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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEGGY J. SOUKUP, Plaintiff and Respondent, v. GREG K. HAFIF et al., Defendants and Appellants.	B154311 (Super. Ct. No. BC247941)

APPEAL from orders of the Superior Court of Los Angeles County, Gregory O'Brien, Judge. Affirmed.

Law Offices of Herbert Hafif, Jeanne A. Sterba; Law Offices of James J. Moneer and James J. Moneer for Defendant and Appellant Greg K. Hafif

Aitken Aitken & Cohn, Darren O. Aitken and Wylie A. Aitken for Defendants and Appellants Wylie A. Aitken and Law Offices of Wylie A. Aitken.

Ronald C. Stock, in pro. per., for Defendant and Appellant.

Peggy J. Soukup, in pro. per.; Law Offices of Gary L. Tysch and Gary L. Tysch for Plaintiff and Respondent.

I. INTRODUCTION

In these consolidated appeals, Greg K. Hafif, Ronald C. Stock, Wylie A. Aitken, and the Law Offices of Wylie A. Aitken (collectively, defendants) appeal from orders denying their Code of Civil Procedure[1], section 425.16 special motions to strike. The present lawsuit is a malicious prosecution and abuse of process action. An underlying lawsuit was dismissed pursuant to section 425.16. This lawsuit followed and defendants, who were the unsuccessful plaintiffs in the underlying litigation, filed special motions to strike notwithstanding the fact their underlying action was dismissed pursuant to section 425.16. We conclude, because the Legislature did not intend such, that the underlying lawsuit did not fall within the protective purview in the present action of section 425.16. Accordingly, we affirm the orders.

II. BACKGROUND

Defendants' section 425.16 motions were directed at a complaint filed by Peggy J. Soukup (plaintiff) alleging malicious prosecution and abuse of process. In an underlying action, Herbert Hafif, Cynthia D. Hafif, Greg K. Hafif, and the Law Offices of Herbert Hafif sued plaintiff. Mr. Aiken and his firm, and Mr. Stock, are attorneys who represented the Hafifs and the Hafif firm in the underlying action against plaintiff.[2] The second amended complaint alleged plaintiff here, Ms. Soukup, a former employee of the Hafif firm, had disclosed to a third party confidential information obtained during her employment. The disclosure was purportedly made in furtherance of a conspiracy to

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[1] All further statutory references are to the Code of Civil Procedure.

[2] We do not reach the question whether an attorney may rely upon his or her exercise of free expression or petition rights while providing legal representation in an underlying lawsuit as a basis for a section 425.16 special motion to strike in subsequent litigation. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113; *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 152-154.)

defame the Hafif firm. The underlying lawsuit was dismissed in response to a section 425.16 special motion to strike. An appellate court affirmed the dismissal. (*Law Offices of Herbert Hafif et al. v. Soukup et al.* (April 27, 2000, G020977) [nonpub. opn.].) In an unpublished opinion, the Court of Appeal for the Fourth Appellate District, Division Three, held: the trial court erred in considering the plaintiffs' subjective motives for bringing the action, but the error was harmless; the allegedly actionable conduct consisted of Ms. Soukup's complaints to the Department of Labor, which statements were within the protective purview of section 425.16; and the Hafif plaintiffs failed to meet their burden of establishing a probability of succeeding on their claims against Ms. Soukup. (*Ibid.)*

III. DISCUSSION

A. Standard of Review

A special motion to strike may be filed in response to "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2, disapproved on another point in *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (S094877, Aug. 29, 2002) __ Cal.4th ___, ___, fn. 5 [2002 WL 1980437, *9, fn. 5] Section 425.16, which was enacted in 1992, authorizes a court to summarily dismiss such meritless suits. (Stats. 1992, ch. 726, § 2, pp. 3523-3524.) The purpose of the statute was set forth in section 425.16, subdivision (a) as follows: "The Legislature finds and declares that there has been 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. . . ."

Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . ." in connection with a public issue must be stricken unless the court finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* __ Cal.4th at p. ___ [2002 WL 1980437, *1]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra*, 47 Cal.App.4th at p. 783.) Section 425.16, subdivision (e) provides: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." In order to protect the constitutional rights of petition and free speech, the statute is to be construed broadly. (§ 425.16, subd. (a); *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at pp. 1119-1121; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175-1176.)

When a special motion to strike is made, the trial court must consider two components. First, the court must consider whether the moving defendant has carried its burden of showing that the lawsuit falls within the purview of section 425.16**,** i.e., arises from protected activity. The moving defendant has the initial burden of establishing a prima facie case that plaintiff's cause of action arises out of a defendant's actions in the furtherance of the rights of petition or free speech. (§ 425.16, subd. (b)(1); *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* __ Cal.4th at p. ___ [2002 WL 1980437, *9]; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65

Cal.App.4th 713, 721, overruled on another point in *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1123, fn. 10; *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 673; *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042-1043; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra,* 47 Cal.App.4th at p. 784; *Wilcox v. Superior Court, supra*, 27 Cal.App.4th at pp. 819-821.) Second, once the defendant meets this burden, the obligation then shifts to the plaintiff to establish a probability that she or he will prevail on the merits. (§ 425.16, subd. (b)(1); *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* __ Cal.4th at p. ___ [2002 WL 1980437, *9]; *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1115; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907; *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1450; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra*, 47 Cal.App.4th at pp. 784-785.) The moving defendant has no obligation to demonstrate that the plaintiff's subjective intent was to chill the exercise of constitutional speech or petition rights. (*Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* __ Cal.4th at p. ___ [2002 WL 1980437, *1].) Stated differently, there is no intent-to-chill proof requirement. (*Id.* at p. ___ [2002 WL 1980437, *8].) Nor must a moving defendant show that the action had the effect of chilling free speech or petition rights. (*City of Cotati v. Cashman* (S099999, Aug. 29, 2002) ___Cal.4th ___, ___ [2002 WL 1997921].) As the Supreme Court explained in *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* __ Cal.4th at page ___ [2002 WL 1980437, *4] ["'[T]he only thing the [moving] defendant needs to establish to invoke the [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of [his or] her right of petition or free speech. From that fact *the court may [effectively] presume the purpose of the action was to chill the defendant's exercise of First Amendment rights*. It is then up to the plaintiff to *rebut the presumption* by showing a reasonable probability of success on the merits.' (*Fox Searchlight Pictures, Inc. v. Paladino* [(2001)] 89 Cal.App.4th [294,] 307 [].)" (Italics added.) In reviewing the trial court's order granting the special motion to strike, we use our independent judgment to determine whether the litigation arises out of protected activity (*Mission Oaks Ranch,*

Ltd. v. County of Santa Barbara, supra, 65 Cal.App.4th at p. 721; *Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 695, disapproved on another point in *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* ___ Cal.4th at p. ___, fn. 5 [2002 WL 1980437, *9, fn. 5]) and a plaintiff has met its burden of establishing a probability of prevailing on a claim in the complaint. (*Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1064; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653, disapproved on another point in *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* __ Cal.4th at p. ___, fn. 5 [2002 WL 1980437, *9, fn. 5].)

B. The Present Orders Will Be Affirmed

Plaintiff argues the special motion to strike was correctly denied because the underlying lawsuit did not arise out of an act in furtherance of defendants' petition rights. (§ 425.16, subd. (b)(1).) Plaintiff reasons the dismissal of the underlying lawsuit pursuant to section 425.16 establishes that it was a meritless action; the purpose of the underlying lawsuit was to chill her exercise of First Amendment rights. Therefore, plaintiff posits, the underlying action does not fall within the protective purview of section 425.16. We agree. Plaintiff's present malicious prosecution and abuse of process causes of action arise out of defendants' underlying action against her. But the underlying action was not brought in furtherance of defendants' constitutionally protected rights of petition or free speech. This is because it has been conclusively established that the underlying action was a meritless lawsuit brought to chill plaintiff's exercise of her constitutional rights. The Legislature did not intend for section 425.16 to apply under these unique circumstances.

In *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1359-1367, disapproved on another point in *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* __ Cal.4th at p. ___, fn. 5 [2002 WL 1980437, *9, fn. 5], it was undisputed the defendants had engaged in illegal campaign money laundering in violation of the Political

Reform Act. The defendants "effectively conceded" as much. (*Id.* at p. 1367.) In an opinion authored by our colleague Associate Justice H. Walter Croskey, the Court of Appeal held as a matter of law the defendants' illegal conduct was not protected under section 425.16; it was not a *valid* exercise of the defendants' constitutional rights. (*Id.* at pp. 1365-1367.) Associate Justice Croskey observed: "[T]he probability that the Legislature intended to give defendants section 425.16 protection from a lawsuit based on injuries they are alleged to have caused by their *illegal* campaign money laundering scheme is as unlikely as the probability that such protection would exist for them if they injured plaintiff while robbing a bank to obtain the money for the campaign contributions or while hijacking a car to drive the campaign contributions to the post office for mailing." (*Id.* at p. 1366.)

In *Wilcox v. Superior Court, supra,* 27 Cal.App.4th at page 820, the Court of Appeal for this appellate district, Division Seven, made a similar observation. Our colleague, Associate Justice Earl Johnson stated: "[T]he statute requires the defendant to make a prima facie showing the plaintiff's suit arises 'from any act of [defendant] in furtherance of [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue.' (§ 425.16, subd. (b).) . . . Thus, if the defendant's act [were] a lawsuit against a developer the defendant would have a prima facie First Amendment defense. [Citation.] But, if the defendant's act was burning down the developer's office as a political protest the defendant's motion to strike could be summarily denied without putting the developer to the burden of establishing the probability of success on the merits in a tort suit against defendant." (*Ibid.*)

We reach the same conclusion. It is undisputed the underlying lawsuit did not arise from a protected exercise of the petition right. The trial and appellate courts have so held. That conclusion is final. The underlying lawsuit was meritless and was brought in order to punish plaintiff for exercising her constitutional rights. It was not brought to vindicate the Hafifs' legally cognizable rights. It was not a *valid* exercise of constitutional petition rights. As a result, defendants' conduct in the underlying litigation is not entitled to section 425.16 protection.

None of the Supreme Court's three recent decisions concerning the special motion to strike, *Equilon Enterprises, LLC v. Consumer Cause, Inc., supra,* __ Cal.4th ___, *City of Cotati v. Cashman, supra,* ___ Cal.4th ___, and *Navellier v. Sletten* (S095000, Aug. 29, 2002) ___ Cal.4th ___ [2002 WL 1997905], was decided in the procedural context of the present case. None of those decisions considered whether the Legislature intended a special motion to strike to apply when the underlying lawsuit was dismissed pursuant to section 425.16. Therefore, the Supreme Court's recent special motion to strike decisions have no direct bearing on the case before us.

There is, however, language in *Navellier v. Sletten, supra,* ___ Cal.4th at page ___ [2002 WL 1997905, *7] that warrants discussion. The state court complaint in *Navellier* arose out of affirmative counterclaims the defendant had filed in a federal court action. Those counterclaims had been dismissed in the federal court on the ground the defendant had signed a general release encompassing them. In response to the defendant's special motion to strike, the plaintiffs argued section 425.16 was inapplicable because the petitioning activity, the federal counterclaims, were invalid. The Supreme Court disagree. It held: "That the Legislature expressed a concern in the statute's preamble with lawsuits that chill valid exercise of First Amendment rights does not mean that a court may read a separate proof-of-validity requirement into the operative sections of the statute. [Citations.] Rather, any 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.' [Citation.] Plaintiffs' argument 'confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits.' [Citation.] [¶] Plaintiffs' argument also runs contrary to the legislative design. 'The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish [his or] her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the [secondary] inquiry as to whether the plaintiff has established

a probability of success would be superfluous.' [Citations.]" (*Navellier v. Sletten, supra,* ___ Cal.4th at p. ___ [2002 WL 1997905, *7].)

The present case is distinguishable. We do not read a proof-of-validity requirement into section 425.16. Defendants were at no time required, in order to invoke the special motion to strike, to establish that their actions were constitutionally protected under the First Amendment as a matter of law. Rather, it had been conclusively established that the underlying action, defendants' petition activity, was subject to and concluded pursuant to section 425.16. We hold only that when there has been a final determination that the petition activity in question was dismissed pursuant to section 425.16, that conduct may not secure the protection of a special motion to strike in a later lawsuit.

Defendants argue that section 425.16 necessarily applies to the present malicious prosecution lawsuit. In *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087-1088, the Court of Appeal held a malicious prosecution lawsuit "may" be subject to a special motion to strike. However, *Chavez* did not involve an underlying lawsuit that had been dismissed pursuant to section 425.16. *Chavez* did not address the present situation where the underlying lawsuit did not arise from the valid exercise of petition rights. *Chavez* is not controlling.

IV. DISPOSITION

The orders denying defendants' motions to strike under Code of Civil Procedure section 425.16 are affirmed. Plaintiff, Peggy J. Soukup, is to recover her costs on appeal, jointly and severally, from defendants, Greg K. Hafif, Ronald C. Stock, Wylie A. Aitken, and the Law Offices of Wylie A. Aiken.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

I concur:

ARMSTRONG, J.

MOSK, J., Dissenting.

I respectfully dissent. I believe that plaintiff's lawsuit is subject to the provisions of Code of Civil Procedure, section 425.16 (section 425.16) and that plaintiff has not demonstrated a reasonable probability that she would prevail on her claims. Accordingly, the trial court should have granted defendants' section 426.16 motions (also known as SLAPP motions).[3]

Section 425.16 provides in relevant part: "A cause of action against a person arising from any act of the person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) Under this statute, the party moving to strike a cause of action (here, defendants) has the initial burden to show that the cause of action "arises from [an] act . . . in furtherance of the [moving party's] right of petition or free speech." (*Ibid.*; *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*); *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188 (*Mattel*).) Once that burden is met, the burden shifts to the opposing party (here, plaintiff) to demonstrate the "probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1); *Equilon*, *supra*, 29 Cal.4th at p. 67; *Mattel*, *supra*, 99 Cal.App.4th at p. 1188.)

In this case, plaintiff's causes of action for malicious prosecution and abuse of process arise from defendants' filing of a lawsuit as attorneys representing clients – a

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3 I refer to plaintiff Peggy J. Soukup as plaintiff, and to defendants Greg K. Hafif, Ronald C. Stock, Wylie A. Aitken, and the Law Offices of Wylie A. Aitken collectively as defendants.

lawsuit determined to be unmeritorious, but a lawsuit just the same.[4] Filing a lawsuit is an act in furtherance of the constitutional right of petition. (See, e.g., *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90 (*Navellier*); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Mattel*, *supra*, at p. 9; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087 (*Chavez*).) This is so *regardless of whether or not the lawsuit has merit*. (See *Mattel*, *supra*, 99 Cal.App.4th at p. 1188; *Chavez*, *supra*, 94 Cal.App.4th at pp. 1087-1088.) Plaintiffs have a constitutional right to file a lawsuit """"even if it is extremely unlikely that they will win."""" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817 (*Wilson*).)

Attorneys representing plaintiffs in such lawsuits also are protected by the constitutional right of petition or free speech as set forth in section 425.16. Subdivision (e) of that section states in relevant part that the term "act in furtherance of a person's right of petition or free speech" includes "(1) any written or oral statement or writing made before a . . . judicial proceeding; [or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body. . . ." Given that an attorney represents a client in a lawsuit by advocating orally and in writing in a judicial proceeding, that representation falls within the protection of section 425.16, especially in light of the Supreme Court's instruction (*Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1113) and statutory directive (§ 425.16, subd. (a)) to construe section 425.16 broadly. (See *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1116 ["the statute does not require that a defendant moving to strike under section 425.16 demonstrate that its protected statements or writings were made on its own behalf (rather than, for example, on behalf of its clients or the general public)"].)

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4 Plaintiff alleged claims for malicious prosecution and abuse of process against all defendants. Following the sustaining of a demurrer without leave to amend, the abuse of process claim survives only as to defendant Ronald C. Stock.

It may be that section 425.16 has, by virtue of its express language, been applied beyond that for which it was intended. Nevertheless, section 425.16 does not distinguish between different acts in furtherance of the constitutional right of petition or free speech, i.e., by recognizing some acts but not others. It includes the filing of lawsuits. There is no distinction between the type of lawsuit filed or in what manner the lawsuit was resolved or terminated. (See *Navellier*, *supra*, 29 Cal.4th at p. 92.) A lawsuit dismissed by summary judgment, demurrer, or a SLAPP motion is still a lawsuit in furtherance of a person's right of petition covered by section 425.16.

As the California Supreme Court recently explained in *Navellier*, the issue of whether defendants' underlying lawsuit had merit – and thus whether defendants' act in filing it is constitutionally protected as a matter of law – is not relevant to defendants' initial burden on a SLAPP motion. (*Navellier*, *supra*, 29 Cal.4th at pp. 94-95; see also *Chavez*, *supra*, 94 Cal.App.4th at p. 1089; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305 ["The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law"].) Instead, the merits of the underlying lawsuit are relevant only to the second step of the SLAPP motion, i.e., plaintiff's burden to show a reasonable probability of prevailing on her malicious prosecution and abuse of process claims. (*Navellier*, *supra*, 29 Cal.4th at pp. 94-95; *Chavez*, *supra*, 94 Cal.App.4th at pp. 1089-1090.) "Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens. [Citation.] A limited exception to the rule precluding a court from determining the validity of the asserted constitutional right in the first step of the anti-SLAPP analysis applies only where the *defendant indisputably concedes* the claim arose from illegal or constitutionally unprotected activity." (*Chavez*, *supra*, 94 Cal.App.4th at p. 1090, italics added.)

In this case, unlike *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, disapproved on another ground in *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, defendants do not concede that the underlying lawsuit was illegal

or constitutionally unprotected, even though the trial court dismissed it under section 425.16 and the appellate court affirmed the dismissal. Accordingly, I would hold that defendants met their burden to show that plaintiff's claims arise from an act in furtherance of defendants' constitutional right of petition. Thus, under my conclusions, it would be necessary to determine whether plaintiff met her burden to show a reasonable probability of prevailing on her claims.

The process used to determine whether parties opposing a SLAPP motion have met their burden is similar to the process used to determine whether parties opposing a motion for summary judgment have met their burden: "a probability of prevailing is established if the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for plaintiff." (*Mattel*, *supra*, 99 Cal.App.4th at p. 1188.) Whether plaintiff has established her prima facie case is a question of law. (*Wilson*, *supra*, 28 Cal.4th at p. 821 ["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"].)

Section 426.16 by its own terms is to be "construed broadly" (Code Civ. Proc., § 425.16, subd. (a)), and there is a "general disfavor in the law for claims of malicious prosecution" (*Loomis v. Murphy* (1990) 217 Cal.App.3d 589, 594). It is difficult to determine the role these principles should play in coming to a conclusion as to whether a party has submitted enough evidence to show a probability of prevailing on the merits in a malicious prosecution action. Here, as I shall discuss, plaintiff has not made such a showing, whatever the role of these general principles. But those principles may, to some, give justification to my conclusion.

To establish a claim for malicious prosecution, plaintiff must show that the underlying action (1) was commenced by or at the direction of defendants and was pursued to a legal termination in favor of plaintiff, (2) was brought without probable

cause, and (3) was initiated with malice. (*Mattel*, *supra*, 99 Cal.App.4th at p. 1190, citing *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50.) The second element — whether defendants had probable cause to bring the underlying lawsuit — is a question of law. (*Wilson*, *supra*, 28 Cal.4th at p. 817, citing *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 874-877 (*Sheldon Appel*).)

Plaintiff's allegations of malicious prosecution are directed at the attorneys representing unsuccessful parties (hereafter the Hafifs) in the underlying action against plaintiff and several other parties (for the sake of clarity, I refer to all of the parties against whom the underlying action was brought collectively as the claimants). The facts before the trial court establish probable cause to commence the underlying action and therefore insulate both the Hafifs and their attorneys—the defendants in this case.

These facts include the number of cases and claims the claimants filed in close proximity with each other against the Hafifs and the disposition of those cases and claims generally in favor of the Hafifs; the press coverage that might seem orchestrated by the claimants; the apparent communication among the various claimants, including plaintiff, all of whom were former clients and employees of the Hafifs; an apologetic acknowledgement from a lawyer representing the claimants that the claims lacked merit; and an apparent effort to have the Hafifs relinquish claims for fees and costs from clients taken by former employees. These facts, even though later contested, were adequate to give the Hafifs (represented by defendants) the right to bring the underlying action. This is so even where "it is very doubtful the claim will ultimately prevail." (*Wilson, supra,* 28 Cal.4th at p. 824.)

Relying upon these facts, a trial court ruled in favor of the Hafifs in a malicious prosecution action brought against them by one of the claimants whom the Hafifs sued in the same underlying action at issue here and arising out of that underlying action. The trial court determined that the Hafifs had probable cause to bring the action against all of the claimants sued in the underlying action, including plaintiff. Such a ruling is consistent with and supportive of defendants' position that the Hafifs (and therefore

defendants) had probable cause to file the underlying action against plaintiff. In addition, the Hafifs' case against one of the claimants survived a summary judgment motion.

Also supporting defendants' position that there was probable cause is the following statement by the Court of Appeal for the Fourth District in affirming the dismissal of the Hafifs' underlying lawsuit against the claimants (one of whom was Terrie Hutton): "The basis for the complaint's allegations against Hutton and Soukup was the newspaper articles. The articles accurately reflected that complaints had been made to the State Bar and to the Department of Labor and the contents of those complaints. The only evidence potentially showing merit in Hafif's claims came from Hutton's diaries, which were prepared for transmission to her lawyer. The trial court properly concluded they were inadmissible. Hafif failed to meet their burden of establishing a probability of succeeding in the claims against Hutton and Soukup." The appellate court's statement that Hutton's diaries "potentially show[ed] merit" in the Hafifs' claims in the underlying lawsuit supports defendants' assertion that they had probable cause to file the lawsuit on behalf of the Hafifs.[5] In fact, the trial court in the underlying lawsuit relied upon those diaries to deny Hutton's summary judgment motion (a different judge subsequently granted plaintiffs' SLAPP motion).

That plaintiff submitted evidence contradicting the allegations in the underlying action does not establish a lack of probable cause. First, in determining "probable cause," — i.e., whether the prior action was "objectively tenable" (*Sheldon Appel, supra,* 47 Cal.3d at pp. 883, 878) — the court views the facts known to the party at the time of the filing of the action and reasonable inferences therefrom, because the probable cause issue rests on whether defendants had probable cause to *initiate* the lawsuit. (See *Vanzant v. DaimlerChrysler Corp.* (2002) 96 Cal.App.4th 1283, 1290-1291.) Second, even if defendants were aware of contradictory evidence at the time they filed the

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[5] Admittedly, the statement that this was the "only evidence" might be viewed as helpful to plaintiffs' position, although the trial court did suggest that the appellate court's statement may answer the probable cause question in the Hafifs' favor.

underlying lawsuit, plaintiff cannot establish lack of probable cause unless that evidence *negates* the evidence upon which defendants and their clients relied when they filed the lawsuit. If plaintiff's evidence simply contradicts defendants' evidence and raises a triable issue of fact on the underlying claims, plaintiff cannot prevail on a malicious prosecution claim unless she can show that defendants' evidence is false. (See *Roberts v. Sentry Life Ins.* (1999) 76 Cal.App.4th 375 [holding that denial of summary judgment motion brought by a defendant who later prevailed at trial precludes malicious prosecution by defendant against plaintiff when summary judgment motion was denied on the ground that there was a disputed issue of material fact, unless it is shown that the evidence in opposition to summary judgment motion was false].)

One of the defendants, Ronald C. Stock, was not even counsel for any party at the inception of the underlying action.

For those reasons, based on the record before the court,[6] I conclude that defendants have established that they had probable cause to file on behalf of their clients the underlying action and that plaintiff has not carried her burden to show she would prevail on her malicious prosecution claims.[7] Moreover, plaintiff did not establish a probability that she would prevail on her other cause of action for the abuse of process as pleaded. Filing an action for an improper purpose does not constitute an abuse of process. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169.) Plaintiff did not allege or set forth facts showing "some

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[6] The trial court did not reach the issue of probable cause and did not rule on various evidentiary objections. Defendants requested that the trial court and this court take judicial notice of the files in a related case brought against the Hafifs (Court of Appeal Case No. B152759). The trial court did not rule on this request, but I am entitled to take such judicial notice. (See *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 483, fn. 3.)

[7] My determination regarding probable cause is based on the record on the SLAPP motion, which motion was filed with defendants' answer to the complaint. As the case proceeds, plaintiffs may be able to provide additional material to support their contention that defendants did not have probable cause.

substantial use or misuse of the judicial process beyond the mere filing of the prior action" (*Loomis v. Murphy*, *supra*, 217 Cal.App.3d at p. 595) necessary for an abuse of process claim.

For the above reasons, I conclude that defendants' SLAPP motion should have been granted. Therefore, I respectfully dissent.

MOSK, J.