti LLP, who represented Parrish and Fitzgibbons at oral argument in June, reiterated a point he'd made to the high court: that the rule doesn't cover situations in which a trial court judge has been "hoodwinked."

"The court's ruling will have a chilling effect on the ability to hold lawyers accountable when they hoodwink courts into denying summary judgment by relying on smoke and mirrors," Avenatti said. "There is no question that the underlying case never had any merit and was brought purely to intimidate two highly respected and accomplished engineers who did nothing wrong."

Everett C. Johnson, general counsel of Latham, cited the court's finding that the initial summary judgment denial in the underlying trade secrets action established probable cause.

"We're pleased by the Supreme Court's unanimous ruling, which confirms what we've maintained all along — that Latham & Watkins acted properly in this matter," Johnson said.

Parrish and Fitzgibbons are represented by Brian J. Panish, Adam K. Shea and Kevin R. Boyle of Panish Shea & Boyle LLP, Michael J. Avenatti and Scott H. Sims of Eagan Avenatti LLP and Stuart B. Esner of Esner Chang & Boyer.

Latham & Watkins is represented by J. Michael Hennigan and Michael Howard Swartz of McKool Smith

Hennigan PC and Theodore J. Boutrous of Gibson Dunn.

The case is William Parrish v. Latham & Watkins, case number S228277, in the Supreme Court of California.

--Additional reporting by Bonnie Eslinger, Y. Peter Kang and Carolina Bolado. Editing by Alanna Weissman.

--*Update: This story has been updated with more counsel for Latham & Watkins.*
