

PROFESSIONAL LIABILITY UPDATE

MALICIOUS PROSECUTION
ABUSE OF PROCESS
LITIGATION PRIVILEGE

By Jennifer A. Becker

***S.A. v. Maiden* (2014) 229 Cal.App.4th 27**

The Fourth District holds an attorney who represented a client in a domestic violence restraining order proceeding is protected by the rule that family law motions do not give rise to malicious prosecution liability; the acts were not an abuse of process; and the litigation privilege barred tort claims.

S.A. physically and emotionally abused N.A. during their marriage. After N.A. left S.A. she retained attorney Jan Maiden to represent her in requests for restraining orders. Eventually N.A. withdrew her request for a permanent restraining order, because she had moved to a different county and felt she was no longer in danger. The trial court granted S.A.'s sanctions motion because N.A. dismissed her petition. S.A. sued N.A. and Maiden for malicious prosecution, abuse of process, and intentional infliction of emotional distress.

The trial court granted Maiden's motion under C.C.P. § 425.16, California's anti-Strategic Lawsuit Against Public Participation statute (anti-SLAPP.) An anti-SLAPP motion requires a two-step process. The court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activities, which are acts taken in furtherance of the defendant's constitutional rights of petition or free speech. If so, it determines whether the plaintiff has demonstrated a probability of prevailing on the

merits of the claim.

An act in furtherance of a right to petition includes any written or oral statement made in a judicial or other official proceeding, or any written or oral statement made in connection with an issue under consideration or review in a judicial or other official proceeding. Every claim of malicious prosecution arises from written and oral statements in a prior judicial proceeding, and satisfies the first prong of the anti-SLAPP analysis.

The Court applied precedent that created a "bright-line rule" barring malicious prosecution causes of action arising out of family law proceedings. Family law cases have a distinctive propensity for bitterness that makes it difficult to distinguish a malicious motion from an ordinary one. Family law courts have the unique ability and authority to swiftly discourage frivolous motions, by imposing attorney fee awards as sanctions. Family law matters require a special sensitivity and flexibility in crafting remedies. The threat of

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malicious prosecution would increase the risk for family law litigants seeking and obtaining effective relief. Malicious prosecution liability would raise malpractice insurance premiums and indirectly make clients' access to attorneys more expensive.

The Court reasoned a motion under the Domestic Violence Prevention Act (DVPA) qualifies as a family law proceeding. The statute is found in the Family Code. Requests for DVPA restraining orders are heard and decided by family law judges. The fact the DVPA protects persons who may not traditionally be considered "family members," does not preclude a request for a DVPA restraining order from constituting a family law motion.

Like malicious prosecution, an abuse of process claim always involves protected activity under § 425.16, satisfying the first prong of the anti-SLAPP analysis. However, abuse of process is distinct from malicious prosecution. Malicious prosecution concerns a meritless lawsuit; abuse of process concerns the misuse of tools the law affords litigants once they are in a lawsuit.

Abuse of process arises when the court's process is used for a purpose other than that for which it was designed. It is essentially a misuse of the power of the court; an act done in the name of the court and under its authority to perpetrate an injustice.

A plaintiff must establish the defendant contemplated an ulterior motive in using the process, and committed a willful act in using the process not proper in the regular conduct of the proceedings. Abuse of process claims typically arise for improper or excessive attachments or improper use of discovery.

S.A.'s claim was the motion under the DPVA was meritless, essentially a malicious prosecution claim. Because he did not allege any misuse of process, or the tools of the law,

the abuse of process claim was properly dismissed.

S.A.'s Intentional Infliction of Emotional Distress was based on the initiation and maintenance of the DVPA proceedings. The activity was protected activity under the first prong of the anti-SLAPP analysis.

S.A. could not show a likelihood of prevailing on the merits, because the conduct was protected by the litigation privilege, Civil Code § 47(b). The conduct did not involve any action calculated to humiliate or inflict emotional distress outside of ordinary court proceedings.

Comment: The anti-SLAPP statute continues to be an effective tool to dispose of third party claims based on proper attorney advocacy.