

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

GEORGE R. DRUMMOND et al.,

Plaintiffs and Appellants,

v.

MICHAEL G. DESMARAIS et al.,

Defendants and Respondents.

H031659

(Santa Clara County

Super. Ct. No. CV068316)

ORDER MODIFYING OPINION

NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on August 5, 2008, be modified as follows:

1. On page 6, footnote 3, beginning with “We must” is deleted and the following footnote is inserted in its place:

<sup>3</sup>We must surmise the fact and date of filing because the complaint, like most of the contents of the appendix, bears no filing stamp (see Gov. Code, § 69846.5) and the appendix does not include the register of actions (Cal. Rules of Court, rules 8.122(b)(1)(f), 8.124(b)(1)(A)). The clerk presumably furnished a copy of the register to appellants under California Rules of Court, rule 8.124(a)(2), but even if the clerk neglected to do so, the superior court has made the register available at its official website in accordance with California Rules of Court, rule 2.503(b)(1). According to the register as there reflected, the complaint was filed on July 31, 2006.

2. On page 7, the last sentence of the first full paragraph is modified to read as follows:

Deborah Drummond, the spouse of one of the plaintiffs, filed a declaration detailing conduct by Desmarais which we describe more fully below in connection with his argument concerning the element of malice. (See pt. IIIA, *post.*)<sup>4</sup>

3. On page 23, line 6, the word “determination” is changed to “disposition” so the sentence reads:

We conclude that when a malicious prosecution action is stayed on the ground that an appeal from the underlying judgment is pending, and the appeal is thereafter resolved adversely to the malicious prosecution plaintiff, a voluntary dismissal by him in response to that event is a technical disposition and not a termination on the merits in favor of his opponent.

There is no change in the judgment.

Dated:

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.