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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KEVIN E. MONSON,

Plaintiff and Appellant,

v.

DYKEMA GOSSETT LLP, et al.,

Defendants and Respondents.

G051639

(Super. Ct. No. 30-2014-00742670)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.

Kevin E. Monson, in pro. per., for Plaintiff and Appellant.

Bird, Marella, Boxer, Wolpert, Nessim, Dooks, Lincenberg & Rhow, Joel E. Boxer, Bonita D. Moore, Douglas A. Fretty; Faegre, Baker, Daniels and Bonita D. Moore for Defendants and Respondents.

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This is an appeal from a dismissal following the granting of an anti-SLAPP motion. Plaintiff Kevin Monson sued defendants Dykema Gossett LLP and an attorney of the firm, Jon Cantor, for malicious prosecution. On appeal, Monson contends he demonstrated a probability of success and thus the dismissal was error. We disagree and affirm the judgment.

## FACTS

The convoluted procedural history of this case dates back to 2007, when a company called Angelus Block, which sold concrete masonry blocks, sued a former customer, Joseph Parks, seeking payment for materials. In 2008, Joseph and his wife, Tiffany Parks (the Parks), filed for bankruptcy. The Parks were represented by Joseph's half brother, Kevin Monson (the plaintiff in this case). The Parks listed Angelus Block as an unsecured creditor in the amount of \$79,164. Angelus Block filed an adversarial complaint in the bankruptcy court, claiming a debt of \$68,490.42 was non-dischargeable based on Joseph's fraud.<sup>1</sup> The bankruptcy court found in favor of Angelus Block in July 2011 in the amount of \$63,870.87, which was affirmed over the course of two appeals (we refer to this as the Angelus Block judgment). Angelus Block was represented by the defendants in the present case, Jon Cantor of the firm Dykemma Gossett, LLP.

Through the course of attempting to collect on the judgment, in August 2013, Cantor conducted a third party debtor examination of Tiffany Parks. At the examination, Tiffany revealed the existence of a postnuptial agreement, executed in March 2013, for the purpose of dissociating all of Tiffany's finances from Joseph. The only outstanding debt that survived the bankruptcy, so far as Tiffany was aware, was the Angelus Block judgment. Through the course of the debtor examination, it became clear

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<sup>1</sup> Angelus Block did not challenge the dischargeability of Tiffany's obligation.

that Tiffany was making all of the money as the nominal owner of a pool servicing business, that Joseph was working for her without being paid, and Tiffany was providing for all of Joseph's expenses and had even purchased a vehicle for him.

The postnuptial agreement recited that Joseph had no separate property, and refers to a schedule with a list of Tiffany's separate property, but the schedule is not in the record. Also, the agreement recited that all earnings of each spouse will be separate property. The Parks' attorney, Kevin Monson, signed the agreement as a witness.

In March 2013, the day before the postnuptial agreement was executed, Monson wrote to Cantor rejecting a settlement of collection efforts on the Angelus Block judgment stating, "[Joe] won't ever have \$200 a month to pay you"; "Your suspicions of secret employment and hidden assets are fanciful hopes, but without any basis in reality"; "Joe helps his wife in her business without compensation while he is looking for a new job; and "Joe has no money." These statements would later become the basis of a fraud claim against Monson.

In September 2013, the postnuptial agreement now having been revealed, Monson wrote to Cantor, "Joe has no assets and will never have any money. Tiffany is beyond your reach (because you have no judgment against her and because the post-nuptial agreement of March 2013 makes all of her future income her separate property). If I find any cash, rest assured that I will take it before anyone else will know it exists." In response, Cantor wrote to Monson stating that Angelus Block intended to file a lawsuit for fraudulent conveyance against the Parks. One month later, as further settlement talks stalled, Cantor renewed the threat to file the lawsuit but this time stated that Monson himself would be named as a defendant for his role in facilitating the fraudulent transfer. The next day, the Parks rescinded the postnuptial agreement. However, they did not tell Cantor or Angeles Block about the rescission.

Unaware that the postnuptial agreement had been rescinded, Angelus Block filed the threatened lawsuit the following month, November 2013 (we refer to this as the

fraudulent conveyance action). Angelus Block asserted two causes of action against Monson: (1) Fraud arising from Monson's claim that Joseph had no assets; and (2) Conspiracy to make a fraudulent conveyance, arising out of Monson's orchestration of the postnuptial agreement.<sup>2</sup>

In January 2014, Monson filed an anti-SLAPP motion seeking dismissal of the fraud cause of action, but, notably, not the conspiracy to make a fraudulent conveyance cause of action. Monson argued his statements regarding Joseph's finances were inadmissible as settlement negotiations (Evid. Code, § 1152), and that Monson was immune from liability based on the litigation privilege (Civil Code, § 47, subd. (b)). The court granted the motion based on the litigation privilege and struck the fraud cause of action.

Four months later, in April 2014, Monson finally revealed the rescission to Cantor. In a letter to Cantor, Monson wrote, "The post-nuptial agreement was rescinded after I received your correspondence that cited authorities indicating that the post-nuptial agreement may be unenforceable. You, of course, chose to file the lawsuit without ever seeing or requesting to see the post-nuptial agreement and without any inquiry as to the continued existence or effect of the agreement. I warned you multiple times that your threatened lawsuit was without basis in law or fact." One week later, Angelus Block dismissed the entire lawsuit without prejudice.

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<sup>2</sup> Of course, "there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results from that act [citation]." (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 45, p. 111.) "[W]here the complaint charges a conspiracy and the commission of a wrongful act, the only significance of the conspiracy charge is that each member may be held responsible as a joint tortfeasor, regardless of whether that member directly participated in the act." (5 Witkin, *supra*, Torts, § 45, p. 111.) Here, the effect of the cause of action for conspiracy is to allege Monson's liability for the fraudulent conveyance separately alleged against the Parks. With that understanding, and for clarity, we will continue to refer to the conspiracy cause of action alleged against Monson as a conspiracy to make a fraudulent conveyance.

Five months later, in September 2014, Monson filed the present lawsuit against Angelus Block, and defendants Dykema Gossett LLP and Jon Cantor for malicious prosecution, intentional infliction of emotional distress, and negligent infliction of emotional distress (the malicious prosecution action). The malicious prosecution claim was based entirely on the fraud cause of action that had been stricken from the fraudulent conveyance action; it was not based on the conspiracy to make a fraudulent conveyance cause of action. The emotional distress claims were based on the alleged malicious prosecution.

In December 2014, Dykemma Gossett and Cantor filed an anti-SLAPP motion against the entire complaint.<sup>3</sup> The court granted the motion without stating the basis for its ruling and dismissed the complaint. Monson timely appealed.

## DISCUSSION

We review de novo a trial court's order granting an anti-SLAPP motion. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 214.)

“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.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Here, there is no dispute that the subject of the malicious prosecution action — a lawsuit — was protected activity. The contested issue in this appeal is the second step, “whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*Ibid.*)

“[A]lthough by its terms section 425.16, subdivision (b)(1) calls upon a court to determine whether ‘the plaintiff has established that there is a *probability* that the

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By this point, Angelus Block had apparently settled out of the lawsuit.

plaintiff will prevail on the claim’ (italics added), past cases interpreting this provision establish that the Legislature did not intend that a court, in ruling on a motion to strike under this statute, would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities.” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) “[T]he court’s responsibility is to accept as true the evidence favorable to the plaintiff . . . .” (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) “[T]he defendant’s evidence is considered with a view toward whether it defeats the plaintiff’s showing as a matter of law, such as by establishing a defense or the absence of a necessary element.” (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 585.)

We must determine, therefore, whether the evidence would support a judgment for malicious prosecution. “[I]n order to establish a cause of action for malicious prosecution of either a criminal or civil proceeding, a plaintiff must demonstrate ‘that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff’s, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].’” (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871.) “Although the malicious prosecution tort has ancient roots, courts have long recognized that the tort has the potential to impose an undue ‘chilling effect’ on the ordinary citizen’s willingness to report criminal conduct or to bring a civil dispute to court, and, as a consequence, the tort has traditionally been regarded as a disfavored cause of action.” (*Id.* at p. 872.)

*The Fraudulent Conveyance Action Was Not Terminated in Monson's Favor*

In order to satisfy the first element, favorable termination, the *entire* action must be terminated in plaintiff's favor. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 686 [“the Supreme Court's holding that a malicious prosecution suit may be maintained where only one of several claims in the prior action lacked probable cause [citation] does not alter the rule there must first be a favorable termination of the *entire* action”].) “In order for the termination of a lawsuit to be considered favorable to the malicious prosecution plaintiff, the termination must reflect the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit.” (*Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1814.) “A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] ‘It is not enough, however, merely to show that the proceeding was dismissed.’ [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits.” (*Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1855.)

The reason Angelus Block dismissed the prior lawsuit is plain. The lawsuit was based on the postnuptial agreement, and Monson waited several months into the litigation before revealing it had been rescinded. Does that reflect Monson's innocence? Clearly not. To the contrary, the fact that Monson orchestrated a rescission in the first place indicates he knew he was likely guilty of conspiring to fraudulently convey the Parks's assets. He then took steps to mitigate any damage to Angelus Block, but he failed to reveal those mitigating steps and, essentially, induced Angelus Block to file the fraudulent conveyance action. He then had the gall to claim *he* was damaged by the pendency of the lawsuit when he was sitting on the key to ending it the entire time. If anyone was damaged as a result of these events, it was Angelus Block, who maintained a lawsuit that had largely been mooted by actions Monson failed to disclose. Monson was

not an innocent party, and thus Angelus Block's dismissal of the conspiracy claim does not constitute a termination in Monson's favor.

*Cantor Had Probable Cause to Assert a Fraud Claim*

The next factor is whether Cantor had probable cause to assert a fraud cause of action against Monson. Cantor's theory of fraud was that when Monson claimed Joseph had no assets, he knew that was based on a fraudulent, invalid agreement, rendering the no-assets claim false. Monson argues there was no probable cause supporting the fraud claim because he was immune to liability based on the litigation privilege (Civil Code, § 47, subd. (b)), and, additionally, that his statements would be inadmissible as settlement communications pursuant to Evidence Code section 1152.

Whether Cantor had probable cause "is purely a legal question," to be determined by the court. (*Sheldon Appel Co. v. Albert & Olier, supra*, 47 Cal.3d at pp. 868, 875.) "[T]he standard of probable cause to bring a civil suit [is] equivalent to that for determining the frivolousness of an appeal [citation], i.e., probable cause exists if 'any reasonable attorney would have thought the claim tenable.' [Citation.] This rather lenient standard for bringing a civil action reflects 'the important public policy of avoiding the chilling of novel or debatable legal claims.' [Citation.] Attorneys and litigants, we observed, "have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . ." [Citation.] Only those actions that "any reasonable attorney would agree [are] totally and completely without merit" may form the basis for a malicious prosecution suit." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817.) Unlike the favorable termination element of malicious prosecution, which looks at the lawsuit as a whole, the probable cause element may be satisfied if even one claim of several was brought without probable cause. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542.)

We begin by analyzing whether the litigation privilege erects an absolute immunity to Monson’s allegedly fraudulent statements. Civil Code section 47 provides, “A privileged publication or broadcast is one made:” “(b) In any . . . judicial proceeding . . . .” “The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.” (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) “[C]ommunications with ‘some relation’ to judicial proceedings have been absolutely immune from tort liability by the privilege codified as [Civil Code section 47, subdivision (b)].” (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193.) “‘The principal purpose of [Civil Code] section [47, subdivision (b)] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.’ [Citation.] Additionally, the privilege promotes effective judicial proceedings by encouraging “‘open channels of communication and the presentation of evidence’” without the external threat of liability [citation], and ‘by encouraging attorneys to zealously protect their clients’ interests.’ [Citation.] ‘Finally, in immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result.’” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 321-322.)

In contending the litigation privilege barred the fraud claim, Monson relies principally on *Rusheen v. Cohen* (2006) 37 Cal.4th 1048. There, an attorney allegedly filed a false proof of service of process in obtaining a default judgment. The judgment debtor sued the attorney for abuse of process, and the attorney filed an anti-SLAPP motion, erecting the litigation privilege as a defense. (*Id.* at pp. 1053-1054.) The court

framed the issue as follows: “Because the litigation privilege protects only publications and communications, a ‘threshold issue in determining the applicability’ of the privilege is whether the defendant’s conduct was communicative or noncommunicative.

[Citation.] The distinction between communicative and noncommunicative conduct hinges on the gravamen of the action. [Citations.] That is, the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature.” (*Id.* at p. 1058.) Addressing the filing at issue, the court disagreed with the notion that the abuse of process claim was based on the noncommunicative act of enforcing the judgment. (*Id.* at p. 1061.) Instead, the gravamen of the action was “the procurement of the judgment based on the use of allegedly perjured declarations of service,” which was a communicative act. (*Id.* at p. 1062.) Monson contends this holding applies to the fraud claim and precludes liability.

Defendants counter with *Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136 (*Rickley*) for their argument that the litigation privilege does not apply to fraudulent statements used to avoid execution of a judgment. There, the plaintiffs prevailed in a lawsuit against their neighbor, requiring the neighbor to pay for environmental remediation. The money to pay for the remediation was placed in the neighbor’s attorneys’ trust account. (*Id.* at p. 1140.) The neighbor allegedly failed to complete the remediation. (*Id.* at p. 1143.) In a subsequent suit, plaintiffs added the neighbor’s attorneys as defendants. The attorneys had allegedly sent e-mails to the remediation contractor in violation of a court order not to contact the contractor without prior approval from the court or opposing counsel. (*Id.* at p. 1144.) They had disbursed the remediation funds in an unfair manner to plaintiffs’ detriment. (*Id.* at p. 1147.) And the attorneys also participated in digging up a tree, thereby disturbing contaminated soil, in violation of a court order. (*Id.* at p. 1144.)

The attorneys argued the litigation privilege immunized their conduct. The court held it did not, and in reaching that conclusion discussed *Rusheen* extensively. It

noted that whether the litigation privilege applies depends on whether the defendants' conduct was essentially communicative or noncommunicative. (*Rickley, supra*, 212 Cal.App.4th at p. 1160.) Whereas in *Rusheen* the defendant's wrongful conduct was filing a false declaration of service — essentially a false communication — in *Rickley* the attorneys' conduct was to perpetuate a nuisance, which is essentially noncommunicative. (*Rickley*, at pp. 1161-1162.) The *Rickley* court distinguished *Rusheen*: “*Rusheen* did not extend the litigation privilege to postjudgment communications or misconduct that contributes to a continuing tort, namely, interfering with a court-approved remediation plan to remove contaminated debris from a neighbor's property. Rather, *Rusheen* ‘[e]xtend[ed] the litigation privilege to postjudgment *enforcement* activities.’ [Citation.] Here, if anything, the attorney-defendants engaged in postjudgment *obstructionist* activities by actively assisting their clients in thwarting the remediation plan. Unlike the defendant in *Rusheen*, the attorney-defendants in this case were *not* taking steps to *enforce* a judgment. Rather, they engaged in affirmative misconduct that contravened a judgment.” (*Rickley*, at p. 1162.)

We need not decide whether *Rickley* was correctly decided, or whether Angelus Block's fraud claim against Monson was ultimately distinguishable from *Rickley*. We need only decide whether Angelus Block's claim was *arguable*, and in our view, it was. *Rickley* distinguished activities enforcing a judgment, which are subject to the litigation privilege, from activities obstructing the enforcement of a judgment, which, in its view, are not. *Rickley* also distinguished between essentially noncommunicative activities that may have some communicative activity associated with it, and vice versa. Cantor could nonfrivolously argue that Monson's statements, in conjunction with the alleged fraudulent conveyance, were incident to the noncommunicative act of obstructing enforcement of a judgment. We do not decide whether that argument would ultimately prevail, only that under the lenient probable cause standard, it was within the realm of

nonfrivolous arguments. Cantor thus had a sufficient basis to conclude that the litigation privilege did not bar the fraud claim.

Monson argues, alternatively, that the fraud claim lacked probable cause because Monson's statements about Joseph's lack of assets were settlement communications inadmissible under Evidence Code section 1152. Here, once again, Cantor had a colorable argument that section 1152 would not exclude Monson's statements.

Evidence Code section 1152, subdivision (a), provides, "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it." "Evidence Code section 1152 provides that evidence that a party has offered to compromise a claim is inadmissible to prove liability for *that claim*." (*Fieldson Associates, Inc. v. Whitecliff Laboratories, Inc.* (1969) 276 Cal.App.2d 770, 772.)

*That claim*. Therein lies the rub. Monson's statements in March 2013 that Joseph had no assets were not made in negotiations to settle a fraud claim against Monson. Angelus Block did not even know it had a fraud claim until six months later, when Tiffany revealed the postnuptial agreement. Plainly, Monson could not have been attempting to settle a claim that did not yet exist. Evidence Code section 1152, therefore, would not exclude Monson's allegedly fraudulent statements.

*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204 (*HMS Capital*) is instructive. There, a title insurance company sued a mortgage broker, claiming the mortgage broker owed \$40,000 in fees. (*Id.* at p. 208.) The broker cross-complained for \$13,578 in fees owed by the title insurance company, and after a court trial, the court found in favor of the broker. (*Ibid.*) The broker then filed a subsequent

suit for malicious prosecution against the title insurance company, which was met with an anti-SLAPP motion. (*Id.* at p. 209.) The issue was whether the broker could establish the malice element of malicious prosecution, and to that end, the broker sought to admit settlement discussions from the prior case in which the title insurance company demanded \$25,000 to settle a plainly frivolous claim. (*Id.* at pp. 218-219.) The title insurance company argued the offer to compromise was inadmissible, but the court disagreed, stating the title insurance company “cites no case holding that settlement discussions are inadmissible to show that a case was litigated for an improper purpose.” (*Id.* at p. 219.) In support of its conclusion, the *HMS Capital* court cited *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 915 (*HMS Capital*, at p. 219), where the court stated, “In insurance litigation, ‘[t]he language of [Evidence Code section 1152] does not preclude the introduction of settlement negotiations if offered not to prove liability for the original loss but to prove failure to process the claim fairly and in good faith.’” (*Shade Foods Inc.*, at p. 915; see *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 887; see also *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 396.)

Likewise, here, defendants would seek to introduce Monson’s settlement communications to prove liability in a whole separate case from the case Monson’s statements pertained to. Monson’s statements, therefore, would not be excluded by Evidence Code section 1152.

#### *There is No Evidence of Malice*

The final element of a malicious prosecution claim is malice. “‘The malice element of the malicious prosecution tort goes to the defendant’s subjective intent . . . . It is not limited to actual hostility or ill will toward the plaintiff.’ [Citation.] It can exist, for example, where the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim. A lack of probable cause is a factor that

may be considered in determining if the claim was prosecuted with malice [citation], but the lack of probable cause must be supplemented by other, additional evidence.

[Citation.] Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.” (*HMS Capital, supra*, 118 Cal.App.4th at p. 218.)

Monson did not present any evidence of malice. Monson’s argument is largely based on his claim that the fraud cause of action was dead-on-arrival, but we have rejected that claim above. Monson also asserts that Cantor offered not to file the threatened fraudulent conveyance action if the Parks would settle Angelus Block’s efforts to enforce the Angelus Block judgment. Monson argues this falls within the following language used by *HMS Capital*: “where the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.” (*HMS Capital, supra*, 118 Cal.App.4th at p. 218.) This argument is a nonstarter, however, because the fraudulent conveyance action plainly has a direct relation to the efforts to collect on the Angelus Block judgment. The fraudulent conveyance was an alleged unlawful attempt to frustrate Angelus Block’s collection of the Angelus Block judgment. Monson’s final evidence was his own declaration that he was a “thorn in the side” of Angelus Block because he was representing the Parks pro bono. He asserts that the fraudulent conveyance action was an attempt to “cut-off” Monson’s representation of the Parks. Under the circumstances, this assertion is pure speculation and, without more, insufficient to establish malice.

Because Monson failed to show a probability of success on the merits of his malicious prosecution claim, the court properly granted the anti-SLAPP motion and dismissed the complaint.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs incurred on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.