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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FARRAH MIRABEL et al.,

Plaintiffs and Appellants,

v.

HALL & BAILEY et al.,

Defendants and Respondents.

G049766

(Super. Ct. No. 30-2013-00627487)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Affirmed.

Farrah Mirabel, in pro. per.; Christopher D. Whyte for Plaintiffs and Appellants.

Clausen Miller, Ian R. Feldman and Jay D. Harker; Donald R. Hall, in pro. per., and for Defendants and Respondents.

## INTRODUCTION

In 1992, the California Legislature enacted the anti-SLAPP statute, Code of Civil Procedure section 425.16,<sup>1</sup> to counteract a “disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” Eleven years later, the Legislature responded to “a disturbing abuse of Section 425.16, the California Anti-SLAPP Law,” by enacting section 425.17. Two years after that, section 425.18, the anti-SLAPPback statute, was enacted, to counteract the hall-of-mirrors effect of parties taking turns suing and SLAPPING each other.

This case is a venture into that hall of mirrors. Appellant Parvin Mirabadi, represented by appellant Attorney Farrah Mirabel, sued Cimarron Escrow, Inc., claiming Cimarron helped to wreck a real estate deal in which Mirabadi was involved. Mirabadi lost. Cimarron then sued Mirabadi and Mirabel for malicious prosecution. It lost. Then Mirabel and Mirabadi sued Cimarron and its attorneys, respondents Hall & Bailey and Donald Hall (collectively Hall), for malicious prosecution under section 425.18 on the theory the failure of their malicious prosecution suit showed it to be itself a malicious prosecution. Cimarron and Hall filed individual anti-SLAPPback motions.

The trial court granted Hall’s anti-SLAPPback motion because appellants failed to show a likelihood of prevailing on the malice element of a malicious prosecution cause of action.<sup>2</sup> We agree and affirm the judgment entered after the order granting respondents’ motion to dismiss pursuant to sections 425.16 and 425.18.

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<sup>1</sup> “SLAPP” is an acronym for “strategic lawsuit against public participation” (*S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 377) and refers to a lawsuit which both arises out of defendants’ constitutionally protected expressive or petitioning activity and lacks a probability of success on the merits. (Code Civ. Proc., § 425.16, subd. (b)(1).)

<sup>2</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated. The court also granted Cimarron’s motion. Appellants have not appealed from this order.

## FACTS

This is the parties' second trip to our court. The first was occasioned by Cimarron's appeal from an order granting Mirabadi's and Mirabel's anti-SLAPP motions, dismissing Cimarron's malicious prosecution action. We affirmed the order in an unpublished opinion.<sup>3</sup> We summarize the facts from our prior opinion to bring the story line up to the present appeal.

In 2005, Mirabadi and her daughter wanted to buy a piece of real estate in Los Angeles County. The property was subject to a tax lien, and a tax sale had been scheduled. To stop the sale, the delinquent taxes had to be paid by close of business three days before the sale date. Cimarron provided escrow services for the transaction.

Mirabadi put the money necessary to pay the taxes into escrow shortly before the deadline. A series of mishaps and miscommunications ensued, none of which bears on the present appeal.<sup>4</sup> The upshot was that the money did not get paid to the taxing authority in time to stop the sale, and the property was sold to someone else.

Represented by Mirabel, Mirabadi and her daughter sued Cimarron and two other entities involved in the transaction for breach of contract, fraud (two kinds), tortious breach of contract, breach of fiduciary duty, and negligence. They claimed they had a buyer who was prepared to pay nearly double their purchase price for the property. Cimarron cross-complained for contractual indemnity.

Cimarron's demurrer to the tortious breach of contract cause of action was eventually sustained without leave to amend. It obtained summary adjudication on the two fraud causes of action. The remaining claims were tried to the court, after summary adjudication was denied as to them. Cimarron prevailed on both the complaint and its

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*Cimarron v. Mirabadi* (Jan. 13, 2012, G044516) [nonpub. opn.].

<sup>4</sup>

The curious reader will find a blow-by-blow description in our prior opinion.

cross-complaint. The trial court awarded Cimarron attorney fees as damages on its cross-complaint.

The judgment was appealed to the Second District Court of Appeal, which affirmed the judgment for Cimarron on the complaint, but reversed the judgment on the cross-complaint.<sup>5</sup>

Cimarron then sued Mirabadi, her daughter, and Mirabel for malicious prosecution. Each of these defendants filed an anti-SLAPP motion, which motions were granted by the trial court and affirmed in this court. We held: (1) the denial of Cimarron's motion for summary adjudication in the underlying tax sale action barred a subsequent claim that Mirabadi lacked probable cause for initiating those three causes of action; (2) granting summary adjudication (dismissing the fraud causes of action) did not necessarily mean Mirabadi initiated these two causes of action without probable cause; (3) Cimarron established a probability of prevailing on lack of probable cause for the bad faith claim (the one dismissed on demurrer); and (4) Cimarron failed to show a probability of prevailing on the malice element. The trial court properly dismissed Cimarron's malicious prosecution lawsuit pursuant to the anti-SLAPP motion because Cimarron did not carry its burden to show a probability of prevailing, in that it could not establish a prima facie case of malice.

Mirabel, her law office, and Mirabadi then sued Cimarron and Hall for malicious prosecution. Cimarron and Hall separately moved for dismissal under sections 425.16 and 425.18. The trial court granted both motions, and appellants have appealed only from the dismissal of their action against Hall.

## **DISCUSSION**

At the outset, we reiterate what courts have said before us regarding the proper tone of appellate briefs. As a widely used treatise on appellate practice advises,

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*Amini v. Cimarron* (June 16, 2009, B205927) [nonpub. opn.].

“[H]yperbole, exaggeration, belligerence, disrespect, and arguments belittling your opponent, the trial judge or the appellate court do nothing to advance your client’s position; quite the contrary, a shrill and abusive tone is more likely to diminish the persuasive force of your brief and ultimately injure your client’s case.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) ¶ 9:29, p. 9-9.) This is especially true of attacks on the trial court. “Disparaging the trial judge is a tactic that is not taken lightly by a reviewing court. Counsel better make sure he or she has the facts right before venturing into such dangerous territory because it is contemptuous for an attorney to make the unsupported assertion that the judge was ‘act[ing] out of bias toward a party.’ [Citation.]” (*In re S.C.* (2006) 138 Cal.App.4th 396, 422.) Arguing, as appellants do, that the trial court ruled on the basis of “subjective, almost personal feelings about this case which were substituted by the trial court in this action for proper objective analysis and logic” places them right square in the middle of this dangerous territory.

In deciding the appeal, we follow a well-trodden path in analyzing an anti-SLAPP motion. “Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) The defendant has the burden to show protected activity; the burden then shifts to the plaintiff to show a probability of prevailing on the merits. We review an

order granting or denying an anti-SLAPP motion de novo; we apply the same two-step analysis as the trial court. (*Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 963.)

## **I. Protected Activity**

We need not discuss this prong of the anti-SLAPP analysis at length. “By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit.” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735 (*Jarrow*); see *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*)). That is a protected activity. The hard question is whether the plaintiff can show a probability of prevailing.

## **II. Probability of Prevailing**

“In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim. [Citation.]’ [Citation.]” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) We look to see whether “the plaintiff has stated and substantiated a legally sufficient claim.’ [Citation.]” (*Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 63.) Although the plaintiff does not have to prove its case at this juncture, it must present a *prima facie* case that could sustain a judgment if its evidence were believed. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) When evaluating the plaintiff’s probability of prevailing for purposes of an anti-SLAPP motion, the court can consider the defendant’s evidence in determining whether it defeats a plaintiff’s case as a matter of law. (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.)

Malicious prosecution actions are disfavored, and they are therefore subject to stringent conditions. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872.) A malicious prosecution plaintiff must plead and prove (1) legal termination of the

previous action in his or her favor, (2) malice, that is, improper purpose or ill-will as an underlying motivation for the action, and (3) lack of probable cause to file or maintain it. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.)

**A. Successful Termination**

It is undisputed that the prior lawsuit, the malicious prosecution case initiated by Cimarron, ended in appellants' favor. The case was dismissed pursuant to appellants' anti-SLAPP motion, and the dismissal was affirmed on appeal. (See *Soukup, supra*, 39 Cal.4th at p. 292; *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1149 (*Sierra Club*) [termination reflects opinion of court that action would not succeed].)

**B. Malice**

Appellants' sole issue is whether they carried their burden to establish a probability of prevailing on the malice element of their malicious prosecution cause of action. The malice element depends on the subjective intent or purpose of the plaintiff in the former action. (*Sheldon Appel Co v. Albert & Oliker, supra*, 47 Cal.3d at p. 874.) "The motive of the defendant must have been something other than . . . the satisfaction in a civil action of some personal or financial purpose. [Citations.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive. [Citation.]" (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494 (*Downey Venture*).) In addition to actual hostility or ill will, malice may be grounded on the lack of belief in the validity of a claim or an intent to force a settlement having no relation to its merits. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383 (*Albertson*), superseded by statute on other grounds.)

Because the malice element is subjective, opinions analyzing it are necessarily fact-intensive. Thus, a finding of malice based on one set of facts is likely to be of limited application to a different set. For example, in *Sierra Club*, a developer sued the Sierra Club Foundation in federal court in California for breach of trust and fraud after he became involved in a dispute with the foundation over land in New Mexico, a

dispute unrelated to the lawsuit. (*Sierra Club, supra*, 72 Cal.App.4th at pp. 1143-1144.) He hoped by means of a media campaign against the foundation based on the California suit to force a capitulation in the land dispute. (*Id.* at pp. 1146-1147.) He was found to have filed the suit out of malice. (*Id.* at p. 1157.) In *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385 (*Sycamore Ridge*), the plaintiffs' attorneys in the underlying suit filed what was apparently a boilerplate complaint on behalf of tenants and employees of an apartment complex, without even meeting some of their clients. (*Id.* at pp. 1392-1393, 1409.) The complaint alleged personal injuries and property damage, among other causes of action, based on poor living conditions in the complex. (*Id.* at pp. 1401-1403.) One plaintiff later responded to interrogatories denying that she had any personal injuries, property damage, or loss of income; her only complaint was unspecified mental distress. (*Id.* at pp. 1393, 1394, 1404.) The attorneys nevertheless did not dismiss her from the action, but instead filed a statement of damages on her behalf. (*Id.* at p. 1404.) The court affirmed the trial court's ruling that Sycamore Ridge had established a probability of prevailing on the malice element of a malicious prosecution action against these attorneys. (*Id.* at pp. 408-409.) In *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204 (*HMS*), the title company sued HMS Capital for cancellation fees despite written escrow instructions explicitly stating that cancellation fees would not be paid. (*Id.* at p. 209.) HMS Capital showed a probability of prevailing on the malice element of its subsequent malicious prosecution action because of this statement in the escrow instructions and because the title company took no depositions, propounded only one set of interrogatories, and demanded \$25,000 to dismiss the case. "These facts could support a conclusion that Lawyers Title was simply trying to squeeze a settlement from HMS on a baseless case, and hence evidence of malice." (*Id.* at p. 218; see *Soukup, supra*, 39 Cal.4th at p. 296 [threats of physical violence, lack of witnesses, threats against opposing counsel evidence of malice]; *Bertero v. National General Corp.*

(1974) 13 Cal.3d 43, 54 [attorney held deep feelings against plaintiff and argued weak point on appeal only to show court “what a bastard” plaintiff was];

From these and other cases we can discern the general outlines of malice, but, to paraphrase Tolstoy, every malicious defendant is malicious in its own way. We evaluate the whole picture, not isolated facts that may have isolated counterparts in other cases, in order to arrive at a conclusion about a defendant’s subjective intent.

Appellants claim the following actions establish Hall’s malice:

Hall made a settlement demand unrelated to the merits of the Cimarron malicious prosecution case against appellants.

Hall appealed from the dismissal of the Cimarron malicious prosecution case.

Hall abandoned discovery propounded in the Cimarron malicious prosecution case.

Hall conceded during oral argument of the Cimarron appeal from the anti-SLAPP dismissal that appellants had not sued Cimarron with malice as to damages.

Hall did not do any research, took depositions off calendar, and sought damages to which Cimarron was not entitled.

Hall improperly relied on *Bertero v. National General Corp.*<sup>6</sup>

Appellants’ grounds for malice can be reorganized for some clarity into three general categories. These are: (1) Hall demonstrated malice by advancing or advocating incorrect legal theories during Cimarron’s malicious prosecution suit and by appealing the adverse result; (2) Hall demonstrated malice by the way they handled discovery and research; and (3) Hall demonstrated malice by conceding during oral

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<sup>6</sup> Appellants did not explain in their opening brief how reliance on *Bertero* was improper or evidence of malice. Accordingly we treat this issue as abandoned. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699 [issue presented without argument or legal authority abandoned].)

argument on the Cimarron appeal that appellants had not sued Cimarron with malice as to damages.

## 1. Legal theories

Cimarron filed its malicious prosecution action in January 2010. In March 2010, Attorney Hall sent Mirabel a settlement offer letter setting out the kinds and amounts of damages Cimarron was claiming in its malicious prosecution suit.<sup>7</sup> These were (1) attorney fees and costs for the trial and appeal of the underlying suit, (2) interest on these amounts, (3) contingency fees for the malicious prosecution action, and (4) punitive damages. Including punitive damages, Hall estimated these damages at \$1.2 million and offered to settle for \$350,000.

Appellants assert this letter is evidence of malice for two reasons. First, Cimarron was not entitled to these damages. Second, the demand letter constituted an effort to force a settlement having no relation to the case's merits.

Damages recoverable in a malicious prosecution include reasonable attorney fees, business losses, harm to credit, and exemplary damages. (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848, fn. 4.) Had Cimarron prevailed in its malicious prosecution action, it would have been entitled to attorney fees incurred in defending itself in the first lawsuit and to some portion of the fees incurred in defending the appeal, at which it was partially successful.<sup>8</sup> It would also have had a basis for requesting punitive damages. (See *Bertero, supra*, 13 Cal.3d at p. 65 [punitive damages award upheld]; *Silas v. Arden* (2012) 213 Cal.App.4th 75, 92 [same]; *Davis v. Local Union No. 11, Internat. etc. of Elec. Workers* (1971) 16 Cal.App.3d 686, 697-698 [compensatory and exemplary damages awarded to malicious prosecution plaintiff].)

Listing an amount of prejudgment interest among the damages was incorrect. Hall evidently still regarded the attorney fees as contract damages – as they

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<sup>7</sup> This sequence of dates disposes of appellants' argument that the settlement letter was intended to "set up" a malicious prosecution lawsuit.

<sup>8</sup> Appellants' contention that Cimarron would not have been entitled to recover *any* fees for the appeal because it was not *entirely* successful is incorrect. (See *Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 96-97 [apportionment between recoverable and nonrecoverable legal fees].)

had been in the first lawsuit – and was proceeding as if Civil Code section 3287 applied to them. In the malicious prosecution action, however, they were not contract damages but tort damages. Prejudgment interest on tort damages can be obtained, but at the discretion of the trier of fact. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814; Civ. Code, § 3288.) Although the attorney was incorrect about the applicable code section and that an amount was then ascertainable, he was correct that interest was potentially available on any recovery. It would certainly figure into any prudent evaluation of exposure.

Of the items listed as damages in the settlement letter, legal fees for defending the underlying lawsuit would be recoverable if both reasonable and proven; legal fees for the appeal would be partially recoverable, if reasonable and proven, the amount depending on the allocation of fees between the complaint and the cross-complaint; interest on the two foregoing amounts was potentially recoverable, and in an unknown amount; and legal fees incurred in the malicious prosecution action itself would not be recoverable. Punitive damages would also be available upon proper proof. The settlement letter could be viewed as not too far off as to potential damages.

Appellants' second criticism of the letter is that it was an attempt to force "a settlement which has no relation to the merits of the claim." It is not clear what appellants mean by this phrase, which they have lifted from *Sycamore Ridge*, which, in turn, quoted it from *Sierra Club, supra*, 72 Cal.App.4th at p. 1157, which cited *Albertson, supra*, 46 Cal.2d at p. 383, which got it from the Restatement of Torts. (Rest. Torts, § 676, com. b.)

If appellants mean the settlement demand was too high – such as the one made in *HMS* – it was lower than the amount of legal fees Hall claimed Cimarron had incurred in the tax sale case, and it was not far removed from the amount Cimarron had sought on its cross-complaint for indemnity, an amount that did not include fees incurred for the appeal. It was not a number totally divorced from reality. Moreover, settlement

offers from plaintiffs are usually somewhat optimistic. Defendants make low-ball counter-offers, and, if the case settles, the parties meet somewhere in the middle.<sup>9</sup> If appellants mean the demand was unrelated to the *issues* of the malicious prosecution action – like the settlement the developer hoped to force in *Sierra Club* – they are simply wrong. Attorney Hall based his demand on damages relating to malicious prosecution.<sup>10</sup> We agree with the trial court that the letter does not supply evidence of malice.

Appellants also assert Hall showed evidence of malice by including as grounds for malicious prosecution causes of action as to which the trial court had denied summary adjudication. Denial of summary adjudication, they claim, is an “absolute bar” to an action for malicious prosecution, citing *Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375 (*Roberts*).

The holding in *Roberts* relates to probable cause, not malice. The court specifically declined to address malice. (*Roberts, supra*, 76 Cal.App.4th at p. 386.) Moreover, appellants misstate the *Roberts* holding. It is not as categorical as they maintain. The court actually held “that denial of defendant’s summary judgment in an earlier case normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit. [¶] We say ‘normally’ rather than ‘conclusively’ because there may be situations where denial of summary judgment should not irrefutably establish probable cause. For example, if denial of summary judgment was induced by materially false facts submitted in opposition, equating denial with probable cause might be wrong. Summary judgment might have been granted but for the false evidence. (For that matter, a jury verdict also might be induced by materially false testimony, raising a good argument that no conclusive presumption of probable cause should arise.)” (*Roberts, supra*, 76 Cal.App.4th at p. 384.)

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<sup>9</sup> In the first lawsuit, for example, appellants offered to settle for \$100,000 an action for which they later obtained a zero award from Cimarron. By their reasoning, this would be evidence of malice.

<sup>10</sup> We also see nothing to indicate any effort to “force” a settlement. Hall made the offer, appellants declined, and that was that.

Cimarron’s malicious prosecution complaint appeared to be trying to conform to this exception. The complaint contained 64 pages of text and 179 pages of exhibits. It included lengthy quotations from declarations, deposition transcripts, and trial transcripts from the first action, alleging that testimony upon which the court based the denial of summary adjudication was perjured. If these allegations proved to be true, they could overcome the denial of summary adjudication.<sup>11</sup>

In any event, *Roberts* deals with probable cause, not malice. Probable cause is objective (the no-reasonable-attorney standard); malice is subjective. (*Sheldon Appel Co. v. Albert & Olier, supra*, 47 Cal.3d at p. 878.) Appellants attempt to bridge this gap by asserting that lack of probable cause is evidence of malice.

As we pointed out in our prior opinion, when the shoe was on the other foot, lack of probable cause is a factor that may be considered, but it does not automatically equate to a finding of malice. (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 204; see *Jarrow, supra*, 31 Cal.4th at p. 743; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 225, 227; *HMS, supra*, 118 Cal.App.4th at p. 218; *Downey Venture, supra*, 66 Cal.App.4th at p. 498.) Once again, it is the specific mix of facts peculiar to the case that determines malice, not the correspondence between one fact in the present case and a fact in a prior case (e.g., lack of research). (See, e.g., *Daniels v. Robbins, supra*, 182 Cal.App.4th at p. 227.)

We are somewhat bemused by appellants’ argument that basing a claim on an incorrect legal theory proves malice. In the first lawsuit against Cimarron, Mirabadi alleged a cause of action for tortious breach of contract – apparently so as to be able to collect punitive damages – in the original complaint, the first amended complaint, and the second amended complaint, the third time after a demurrer to this cause of action had been sustained. The law in California has been abundantly clear since 1995 that tort

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<sup>11</sup> Appellants simply categorize these allegations as “invent[ions]” and “fabricat[ions].” Vituperation is no substitute for facts backed up by citations to the record.

damages are recoverable for a breach of contract *only* in the context of an insurance bad faith claim and not for any other kind of breach. (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 103.) Yet we held in the prior opinion that even such an egregious legal gaffe as this was not adequate proof of malice.<sup>12</sup>

Finally, appellants assert that Cimarron’s appeal from the adverse ruling on its anti-SLAPP motion, which we affirmed on appeal, demonstrated malice. Cimarron had a right to appeal from the adverse ruling on appellants’ anti-SLAPP motion, just as appellants are now doing from the adverse ruling on Hall’s SLAPPback motion. It does not follow at all from an adverse ruling in the trial court that “[o]nce it became clear that there was no basis for Cimarron’s claims, [Hall] were under an affirmative obligation to immediately dismiss their claims.” Trial courts have been known to make mistakes now and then. It’s rare – given the number of decisions they’re required to make – but it happens. That is why we are here.<sup>13</sup>

Appellants made no motion during the prior appeal to dismiss it as frivolous, and nothing in our prior opinion so much as hints that Cimarron’s appeal was frivolous. In fact, we found that appellants had filed and pursued one of the causes of action, the bad faith claim, *without* probable cause.

Mirabadi appealed from the adverse ruling in her original lawsuit against Cimarron and lost the appeal on the complaint. This should suggest to appellants that appealing from an adverse ruling does not itself indicate malice.

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<sup>12</sup> Appellants argue that further evidence of malice is demonstrated by the general, rather than specific, allegations on that subject in Cimarron’s malicious prosecution complaint, maintaining that malice must be pleaded with particularity and the general allegations show Hall had no evidence of malice. Malice in malicious prosecution actions may be pleaded generally. (*Axline v. Saint John’s Hospital & Health Center* (1998) 63 Cal.App.4th 907, 918, disapproved on other grounds *Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709 .) The “malice” referred to in the case appellants cite to back up this argument is *New York Times* actual malice (knowledge of falsehood or reckless disregard), which must be pleaded and proved in a defamation action by a public official. (*Noonan v. Rousselot* (1966) 239 Cal.App.2d 447, 452-453, 455, disapproved on other grounds in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 735.)

<sup>13</sup> Hall could also disagree with the outcome of the prior appeal, without such disagreement being considered malice. We find nothing in the record to support appellants’ contention that Hall advocated “overturn[ing]” our previous opinion or that the trial court “concurred with this nonsensical idea.”

## 2. Discovery and Research

Appellants claim Hall showed malice by moving to compel depositions and document production, successfully, then canceling the depositions shortly before they were to occur. Hall explained they no longer needed the depositions once they got the documents. Appellants presented no evidence this explanation was untrue.

A far more likely indicator of malice would have been Hall's proceeding with unnecessary discovery. Appellants appear to be complaining that their witnesses did *not* have to sit for depositions. Usually this is cause for rejoicing, not an indicator of ill will or improper purpose.

Appellants also argue that Hall did not do research into their damages in the tax sale action, concluding "[Hall] should not have claimed that Appellants lacked damages; therefore they had filed [the tax sale] action with malice." "This is *prima facie* proof of [Hall's] malice."

This argument, to the extent it is comprehensible, seems to refer to Cimarron's position in the first case that because Mirabadi had received \$252,000 from another defendant and because her damages expert testified that the property had a market value of \$240,000, being unable to buy the property did not damage her. Mirabadi, for her part, elicited testimony from the potential buyer that negotiations were underway to sell the property for more than the market value. Appellants regard this latter testimony as conclusive on the issue of Mirabadi's damages and Hall's contrary position as malicious.

Neither the statement of decision nor the opinion from the Second District Court of Appeal discussed Mirabadi's damages, and the issue was unresolved in the tax sale case. Thus, appellants' representation that Hall "were well aware of that prospective buyer testimony, but intentionally ignored it for self serving reasons and instead lied that Appellants had no damages" assumes they were indisputably right and Hall indisputably wrong, when there was never any resolution of this dispute. Their contention that "[this

fabricated issue] was blatantly false and indicative of [Hall's] malice” thus rests on their own highly subjective view of the evidence.<sup>14</sup>

### 3. Oral Argument

Appellants assert that Hall's malice can be inferred from some remark about appellants' damages in the tax sale case allegedly made at oral argument during the Cimarron appeal. There is no transcript of the oral argument in the record. Appellants refer to a compact disc (CD) recording of the oral argument, which is also not part of the record, and quote only a snippet of what was purportedly said, failing to provide any context whatsoever for the alleged remark. This is not an adequate record. (See *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [party challenging judgment must supply adequate record].)

Opposition to an anti-SLAPP motion must be based on admissible evidence.<sup>15</sup> (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 45; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497.) This “evidence” lacks proper foundation and authentication and is inadmissible. The recordings of oral arguments in the appellate courts are prepared for the courts' use in finalizing opinions; they are not official records. (See Evid. Code, §§ 452, subd. (d), 459.) CDs of arguments in particular cases are made available to the public as a courtesy, but they cannot be authenticated, and we could not take judicial notice of them as court records, even if we had been asked to do so, as we were not.<sup>16</sup>

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<sup>14</sup> Even less comprehensible is appellants' contention that “[Hall] argue as to the credibility of the prospective buyer issue although already decided in favor of Appellants since the prospective buyer did testify at the [tax sale case] trial . . ., establishing the element of damages.” The damages issue, or the “prospective buyer” issue, was never decided at all, let alone decided in appellants' favor, and the fact that a witness testified at trial is not an endorsement of his or her credibility.

<sup>15</sup> Hall objected to the reference to the oral argument in the trial court. The court did not rule on any evidentiary objections.

<sup>16</sup> The existence of damages is only one element of a cause of action, so even if Hall did make the concession appellants claim, it would not negate lack of probable cause for the rest of the cause of action.

### C. Lack of Probable Cause

In our prior opinion, we determined, in effect, that Mirabadi had probable cause for bringing all but one of the causes of action against Cimarron in the first case, and Cimarron did not have evidence of malice. Therefore Cimarron could not show a probability of prevailing on its malicious prosecution action. We did *not*, however, express an opinion about whether *Cimarron* did or did not have probable cause to bring *its* malicious prosecution action, an issue that was not before us. Whether a party is likely to prevail is a question separate from whether it had a reasonable basis for initiating an action. (*Jarrow, supra*, 31 Cal.4th at pp. 742-743 [“tenable” claim may fail as litigation unfolds].)

In deciding this SLAPPback motion, the trial court based its ruling on the probable cause element on our prior opinion, stating, “Judge Moberly decided, and the Court of Appeal affirmed, that Hall did not establish he could prevail on the element of probable cause. He is stuck with that finding and [appellants] can use it to establish [lack of] probable cause here.” In their brief, Hall challenged the trial court’s ruling that appellants had demonstrated a likelihood of prevailing on the lack of probable cause element of malicious prosecution.

Under section 906, a respondent may, without filing a cross-appeal, request a review of whether the error upon which an appellant bases a claim for reversal was prejudicial.<sup>17</sup> (See *Citizens for Uniform Laws v. County of Contra Costa* (1991) 233

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<sup>17</sup> Section 906 provides, “Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party, including, on any appeal from the judgment, any order on motion for a new trial, and may affirm, reverse or modify any judgment or order appealed from and may direct the proper judgment or order to be entered, and may, if necessary or proper, direct a new trial or further proceedings to be had. The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken. The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken.”

Cal.App.3d 1468, 1472.) As the rule applies to this case, it means that if the trial court should have ruled in Hall's favor on the lack of probable cause issue, whether it made a mistake about malice is irrelevant; Hall still win, because appellants cannot show a probability of prevailing on both required elements of malicious prosecution.

In the absence of a cross-appeal, we need not address this issue, because we are affirming the trial court's ruling on the issue of malice. This is sufficient to defeat a cause of action for malicious prosecution and to support the granting of Hall's SLAPPback motion.

### **DISPOSITION**

The judgment dismissing appellants' complaint is affirmed. Respondents are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.