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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

TOM L. McMILLIN,

Plaintiff and Respondent,

v.

CITY OF FOSTER CITY et al.,

Defendants and Appellants.

A132043

(San Mateo County
Super. Ct. No. CIV 487543)

After hearing a BB hit his home, plaintiff Tom McMillin grabbed a loaded gun and drove after a group of teenagers who had entered a nearby park. Without waiting for the police, McMillin confronted the teenagers and, holding them at gunpoint, forced them to lie down on the ground. McMillin was later charged by complaint with multiple counts of assault with a firearm, brandishing a firearm, and false imprisonment, and he eventually pleaded nolo contendere to a charge of disturbing the peace. McMillin then sued defendant City of Foster City (City) and two City police officers, contending the police investigation of the incident had been negligent. After this court directed the dismissal of the lawsuit as time-barred, the City unsuccessfully sought attorney fees from McMillin under Code of Civil Procedure section 1021.7. Finding McMillin's action to have been without reasonable cause, we vacate the denial of attorney fees and remand for the trial court to exercise its discretion under section 1021.7.

I. BACKGROUND

McMillin filed an administrative claim with the City on January 27, 2009, contending the City and defendants Douglas Nix, a City police officer, and Pierre

Morrison, Nix's superior, were liable for false arrest, malicious prosecution, and "abuse [sic] color of authority." The claim was based on a "citizens complaint" lodged by McMillin against the City and Nix, concerning Nix's investigation of an incident over two years earlier. According to Nix's police report of the incident, he was called to a city park at 8:46 p.m. on October 20, 2006. Upon arriving, Nix found earlier responding officers, seven 15- and 16-year-olds lying face-down on the ground, and McMillin, whom Nix recognized as the owner of a local security service. McMillin was barefoot and dressed in a "tactical vest" and his underwear. Nix was told by the first officer on the scene that, when the officer arrived, McMillin was holding the juveniles at gunpoint. McMillin had explained to another officer he heard a " 'ping' " noise outside his home, went outside to investigate, and saw the group of juveniles. A woman walking by told McMillin they had " 'a rifle' " and had gone to the park. McMillin went back inside, put on his vest, retrieved a loaded gun, and drove after the teenagers. Only upon arriving at the park did he call the police. Despite being asked to stay in his car by the police dispatcher, McMillin entered the park and confronted the teenagers.

Nix searched the teenagers, found no firearms, although they did have two toy pistols, a pellet gun and a BB gun, and released them to a parent. McMillin was apparently released as well. During Nix's subsequent investigation, one of the teenagers told him McMillin came out of the dark with his gun drawn, yelling at them to lie on the ground and, once they complied, threatening to shoot them if they moved. Based on his investigation, Nix concluded McMillin's conduct constituted a violation of Penal Code sections 417, subdivision (a)(2), brandishing a weapon, and 236, false imprisonment.

Nearly a year later, on October 16, 2007, McMillin was charged by criminal complaint with 21 misdemeanor counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2)), brandishing a firearm (Pen. Code, § 417, subd. (a)(2)), and false imprisonment (Pen. Code, § 236). An arrest warrant was issued and served on November 7, 2007, and McMillin was released on bail the same day. At arraignment on December 12, he was required to surrender his firearms. On August 4, 2008, McMillin

pleaded nolo contendere to a charge of disturbing the peace (Pen. Code, § 415, subd. (2)), which had been added by amendment, and the remaining charges were dismissed.

McMillin's "citizens complaint," which he lodged only after entering the criminal plea, argued Nix's investigation was incomplete, inaccurate, and biased. According to McMillin, Nix should have concluded the teenagers had committed crimes, since the BB gun, air guns, and pellet pistol found on them were "firearms" whose possession by juveniles is prohibited. McMillin claimed at least one of the teenagers during an interview with Nix admitted firing the BB gun. The complaint also quibbled with the report's characterization of events, contending Nix's account of the circumstances demonstrated a lack of impartiality toward McMillin's participation. In particular, McMillin contended: the dispatcher requested him to stay in his car, rather than directing him to do so; the police never examined his weapon to see whether it was loaded (although McMillin did not deny it was loaded); and not all the juveniles told police he threatened to shoot them. The complaint did not challenge the elements of the criminal violations identified by Nix: that McMillin confronted the teenagers with a loaded gun (Pen. Code, § 417) and coerced them into lying down while brandishing the weapon (Pen. Code, § 236).

The City's chief of police responded on January 15, 2009, with a letter to McMillin stating that, after a thorough internal affairs investigation, the department had concluded "Officer Nix failed to conduct as thorough an investigation as possible and failed to write as complete and accurate a report as possible. The allegation that he failed to act on criminal violations committed by the juveniles was determined to be unfounded." The letter did not identify the inaccuracies and omissions on which the apology was based. After receiving this letter, McMillin submitted his administrative claim to the City.

The City rejected the claim. In a letter to McMillin's attorney, the City's attorney explained the claim, to the extent it was based on violations of state law, was untimely under Government Code section 911.2 because it was not filed within six months of the filing of the criminal complaint. Further, the one-year time period for requesting leave to

file a late claim under Government Code section 911.4, subdivision (b), had also expired. The City's attorney also noted the City and its employees were immune from suit on grounds of malicious prosecution under Government Code section 821.6, which states that public employees are not liable for "instituting or prosecuting any judicial or administrative proceeding," even when acting "maliciously and without probable cause." The letter threatened the City would seek to recover attorney fees if McMillin filed suit.

McMillin petitioned the superior court for relief from the claim-filing requirement under Government Code section 946.6, subdivision (a), which permits the court to grant relief to a claimant who failed to meet the six-month deadline. Without addressing the timeliness of McMillin's claims for false arrest and abuse of authority, the court "denied" the petition "as moot" upon concluding McMillin's claim for malicious prosecution was timely filed because the cause of action did not accrue until the date of his plea. The order, however, expressly noted it was "without prejudice" to further litigation.

McMillin proceeded to sue defendants. The amended complaint contained causes of action for negligence, violation of civil rights (42 U.S.C. § 1983), failure to discharge mandatory duties, violation of constitutional rights by law enforcement officers (Civ. Code, § 52.3), and negligent and intentional infliction of emotional distress.¹ All of the causes of action were based on the allegation Nix failed to prepare a complete and accurate report and to follow police procedural guidelines in his investigation. McMillin's claim for damages was based on the expenses and inconvenience he incurred as a result of his prosecution, which he attributed to the allegedly negligent investigation. Although the trial court's conclusion that an action would be timely was based solely on a claim for malicious prosecution, McMillin did not plead such a claim.

¹ For reasons unclear, the parties did not include a copy of the complaint in the appellate record. We take sua sponte judicial notice of the complaint, which was included in the record in case No. A128287 in this court. (Evid. Code, §§ 452, subd. (d), 459, subd. (a); *In re Marriage of David & Martha M.* (2006) 140 Cal.App.4th 96, 98, fn. 3.)

In response to defendants' demurrer, the trial court dismissed the claims alleged under title 42 United States Code section 1983 (hereafter section 1983) and Civil Code section 52.3 and the violation of a mandatory duty. As to the section 1983 claim, the court ruled a claimant cannot recover damages if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his or her conviction"; as to the latter two claims, the court found no private right of action. The court overruled the demurrer as to the claims for negligence and intentional infliction of emotional distress, which had been challenged on grounds of timeliness, in reliance on the order denying McMillin's petition for relief.

We granted defendants' petition for a writ of mandate and ordered the trial court to grant the demurrer in toto. (*City of Foster City v. Superior Court* (Nov. 10, 2010, A128287) [nonpub. opn.].) Initially, we refused to give collateral estoppel effect to the order denying the petition for relief. While recognizing the trial court's "apparent finding that a malicious prosecution action was timely filed," we noted the complaint did not contain a malicious prosecution claim, which would have been barred by Government Code section 821.6, and the order did not consider the claims actually contained in the complaint. On the issue of the timeliness of McMillin's claims, we concluded all of the elements of the negligence and infliction of emotional distress causes of action had occurred no later than December 2007, when McMillin was arraigned and ordered to surrender his weapons. We rejected McMillin's argument accrual was delayed until his receipt of the City's letter of apology, noting the letter "may have reinforced or confirmed plaintiff's perception that a negligent police investigation was performed, but it did not furnish him with awareness of the factual basis for the elements [of] his action."

Following remand, defendants filed a motion for attorney fees pursuant to Code of Civil Procedure section 1021.7, which permits a court to award attorney fees to a defendant in any action "arising out of the performance of a peace officer's duties" if the court finds "that the action was not filed or maintained in good faith and with reasonable cause." Defendants argued McMillin's inclusion of a cause of action for malicious prosecution in his petition for relief was an example of bad faith, since the claim was

patently barred by Government Code section 821.6. They then reviewed the causes of action actually alleged, noting each was unsupported by reasonable cause because all failed to state a claim both on grounds of timeliness and on the merits. In addition, defendants argued the errors in Nix's report and investigation alleged in the complaint were trivial and immaterial to Nix's conclusions. The motion was supported by declarations that included the principal documents, provided an estimate of the attorney fees incurred by the City, and reported McMillin's admission the gun he used against the juveniles was, in fact, loaded.

McMillin's opposition noted his claim and complaint had survived two separate legal challenges in the trial court, arguing this was evidence of his good faith. It also cited the chief of police's letter of apology as the reasonable cause underlying the action.

The trial court denied the motion, finding the City had failed to meet its burden of proving McMillin acted with bad faith and a lack of reasonable cause. In explanation, the court stated only, "The facts are subject to interpretation which may result in differing opinions. Two superior court judges ruled that Plaintiff's claims were timely and the appellate court found otherwise."²

II. DISCUSSION

Defendants contend the trial court erred in denying their motion for Code of Civil Procedure section 1021.7 attorney fees. Section 1021.7 states: "In any action for damages arising out of the performance of a peace officer's duties, brought against a peace officer, . . . or against a public entity employing a peace officer . . . , the court may, in its discretion, award reasonable attorney's fees to the defendant or defendants as part of the costs, upon a finding by the court that the action was not filed or maintained in good faith and with reasonable cause."

Code of Civil Procedure section 1021.7 has received little judicial attention, but cases construing a similar statute, Code of Civil Procedure section 1038, have been

² We note the brevity of the trial court's ruling. Upon remand, whether the trial court grants or denies fees, it should provide a sufficiently detailed explanation of its rationale to permit meaningful appellate review of its exercise of discretion.

recognized as providing guidance in interpreting section 1021.7. Section 1038, enacted one year prior to section 1021.7 (*Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1248), permits a defendant in a Tort Claims Act suit to recover attorney fees if the action was not brought “with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint.” (Code Civ. Proc., § 1038, subd. (a).) Both sections 1021.7 and 1038 are intended to serve as a substitute to suits for malicious prosecution by governmental entities, which the Supreme Court has held to be prohibited by the Constitution. (See *City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 538 [§ 1021.7]; *Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 931 (*Knight*), disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7 [§ 1038].) As such, both statutes provide public entities with a remedy against unwarranted litigation. (*Martin v. Szeto* (2004) 32 Cal.4th 445, 450 [§ 1021.7]; *Knight*, at p. 931 [§ 1038].) Because the two statutes “use the same terms within similar contexts,” cases construing “good faith” and “reasonable cause” in section 1038 are equally applicable in interpreting those terms as used in section 1021.7. (*Salazar v. Upland Police Dept.* (2004) 116 Cal.App.4th 934, 949.)

Knight, still the leading case in defining good faith and reasonable cause under Code of Civil Procedure section 1038 (e.g., *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 183 [quoting *Knight*]), defines the terms as follows: “*Good faith*, or its absence, involves a factual inquiry into the plaintiff’s subjective state of mind [citations]: Did he or she believe the action was valid? What was his or her intent or purpose in pursuing it? A subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence. Because the good faith issue is factual, the question on appeal will be whether the evidence of record was sufficient to sustain the trial court’s finding. [¶] *Reasonable cause* is to be determined objectively, as a matter of law, on the basis of the facts known to the plaintiff when he or she filed or maintained the action. Once what the plaintiff (or his or her attorney) knew has been determined, or found to be undisputed, it is for the court to

decide “whether any reasonable attorney would have thought the claim tenable” [Citation.] Because the opinion of the hypothetical reasonable attorney is to be determined as a matter of law, reasonable cause is subject to de novo review on appeal. [¶] Of the two requirements to avoid an order for defense costs, reasonable cause is obviously the more stringent. A normal enthusiasm for one’s cause may in some circumstances provide the requisite subjective *good faith*, but the fact the plaintiff himself or herself (or his or her attorney) ‘thought the claim tenable’ would be essentially irrelevant to objective *reasonable cause*.” (*Knight, supra*, 4 Cal.App.4th at p. 932; see similarly *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1273–1274.)

Because attorney fees must be awarded under Code of Civil Procedure section 1038 if a lawsuit is not brought both in good faith *and* with reasonable cause, a finding that either element is lacking supports an award of fees. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861–862 (*Kobzoff*.) Because section 1021.7 uses similarly conjunctive language, it must be held to impose a similar requirement. Accordingly, if McMillin’s action lacked either good faith or reasonable cause, the City satisfied the prerequisite to an award of attorney fees under section 1021.7.

We begin our review with the “more stringent” element of reasonable cause, which asks objectively “ ‘whether any reasonable attorney would have thought the claim tenable,’ ” based on the information available to the plaintiff at the time of filing. (*Laabs v. City of Victorville, supra*, 163 Cal.App.4th at pp. 1273–1274; *Knight, supra*, 4 Cal.App.4th at p. 932.) As noted, we review this element de novo. (*Knight*, at p. 932.)

Judged by that standard, we find McMillin’s action to be so lacking in reasonable cause as to have been frivolous. There is no right of action in California for negligence in the course of a police investigation, since officers are protected by the immunity of Government Code section 821.6.³ In *Johnson v. City of Pacifica* (1970) 4 Cal.App.3d 82

³ Government Code section 821.6 reads: “A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding

(*Johnson*), the plaintiff brought an action against, among others, two police officers after he was arrested and temporarily detained on charges of which he was innocent. (*Id.* at p. 83.) The plaintiff alleged his detention occurred as a result of negligent investigation of the incident by the police officers, “in that they failed to follow ‘established police practices’ (or ‘established police procedures’) which control such matters.” (*Id.* at p. 84.) The court rejected the claim, concluding the officers were protected by the immunity of Government Code section 821.6. (*Johnson*, at pp. 85–87.)

McMillin’s action is indistinguishable from *Johnson*, since it relies on identical allegations of negligence and failure to follow proper investigative procedures.⁴ Similarly, in *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, the court held that officers accused of disrespectful treatment of the victim of a crime during the course of an investigation were immune to suit under Government Code section 821.6. (*Amylou R.*, at pp. 1209–1211.) The court noted, “Because investigation is ‘an essential step’ toward the institution of formal proceedings, it ‘is also cloaked with immunity.’ ” (*Id.* at p. 1210; see also *Farnam v. State of California* (2000) 84 Cal.App.4th 1448, 1458 [“section 821.6 immunity is intended to protect the ability of law enforcement officers to make judgment calls”]; *Baughman v. State of California* (1995) 38 Cal.App.4th 182, 192 [“Officers must be free to use their honest judgment uninfluenced by fear of litigation or harassment of themselves in the performance of their duties”]; *Jenkins, supra*, 212 Cal.App.3d 278, 283 [social worker immune from suit alleging negligent investigation of dependency matter].) All of these cases were decided prior to

within the scope of his employment, even if he acts maliciously and without probable cause.”

⁴ Defendants did not raise this issue or cite the relevant cases in their appellate briefs. To allow the parties an opportunity to present their views on the matter (Gov. Code, § 68081), we issued an order requesting supplemental briefing on the issue and citing both *Johnson, supra*, 4 Cal.App.3d 82 and *Jenkins v. County of Orange* (1989) 212 Cal.App.3d 278 (*Jenkins*). In addition to addressing *Johnson* and *Jenkins*, McMillin’s supplemental brief contains other arguments. To the extent they were not raised in his opening brief, we do not address them. (See *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

McMillin’s filing of the complaint, and the City had cited section 821.6 immunity to McMillin in its letter rejecting his claim. Accordingly, any reasonable attorney would have recognized McMillin’s claims were untenable.

McMillin argues “[a] city can be sued for the negligence of a police officer in investigating an incident,” citing *McCorkle v. County of Los Angeles* (1969) 70 Cal.2d 252 and *Clemente v. State of California* (1985) 40 Cal.3d 202. Contrary to McMillin’s characterization, liability in *McCorkle*, which involved a traffic accident investigation, was not based on inadequate investigation but on the officer’s creation of dangerous circumstances during the investigation. (*Id.* at pp. 259–260.) *Clemente* involved an allegedly negligent civil investigation, and subsequent decisions have abrogated any general liability in such circumstances. (See *Strong v. State of California* (2011) 201 Cal.App.4th 1439, 1449–1457.) In any event, because neither case involved criminal proceedings, they would not have involved immunity under Government Code section 821.6, the basis for the decision in *Johnson*. They therefore provide no support for McMillin’s claims.

McMillin attempted to avoid the lack of any legal basis for his negligence claim by alleging claims under Civil Code section 52.3 and title 42 United States Code section 1983. Both statutes, however, require the allegation of a constitutional violation. McMillin points to no constitutional right violated by Nix’s conduct. Of course, if an investigation is so flawed that it results in an arrest unsupported by probable cause, a common law or constitutional violation may occur. (Gov. Code, § 820.4 [exempting false arrest and imprisonment from law enforcement immunity]; *Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 752–753 [common law claim]; *Smiddy v. Varney* (9th Cir. 1981) 665 F.2d 261, 266–267, overruled on other grounds in *Beck v. City of Upland* (9th Cir. 2008) 527 F.3d 853, 865 [42 U.S.C. § 1983 constitutional claim].) The gravamen of such a claim, however, is not the manner in which the investigation was carried out, per se, but the lack of probable cause underlying the arrest. McMillin did not allege such a claim, presumably because (1) Nix did not arrest him and (2) there was

evident probable cause to support his arrest on the basis of facts unchallenged by McMillin.⁵

Further, when a claim under Civil Code section 52.3 or title 42 United States Code section 1983 involves a criminal proceeding against the plaintiff resulting in conviction, the claim cannot be maintained if the claim “ “would necessarily imply the invalidity of his conviction or sentence.” ’ ’ (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 893 (*Yount*); *Nuno v. County of San Bernardino* (C.D.Cal. 1999) 58 F.Supp.2d 1127, 1135–1138 [considering nolo contendere plea].) To state a constitutional claim in connection with Nix’s investigation, McMillin was required to claim he was wrongfully detained, but such a claim would necessarily imply his nolo contendere plea was invalid. Because the plea has not been overturned or otherwise vacated, his claims under Civil Code section 52.3 and title 42 United States Code section 1983 were invalid.⁶

McMillin contends the reasoning of *Yount* is inapplicable because he “is not seeking to overturn or invalidate his misdemeanor plea.” That argument misunderstands *Yount*. A civil rights lawsuit is not barred under *Yount* if the plaintiff is seeking to invalidate a plea or conviction. It is barred if the cause of action is *inconsistent* with the conviction or plea. (*Yount, supra*, 43 Cal.4th at p. 893.) For the reasons discussed, McMillin’s plea is inconsistent with his claims in this lawsuit. The case cited by

⁵ McMillin makes a similar point in purporting to distinguish *Johnson* and *Jenkins*, arguing peace officers “do not enjoy immunity under California law for false arrest.” While that may be true, it is irrelevant here because Nix did not arrest McMillin and there was, in any event, probable cause to support his arrest.

⁶ McMillin also alleged claims for negligent and intentional infliction of emotional distress. Negligent infliction of emotional distress is not an independent cause of action and would therefore be barred for the same reasons as his negligence claim. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984.) While intentional infliction can stand alone, there was nothing in Nix’s conduct as claimed by McMillin in the citizen’s complaint that even colorably constituted the type of “outrageous” conduct “ ‘ ‘ ‘so extreme as to exceed all bounds of that usually tolerated in a civilized community’ ’ ’ ” necessary to support a cause of action for intentional infliction of emotional distress. (See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051.) Further, Government Code section 821.6 immunity would apply in any case, since it protects conduct that is “malicious[] and without probable cause.”

McMillin in support, *Nelson v. Jashurek* (3d Cir. 1997) 109 F.3d 142, holds that a civil claim for use of unreasonable force during an arrest is not necessarily inconsistent with a conviction for resisting arrest. (*Id.* at pp. 145–146.) Because McMillin’s claims did not involve allegations of unreasonable force, the case is of no help to him.

In addition, for the reasons described above and in our decision in *City of Foster City v. Superior Court, supra*, A128287, McMillin’s claims were untimely. Not only were the claims not filed within the six-month period of Government Code section 911.2, they failed even to satisfy the additional six-month grace period of Government Code section 911.4, subdivision (b). Moreover, the sole claim found timely by the trial court in ruling on McMillin’s petition for relief was not even included in his complaint. The arguments raised by McMillin for avoiding these clear statutory timeliness requirements were insubstantial and would not have been persuasive to a reasonable attorney.

Finally, we note an overarching deficiency in the lack of any proximate causal connection between Nix’s alleged wrongdoing and the alleged harm to McMillin. Because the factual basis for each cause of action was the claimed flaws in Nix’s investigation, McMillin was required to plead harm proximately caused by those flaws. The harm alleged by McMillin was his prosecution, but none of McMillin’s criticisms claimed Nix erred with respect to the conduct underlying the prosecution. McMillin did not dispute that he drove off with a loaded gun after a group of teenagers who presented no physical threat to him, confronted them while displaying his weapon, and detained them at gunpoint. This conduct fully justified his arrest and prosecution.⁷ As a result, any errors Nix committed were not a proximate cause of the harm McMillin alleged. This fundamental flaw would have been obvious to any reasonable attorney evaluating the documents generated prior to the filing of the lawsuit.

⁷ McMillin also claimed a proper investigation would have resulted in charges filed against the teenagers, since they admitted firing the guns. Even assuming the teenagers could have been charged, none of their conduct provided a justification for McMillin’s actions in detaining them at gunpoint.

In defending the trial court's ruling, McMillin argues the chief of police's letter provided reasonable cause.⁸ At most, the chief's letter acknowledges deficiencies in Nix's investigation, without stating what those deficiencies were. For the reasons stated above, the letter provides no reasonable basis for McMillin's claims because, among other things, (1) there is no cause of action for negligent investigation, (2) McMillin's prosecution was not proximately caused by the alleged flaws, and (3) the claims were untimely.

McMillin also cites the trial court's orders as supplying reasonable cause. As discussed above, however, the single claim considered by the trial court in denying his petition for relief, a malicious prosecution claim, was not included in the complaint. The trial court expressly declined to address the timeliness of the remaining claims. For that reason, the first ruling provides no support for the reasonableness of the claims actually alleged. The demurrer ruling dismissed three of McMillin's claims on their merits. While it declined to dismiss the remaining claims as untimely, that ruling was expressly done in reliance on the earlier order denying the petition for relief. Because, as noted, that order did not consider the timeliness of the claims actually pleaded, it provided no authority for the timeliness of those claims.

Because McMillin's action was filed without reasonable cause, the trial court erred in denying defendants' motion on the ground they failed to show a lack of good faith and reasonable cause. (*Kobzoff, supra*, 19 Cal.4th at pp. 861–862.) Because an award under Code of Civil Procedure section 1021.7 is not mandatory, however, we remand to the trial court to exercise its discretion with respect to defendants' motion.

⁸ McMillin's counsel also attaches to the respondent's brief a copy of a letter from the District Attorney of San Mateo County acknowledging "mishandl[ing]" of McMillin's criminal prosecution and argues the letter supports McMillin's claims. Because the letter was not a part of the appellate record and no motion has been made for its admission, we do not consider it. In any event, an admission of mishandling by the County, a separate public entity from the City, would have no bearing on the claims asserted here.

III. DISPOSITION

The trial court's order denying defendants' motion for attorney fees is vacated. The matter is remanded to the trial court for further proceedings consistent with this decision.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.