

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TERRIE HUTTON,

Plaintiff and Respondent,

v.

HERBERT HAFIF et al.,

Defendants and Appellants.

B162572

(Los Angeles County  
Super. Ct. No. BC241082)

APPEAL from an order of the Superior Court of Los Angeles County, Paul Gutman, Judge. Reversed with directions.

Cheong, Denove, Rowell & Bennett, John D. Rowell for Plaintiff and Respondent.

Law Offices of Herbert Hafif, Jeanne A. Sterba; and Law Offices of James J. Moneer, James J. Moneer for Defendants and Appellants.

## I. INTRODUCTION

Herbert Hafif, Cynthia D. Hafif, Gregory K. Hafif, and the Law Offices of Herbert Hafif (the Hafif firm) (defendants), appeal from an order denying their special motion to strike (Code Civ. Proc.,<sup>1</sup> § 425.16) a malicious prosecution action brought by Terrie Hutton (plaintiff). The present lawsuit arose after an action brought by defendants was dismissed pursuant to section 425.16. We reverse the order and direct the trial court to grant the section 425.16 motion in the present lawsuit.

## II. BACKGROUND

### A. The First Lawsuit

Plaintiff originally sued Herbert Hafif and the Hafif firm for legal malpractice on June 29, 1993. Plaintiff's legal malpractice action against Herbert Hafif and the Hafif firm was dismissed after a demurrer to her second amended complaint was sustained without leave to amend. Los Angeles Superior Court Judge Melvin Grover imposed \$25,000 in sanctions against plaintiff and her attorney, Sassoon Sales, for filing in bad faith a frivolous lawsuit. The judgment of dismissal and the sanctions order were reversed on appeal. Division Two of the Court of Appeal for this appellate district found plaintiff had stated a fiduciary duty breach cause of action. (*Hutton v. Hafif* (Aug. 20, 1997, B088405) [nonpub. opn.].) According to the superior court's online records, plaintiff's legal malpractice action was later dismissed for failure to prosecute. (<http:>

---

<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise noted.

//www.lasuperiorcourt.org/CivilCaseSummary/casesummary.asp? Referer = index&divCode = CV & Case = BC084002Source // CAS.)

## B. The Second Lawsuit

In the second lawsuit, *Law Offices of Herbert Hafif v. Killingsworth* (Super Ct. Orange County, 1996, No. 729347), defendants alleged plaintiff had conspired with others to coerce financial concessions from the Hafif firm by bringing specious legal malpractice lawsuits against it and instigating negative publicity about it. The original *Killingsworth* complaint, filed on May 6, 1994, asserted causes of action against plaintiff for fraud, criminal profiteering, tortious interference with business relations, slander and libel, and privacy invasion. The causes of action asserted against plaintiff in the second amended complaint in *Killingsworth*, filed on October 13, 1994, were for malicious prosecution, defamation, and tortious interference with business relations.

In addition to the fact that plaintiff filed a legal malpractice action against Mr. Hafif and his firm, which the trial court found to be frivolous, the principle conspiracy evidence against her consisted of diaries she had kept. The diaries purportedly document plaintiff's contacts with other members of the alleged conspiracy. Orange County Superior Court Judge Leonard Goldstein denied plaintiff's summary judgment motion in the second lawsuit. Judge Goldstein found there were triable issues of material fact as to plaintiff's participation in the alleged conspiracy based on her diaries. Plaintiff's subsequent special motion to strike pursuant to section 425.16 was granted. In connection with that motion, Orange County Superior Court Judge Robert E. Thomas ruled that plaintiff's diaries were inadmissible. Division Three of the Court of Appeal for the Fourth Appellate District affirmed Judge Thomas's order granting the special motion to strike. (*Law Offices of Herbert Hafif v. Soukup* (April 27, 2000, G020977) [nonpub. opn.].) The Court of Appeal held in part: "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.” (*Id.*, typed opn. at p. 6.) As discussed below, the record before us shows plaintiff had prepared *summaries* of her diary entries—but not the diaries themselves—for Mr. Sales’s use.

### C. The Third Lawsuit

On November 30, 2002, plaintiff filed the present action alleging the second lawsuit, the Killingsworth matter, was maliciously prosecuted against her. On July 20, 2001, defendants filed a special motion to strike the present malicious prosecution action. Defendants presented evidence that: a former associate had left the Hafif firm, had taken clients with him, and had then sought to coerce defendants to relinquish claims for fees and costs in connection with those matters; further, numerous frivolous legal malpractice claims by former clients and State Bar of California complaints had been subsequently filed against them and negative publicity disseminated, in close proximity to each other; there was communication among the alleged conspirators, all former clients or employees of defendants; and a lawyer who represented some of the former clients in their legal malpractice actions subsequently apologized to defendants. Defendants argued in part that probable cause was established as a matter of law because Judge Goldstein had denied plaintiff’s summary judgment motion in the second lawsuit, the Killingsworth action. Plaintiff opposed defendant’s section 425.16 motion in this lawsuit. She presented evidence contradicting defendants’ claim she had participated in a conspiracy against them. The special motion to strike was denied by Judge Alban I. Niles.

### III. DISCUSSION

#### A. General Principles

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 v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 68, fn. 5.) Section 425.16 authorizes a court to summarily dismiss such meritless suits. The purpose of the statute is 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 right 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 v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 58; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415.)

Section 425.16, subdivision (e), defines acts in furtherance of free speech or petition rights in connection with a public issue by setting forth four categories of conduct to which the statute applies. 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.” A specific public issue showing is required for acts claimed to fall under section 425.16, subdivisions (e)(3) and (e)(4), but not for acts claimed to fall under subdivisions (e)(1) and (e)(2). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1111-1123; *Du Charme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107, 112-114.)

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 the plaintiff’s cause of action arises out of the defendant’s actions in the furtherance of petition or free speech rights. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67; *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.) 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. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 66.) Nor must a defendant show that the action had the effect of chilling free speech or petition rights. (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 88; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75.)

Second, once the defendant meets this burden, the obligation shifts to the plaintiff to establish a probability that it will prevail on the merits. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67; *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1115.) As to the second step of the weighing process, the Supreme Court in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, described the trial judge’s duties as follows: “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.]” (Orig. italics; see *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.) We conduct independent review of the trial court’s decision. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, *supra*, 65 Cal.App.4th at p. 721; *Paul for Council v. Hanyecz*, *supra*, 85 Cal.App.4th at p. 1364.)

## B. Defendant’s Initial Burden

Here, defendants met their initial burden of establishing a prima facie case that plaintiff’s causes of action arose out of their actions in the furtherance of their petition rights. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, *supra*, 65 Cal.App.4th at p. 721.) Plaintiff’s malicious prosecution claim arises out of defendants’ filing and prosecution of the second lawsuit, the Killingsworth action. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733-741; *Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 89-95.)

### C. Plaintiff's Burden

We turn to the question whether plaintiff established a probability that she will prevail on the merits. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67; *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1115.) The California Supreme Court has explained: “[I]n order to establish a cause of action for malicious prosecution . . . 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 [the plaintiff’s] favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].’ [Citations.]” (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871-872; accord, *Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 313.) Whether probable cause exists is a question of law. (*Wilson v. Parker, Covert & Chidester*, *supra*, 28 Cal.4th at p. 817; *Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512, disapproved on another point in *Zamos v. Stroud* (2004) 32 Cal.4th 958, \_\_\_\_ [12 Cal.Rptr.3d 54, 65].)

Judge Goldstein’s denial of plaintiff’s summary judgment motion in the second lawsuit, the Killingsworth action (in which she was a defendant) on the grounds there were triable issues of material fact established that probable cause existed as a matter of law. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382-385; accord, *White v. Lieberman* (2002) 103 Cal.App.4th 210, 217-218; cf. *Wilson v. Parker, Covert & Chidester*, *supra*, 28 Cal.4th at pp. 816-826 [trial court’s denial of defendant’s section 425.16 motion to strike established probable cause].) As the Supreme Court explained in *Wilson*, “Denial of a defense summary judgment motion on grounds that a triable issues exists . . . while falling short of a determination of the merits, establishes that the plaintiff has substantiated, or can substantiate, the elements of his or her cause of action with evidence that, if believed, would justify a favorable verdict.” (*Wilson v. Parker, Covert & Chidester*, *supra*, 28 Cal.4th at p. 824; accord *Bealmear v. So. Cal. Edison Co.* (1943) 22 Cal.2d 337, 340.)

Plaintiff contends, but has not established, that the summary judgment denial in the second lawsuit, the Killingsworth action, was obtained by material misrepresentations of fact with respect to her diaries. Plaintiff claims defendants were in possession of her diary entries, on which they relied in opposing that summary judgment motion, only through a court reporter's inadvertent error, not by any legitimate means, and in violation of a stipulation among counsel; therefore, defendants' authentication of the evidence rested on material misrepresentations of fact. Defendants assert plaintiff was ordered to produce the diaries in the second lawsuit; however, their citation to the record does not support that claim. In any event, the record before us does *not* support plaintiff's claim. At her deposition in the underlying action, on April 24, 1995, plaintiff said she had prepared *summaries* of her diary entries—but not the diaries themselves—for “the use of” her attorney. In addition, there was an indication the summaries reflected communications between plaintiff and her then attorney, Mr. Sales. Counsel agreed the summaries would not be attached as an exhibit to plaintiff's deposition transcript until they had resolved admissibility issues. There is no evidence the diary entries, as opposed to the summaries, were not made at the time of the events recorded therein. Moreover, later, by way of a declaration dated October 5, 1995, *plaintiff* herself introduced her diary entries as evidence in the second lawsuit, the Killingsworth action. Judge Goldstein subsequently relied on the diaries in denying plaintiff's summary judgment motion in the second lawsuit, the Killingsworth action, on February 6, 1996. On this record, we cannot conclude that the order denying summary judgment in the second lawsuit, the Killingsworth action, was obtained by material misrepresentations of fact. Judge Goldstein, who ruled on the summary judgment motion in the underlying case, made no such finding.

We are mindful that Judge Thomas granted plaintiff's section 425.16 motion to strike in the second lawsuit, the Killingsworth action, based on the *exclusion* of the very evidence on which Judge Goldstein had *relied* in denying her summary judgment motion. Judge Thomas's ruling granting the special motion to strike in the second lawsuit, the

Killingsworth action, did not undermine the effect of the Judge Goldstein’s order denying summary judgment in terms of the probable cause analysis. As the Supreme Court held in *Wilson*, “Claims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.” (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 818; accord, *Bealmear v. So. Cal. Edison Co., supra*, 22 Cal.2d at p. 340.) As noted above, plaintiff submitted evidence contradicting defendants’ allegations in an effort to establish evidentiary support for her malicious prosecution claim in this lawsuit. Defendants’ showing they had probable cause to bring the underlying action, however, defeats that evidence. (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 821; see *Paul for Council v. Hanyecz, supra*, 85 Cal.App.4th at p. 1365.) Accordingly, the order denying defendants’ section 425.16 special motion to strike must be reversed.

#### IV. DISPOSITION

The order denying the special motion to strike pursuant to Code of Civil Procedure section 425.16 brought by defendants, Herbert Hafif, the Law Offices of Herbert Hafif, Cynthia D. Hafif, and Gregory K. Hafif, is reversed. The trial court is directed to enter a new order granting the special motion to strike. Defendants, Herbert Hafif, the Law Offices of Herbert Hafif, Cynthia D. Hafif, and Gregory K. Hafif, are to recover their costs on appeal from plaintiff, Terrie Hutton. Any attorney fee motion must be pursued in compliance with rule 870.2(b) of the California Rules of Court.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.