

PROFESSIONAL LIABILITY UPDATE

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MALICIOUS PROSECUTION

California Law

By Jennifer A. Becker and Jessica B. Rudin

The California Supreme Court holds that denial of a C.C.P. § 425.16 special motion to strike establishes probable cause in a subsequent malicious prosecution action. The Court accepts a decision permitting an attorney to utilize a C.C.P. § 425.16 special motion to strike in a malicious prosecution action.

Wilson v. Parker, Covert & Chidester 02 C.D.O.S. 6910

Teachers and administrators at a public school sued Raul Wilson and the Mexican Political Association (“MPA”) to curtail demonstrations and public confrontations. Wilson and the MPA’s motion to strike the lawsuit under the anti-SLAPP (“Strategic Lawsuit Against Public Participation”) statute, C.C.P. § 425.16, was denied. The Court of Appeal granted a writ of mandate in part, ruling that the organized protests came within the protective scope of C.C.P. § 425.16, though some of the personal insults and slurs did not. There was no evidence that Wilson participated in the tortious insults and slurs, and the MPA was not responsible for its members’ conduct. Therefore both Wilson and the MPA were entitled to dismissal.

When Wilson and the MPA filed a malicious prosecution action against the teachers, administrators, and their counsel the trial court sustained demurrers without leave to amend. On appeal, the question was whether the

teacher’s success in the trial court on the motion to strike precluded the malicious prosecution action.

The Supreme Court noted that its decision in *Sheldon Appel v. Albert & Oliker* (1989) 47 Cal.3d 863 established that the existence or nonexistence of probable cause is a legal question to be resolved by the court. Probable cause is an objective determination of whether any reasonable attorney would have thought the claim tenable. The lenient standard reflects the public policy of avoiding the chilling of novel or debatable legal claims.

Prior to *Sheldon Appel* decisions established that a trial court judgment or verdict in favor of the plaintiff establishes probable cause even if it is overturned on appeal or by later ruling of the trial court. Claims that have succeeded at a hearing on the merits, even if overturned, have enough merit that a reasonable attorney or litigant

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would not necessarily have recognized their frivolousness.

The Court of Appeal in *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, held that that denial of a defense motion for summary judgment in the underlying case established probable cause. A trial court's conclusion that there are issues of material fact implies that the judge finds at least some merit in the claim.

To prevail on a motion to strike under C.C.P. § 425.16, a plaintiff must demonstrate that the complaint is legally sufficient and supported by an adequate prima facie showing of facts to sustain a favorable judgment. Although it does not weigh the evidence, the court considers both the plaintiff's and the defendant's evidence and grants the motion if the defendant's evidence establishes as a matter of law that plaintiff's claim has no merit. Denial of a motion to strike implies that plaintiff has established a probability of success and therefore a legally tenable claim.

Plaintiffs and their attorneys are not required to predict how a trier of fact will weigh the competing evidence. A litigant who possesses competent evidence to substantiate a legally cognizable claim will not be penalized even if he or she is also aware of evidence that will weigh against the claim. Litigants have a right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious.

In the underlying litigation, the Court of Appeal found the trial court ruled in error and reversed its ruling on the

motion to strike. However, the appellate court did not find the trial court acted irrationally. Thus the reversal of the trial court's ruling by the Court of Appeal did not vitiate the effect of the teacher's original victory.

The Supreme Court addressed the confusion engendered by the Court of Appeal decision in *Lucchesi v. Giannini & Uniack* (1984) 158 Cal.App.3d 777, and the court's favorable citation of *Lucchesi* in *Crowley v. Katleman* (1994) 8 Cal.4th 666. In *Lucchesi* the Court of Appeal rejected the denial of a motion for summary judgment as establishing probable cause because a motion may be denied for reasons other than the existence of triable issues of fact.

The Supreme Court agreed that denial of a motion for summary judgment on technical grounds, rather than on the grounds that there exist triable issues of fact, does not support a conclusion that the underlying action is tenable. The same is true if denial of a C.C.P. § 425.16 motion to strike is on technical grounds, or for reasons that cannot be determined, or because the action does not arise from an act in furtherance of defendant's right to petition or free speech.

However, the Supreme Court disagreed with the *Lucchesi* Court's holding that a denial based on material issues of fact falls short of a hearing on the merits and will not support a finding of probable cause for malicious prosecution purposes. The Supreme Court held that the holding in *Sheldon Appel* clarifying that probable cause to bring an action does not depend upon it being

meritorious, but upon it being arguably tenable, had undermined that part of the *Lucchesi* opinion finding the denial of summary judgment or nonsuit to have no effect on the probable cause determination. Denial of either motion establishes that the plaintiff has substantiated, or can substantiate, the elements of his or her cause of action with evidence that, if believed, would justify a favorable verdict. Although *Lucchesi* was mentioned favorably in passing in the *Crowley* decision in relation to other issues, the Supreme Court disapproved *Lucchesi* insofar as it held that denial of summary judgment or nonsuit for nontechnical reasons did not establish probable cause to bring the action.

The Supreme Court disagreed with Wilson's argument that the determination of probable cause from a finding or ruling in the underlying case is tantamount to an application of collateral estoppel, which precludes relitigation of issues of fact. The determination of probable cause is an

issue of law. The determination arises because the result in the prior case establishes the existence of probable cause as a matter of law, absent proof of fraud or perjury.

Finally, the court found that application of the probable cause determination did not undermine the effect of C.C.P. § 425.16. Evidence of denial of a motion to strike is inadmissible in the underlying action under C.C.P. § 425.16(b)(3), but this does not apply to derivative litigation. A rule equating denial of a C.C.P. § 425.16 motion with probable cause will not deter SLAPP defendants from taking advantage of its provisions for fear denial will bar a malicious prosecution action. *Sheldon Appel* sets such a low standard for probable cause that defendants should not factor a malicious prosecution action into their strategy. The ability to recover attorney's fees if a defendant is successful in a C.C.P. § 425.16 motion is an adequate incentive for a defendant to utilize it.

Jarrow Formulas, Inc v. Sandra Hogan LaMarche 02 C.D.O.S. 2706 (rev. granted 6/12/02)

Sandra Hogan LaMarche is a graphic artist who had a professional relationship with Jarrow Formulas, Inc. Jarrow sued LaMarche in municipal court for breach of contract. LaMarche's attorney Mark Brutzkus filed a cross-complaint on LaMarche's behalf against Jarrow for slander of title and interference with economic advantage. LaMarche alleged that Jarrow had intentionally interfered with her business relationship with

Mercial, a supplier of Jarrow. Jarrow obtained summary adjudication on LaMarche's cross-complaint and LaMarche prevailed at trial of the complaint.

Jarrow sued LaMarche and Brutzkus for malicious prosecution of the cross-complaint. Both LaMarche and Brutzkus filed a special motion to strike Jarrow's complaint pursuant to C.C.P. §

425.16. The trial court denied this motion.

On appeal, the Court held that both LaMarche and Brutzkus had the burden of proving that Jarrow's lawsuit arose out of their actions in furtherance of a right of petition or free speech and therefore fell within the purview of C.C.P. § 425.16. The burden would then shift to Jarrow to prove a probability of success on the merits. The Court determined that LaMarche was exercising her right of petition when she filed her cross-complaint against Jarrow. Brutzkus argued that he was entitled to the same protection.

The Court reviewed the myriad of ways a constitutional right of free expression can arise, including playing music, making political contributions, dancing, and placing a peace symbol on the American flag. It also noted a ruling by the U.S. Supreme Court that free expression arising out of litigation should be given wide latitude consistent with the fair and orderly administration of justice.

The right of free expression includes conduct by a lawyer who advocates on

behalf of a client and against an adversary. California Code of Civil Procedure § 425.16 expressly applies to any cause of action against a person arising out of statements or writings made in connection with an issue being considered or reviewed in an official proceeding. The Court held that C.C.P. § 425.16 should apply to a defendant whose advocacy is exercised on behalf of others. Thus, Brutzkus was entitled to the protection of the statute for any statements or writings made in connection with his representation of LaMarche in the Municipal Court action.

Comment: The Supreme Court has preserved the tort of malicious prosecution but subjected those who prosecute this tort to heightened standards of proof. To date there has been no clear statement that the protections of C.C.P. § 425.16 apply to attorneys. The Court's grant of review may result in yet another significant defense to attorneys sued for malicious prosecution.