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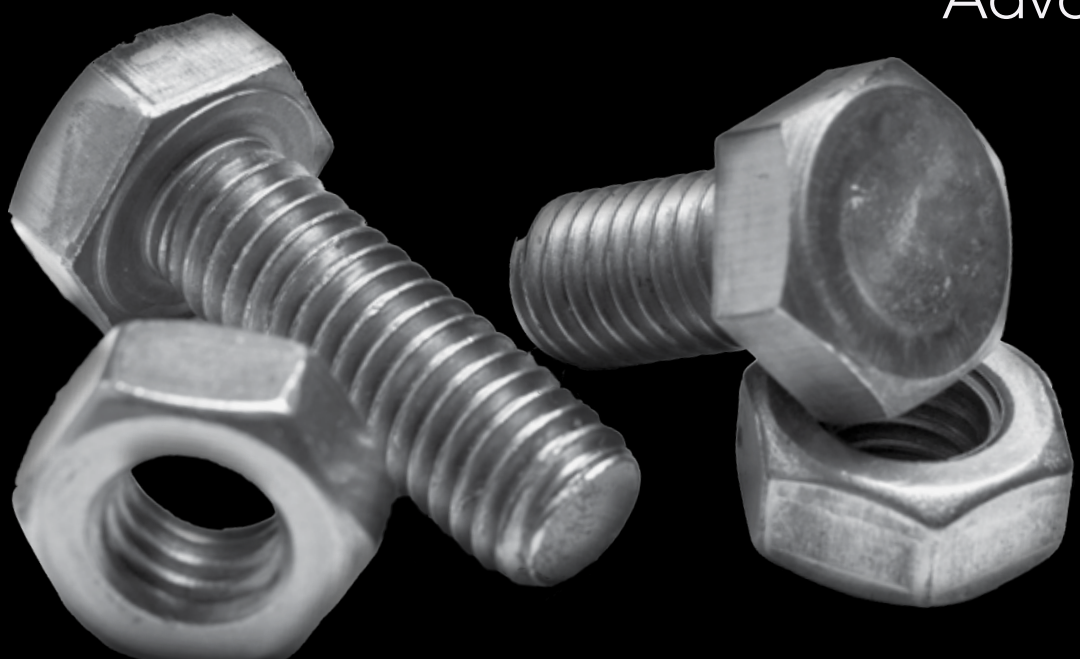

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Showing Lack of Probable Cause:

Plaintiff's Burden of Proof in Opposing an Anti-SLAPP Motion Attacking a Malicious Prosecution Claim

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An anti-SLAPP motion is a critical phase in a malicious prosecution case. Courts have long held that malicious prosecution claims fall within the purview of the anti-SLAPP statute, which gives the defendants an extraordinary tool to force plaintiffs to establish the prima facie merits of their case before discovery even starts. An anti-SLAPP motion can be case dispositive and, if successful, entitles the moving party to attorneys' fees. An order granting or denying the motion is immediately appealable and appellate review is de novo. It is therefore not surprising that anti-SLAPP motions are frequently filed in malicious prosecution cases, and there is substantial case law analyzing the elements of malicious prosecution. But analyzing the plaintiff's burden in establishing a lack of probable cause on an anti-SLAPP motion can get tricky.

Under the anti-SLAPP statute, once the court determines that the special motion to strike is appropriately invoked, the burden shifts to plaintiffs to prove, by competent admissible evidence, that it is probable they will prevail on their claims. (Code Civ. Proc., § 425.16, subd. (b).) To meet this burden, the plaintiffs must substantiate a legally sufficient claim that is supported by a sufficient prima facie showing of facts. (*Jarrow Formulas v. LaMarche* (2003) 31 Cal.4th 728, 741.) Courts do not weigh the evidence or determine credibility on an anti-SLAPP motion. (*Squires v. City of Eureka* (2014) 231 Cal. App.4th 577, 590-591.) Instead, the courts accept as true all evidence favorable to the plaintiffs and assess the defendants' evidence only to determine if it defeats the plaintiffs' submission as a matter of law. (*Ibid.*) Put another way, the party opposing an anti-SLAPP motion must present admissible evidence

demonstrating "the existence of disputed material facts." (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 112.) This standard is "'not high'" and the plaintiffs need to show only a "'minimum level of legal sufficiency and triability.'" (*Squires*, *supra*, at p. 591.)

One of the elements that a malicious prosecution plaintiff must establish is that the prior action was brought without probable cause. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.) The burden of showing a lack of probable cause is hard to carry; probable cause is present unless all reasonable attorneys would agree that the action is totally and completely devoid of merit. (*Roberts v. Sentry Life Ins.* (1999) 76 Cal.App.4th 375, 382.) Thus, an action does not lack probable cause simply because it lacks merit: "probable cause to bring an action does not depend upon it being meritorious, as such, but upon it being *arguably tenable*, i.e., not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 824.) Plaintiffs and their attorneys therefore do not act without probable cause "by bringing the claim, even if [they are] also aware of evidence that will weigh against the claim. [Litigants] and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them." (*Id.* at p. 822.) Instead, litigants and their attorneys have a right "'to present issues that are arguably correct, even if it is extremely unlikely that they will win.'" (*Id.* at p. 817.)

In a sense, the element of lack of probable cause effectively turns the prima facie showing standard on an anti-SLAPP motion on its head. Where the existence of conflicting evidence ordinarily tends to work in favor of a plaintiff opposing an anti-SLAPP motion, that ought not to be the case where the issue is probable cause. Because attorneys and litigants are not required to predict how the trier of fact will weigh the evidence, the existence of conflicting evidence favoring plaintiffs' position should not negate a finding of probable cause; because probable cause exists when there is only *some* evidence in support of the underlying claims, pointing to weaknesses in defendants' evidence ought not to advance the plaintiffs' showing of lack of probable cause. The low threshold of factual showing mandated by the prima facie standard becomes irrelevant because virtually *any* evidence supporting defendant's position can defeat probable cause as a matter of law.

Nor can plaintiffs meet their burden to make a prima facie showing of lack of probable cause by pointing to disputed material facts concerning the underlying claims. The existence of such disputed facts merely suggests that the outcome of the underlying action was subject to doubt, but does not mean the claims were pursued without probable cause. Put another way, the presence of disputed facts as to the underlying claims does not mean there are disputed material facts as to the existence of probable cause so as to require the denial of an anti-SLAPP motion. One implication of this is that the plaintiffs' prima facie burden in opposing an anti-SLAPP motion is no different from their ultimate burden of proof on the issue of probable cause.

The application of the low prima facie showing standard to the demanding element of lack of probable cause has been the source of considerable confusion. For example, some courts have mistakenly concluded that

the evidence presented by the malicious prosecution defendants on the issue of probable cause was irrelevant because it, at most, created a disputed material fact that should be resolved by the jury. (See, e.g., *Roscoe BK Restaurant Inc. v. Murphy* (May 13, 2016, B260709) 2016 WL 2892746, at *6 [affirming the denial of an anti-SLAPP motion and concluding that defendants' evidence in support of the underlying claim "does not defeat as a matter of law" plaintiffs' evidence against the merit of that claim but "instead would require us to weigh the evidence, which we may not do"]; *Groom v. Fritch* (June 29, 2004, G031960) 2004 WL 1445077, at *3 [concluding that evidence favoring the merit of the underlying claims and undermining the plaintiff's showing of lack of probable cause merely created a factual dispute that should be resolved by the jury].) One reason for this apparent confusion stems from a misunderstanding of dicta in *Sheldon Appel,* in which the court stated: "While, as we have just discussed, the probable cause determination has always been considered a question of law for the court, the cases have also made clear that if the facts upon which the defendant acted in bringing the prior action 'are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause.... "What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, the latter for the jury."'" (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 877.)

This dicta is consistent with the observation discussed above. Disputed facts that are consequential to the question of probable cause should go to the jury. Such is the case, for example, where there is a dispute as to the facts known to the defendant when he or she instituted or prosecuted the prior action. (See *Sheldon*, *supra*, 47 Cal.3d at p. 884.) But disputed facts concerning the merits of the underlying claims are irrelevant and therefore do not preclude resolution of the probable cause question as a matter of law. Therefore, unlike in the typical prima facie analysis, the starting point of the probable cause inquiry should be the defendants' evidence favoring existence of probable cause rather than plaintiffs' evidence of lack of probable cause. And while courts do not weigh the evidence or determine credibility, they must consider *all* evidence presented by the defendants in support of the underlying claims before concluding that the plaintiffs have met their burden of proof. Because the existence of probable cause is a question of law receiving de novo appellate review, we should expect to see further development.