SUMMARY
February 15, 2024

2024COA17

No. 23CA1333, *Schnelle v. Cantafio* — Civil Procedure — Summary Judgment — Motion for Directed Verdict; Torts — Malicious Prosecution — Lack of Probable Cause

A division of the court of appeals decides an interlocutory appeal under C.A.R. 4.2, considering whether the denial of a defense motion for summary judgment or a directed verdict establishes probable cause for bringing a claim as a matter of law, thus automatically defeating a later malicious prosecution claim. The division first addresses the reasons why it has jurisdiction under C.A.R. 4.2. It then goes on to address the impact of the denial of a summary judgment or directed verdict motion in a previous case. The division concludes that the denial does not establish a presumption of probable cause but, instead, is merely a

factor that may be considered in determining whether there was probable cause to bring the claims in the previous case.

Accordingly, the division affirms the trial court's order denying defendants' motion to dismiss the plaintiff's malicious prosecution claim.

COLORADO COURT OF APPEALS **2024COA17**

Court of Appeals No. 23CA1333
Routt County District Court No. 22CV30074
Honorable Michael A. O'Hara III, Judge

Kaylee Schnelle,

Plaintiff-Appellee,

v.

Ralph Cantafio, David Feeder, Lilly Lentz, Mike Lazar, Cantafio & Song PLLC, Mark Fischer, and Patricia Ann Scott,

Defendants-Appellants.

ORDER AFFIRMED AND CASE REMANDED WITH DIRECTIONS

Division A
Opinion by JUDGE GOMEZ
Fox and Kuhn, JJ., concur

Announced February 15, 2024

Clark L. Davidson, Steamboat Springs, Colorado, for Plaintiff-Appellee

Gordon Rees Scully Mansukhani, LLP, John M. Palmeri, John R. Mann, William G. Dewey, Denver, Colorado, for Defendants-Appellants Ralph Cantafio, David Feeder, Lilly Lentz, Mike Lazar, Cantafio & Song PLLC, Mark Fischer,

Coan, Payton & Payne, LLC, Brett Payton, Greeley, Colorado, for Defendant-Appellant Patricia Ann Scott

¶ 1 In this interlocutory appeal, which we accepted under C.A.R. 4.2, we consider whether the denial of a defense motion for summary judgment or a directed verdict establishes probable cause for bringing a claim as a matter of law, thus automatically defeating a later malicious prosecution claim. We conclude that it does not. Accordingly, we affirm the trial court's decision denying a motion to dismiss the malicious prosecution claim that plaintiff, Kaylee Schnelle (formerly Kaylee Maykranz), brought against defendants, Ralph Cantafio, David Feeder, Lilly Lentz, Mike Lazar, Mark Fischer, Patricia Ann Scott, and Cantafio & Song PLLC.

I. Background

¶ 2 In a previous case, Scott sued Schnelle for professional negligence, alleging that Schnelle mishandled her responsibilities as the listing broker for the sale of Scott's commercial property, causing the property to be sold for less than its fair market value.[1] The other defendants are the attorneys who represented Scott in that case, their law firm, and other members of the law firm.

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[1] We take judicial notice of the court filings in the previous related case under CRE 201(b). *See Doyle v. People*, 2015 CO 10, ¶ 12; *People in Interest of I.S.*, 2017 COA 155, ¶ 7.

¶ 3 In that previous case, Schnelle moved for summary judgment on the basis that Scott couldn't establish the necessary elements of breach of the professional duty of care, damages, or causation to support her claim. The trial court denied the motion, concluding that "[g]enuine issues of material fact exist about whether [Schnelle] was professionally competent and properly marketed the [p]roperty" and "whether [Scott] would have obtained a more favorable result but for [Schnelle's] alleged professional negligence." The case proceeded to a jury trial. At the close of Scott's case, Schnelle made an oral motion for a directed verdict, which the court denied. The jury returned a verdict for Schnelle.

¶ 4 Schnelle then brought this case, initially asserting claims for malicious prosecution, civil conspiracy, intentional interference with economic advantage, and outrageous conduct. In response to defendants' C.R.C.P. 12(b)(5) motion to dismiss, Schnelle voluntarily dismissed the intentional interference with economic advantage claim and the trial court dismissed the civil conspiracy and outrageous conduct claims. But the court denied the motion as it related to the malicious prosecution claim. In doing so, the court rejected defendants' argument that the denial of Schnelle's motions

for summary judgment and a directed verdict in the previous case prevented her from establishing the probable cause element of her malicious prosecution claim in this case.

¶ 5 Pursuant to C.A.R. 4.2(c), defendants timely sought certification of the trial court's ruling on the malicious prosecution claim. The trial court ordered the certification over Schnelle's objection. Defendants then filed a petition in this court to allow the interlocutory appeal under C.A.R. 4.2(d), and we granted it.

II. Jurisdiction

¶ 6 Before we turn to the merits, we first explain why we have jurisdiction over this interlocutory appeal.

¶ 7 With limited exceptions, this court has jurisdiction only over final judgments — that is, judgments that end an action, leaving nothing further for the ruling court to do in order to completely determine the parties' rights. *See Wilson v. Kennedy*, 2020 COA 122, ¶¶ 5-7. One such exception lies in section 13-4-102.1(1), C.R.S. 2023, and C.A.R. 4.2. Under these provisions, this court, in its discretion, may review a non-final order in a civil case where the trial court certifies and we agree that (1) immediate review may promote a more orderly disposition or establish a final disposition of

the litigation; (2) the order involves a controlling question of law; and (3) that question of law is unresolved. *S. Conejos Sch. Dist. RE-10 v. Wold Architects Inc.*, 2023 COA 85, ¶ 11.

¶ 8 We conclude that these three requirements are satisfied here. First, our immediate review of the question presented to us — whether the denial of a motion for summary judgment or a directed verdict establishes probable cause for bringing a claim as a matter of law — may establish a final disposition of the litigation. If we were to answer this question in the affirmative, then Schnelle's malicious prosecution claim would fail as a matter of law. *See Montgomery Ward & Co. v. Pherson*, 129 Colo. 502, 507, 272 P.2d 643, 645 (1954) ("The existence of probable cause is alone sufficient to relieve a defendant of a charge of malicious prosecution."). And the rest of Schnelle's claims have already been dismissed. Thus, resolution of the question could end this litigation. *See Indep. Bank v. Pandy*, 2015 COA 3, ¶ 10 (finding the first requirement satisfied in similar circumstances), *aff'd*, 2016 CO 49.

¶ 9 Second, the question presented to us is a controlling question of law. It is a question of law concerning the effect of rulings under C.R.C.P. 56 and 50. *See Boudette v. State*, 2018 COA 109, ¶ 20

(interpretation of procedural rules presents a question of law). And whether the question may be dispositive of the case is one factor we may consider in deciding whether the question is controlling. *See Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 2019 COA 147, ¶ 17. For the same reasons, the question presented is potentially case dispositive; thus, it is controlling. *See Indep. Bank*, ¶ 11 (finding the second requirement satisfied in similar circumstances).

¶ 10 And third, the question presented is unresolved. While many other jurisdictions have considered this question, no published appellate court case in Colorado has addressed it. *See* C.A.R. 4.2(b)(2) (for state law issues, a question is unresolved if it hasn't been resolved by our state supreme court or determined in a published decision of this court). And while a division of this court has addressed a similar question in a decision concerning an abuse of process claim, our supreme court reversed the decision without addressing that question. *See Health Grades, Inc. v. Boyer*, 2012 COA 196M, *rev'd*, 2015 CO 40. Accordingly, the third requirement is satisfied. *See S. Conejos Sch. Dist. RE-10*, ¶ 15 (finding this requirement satisfied where no published Colorado case had addressed the question).

III. Standard of Review and Legal Standards

¶ 11 We review de novo a trial court's ruling on a Rule 12(b)(5) motion to dismiss for failure to state a claim. *Alderman v. Bd. of Governors of Colo. State Univ.*, 2023 COA 61, ¶ 11. To survive such a motion, a plaintiff must plead sufficient facts to suggest plausible grounds to support a claim for relief. *Warne v. Hall*, 2016 CO 50, ¶¶ 9, 24; *Coyle v. State*, 2021 COA 54, ¶ 25.

¶ 12 Malicious prosecution provides a remedy when "a person knowingly initiates baseless litigation," including, among other things, a baseless criminal prosecution or civil proceeding. *Parks v. Edward Dale Parrish LLC*, 2019 COA 19, ¶ 11 n.3 (quoting *Mintz v. Accident & Injury Med. Specialists, PC*, 284 P.3d 62, 66 (Colo. App. 2010)); *see also Walford v. Blinder, Robinson & Co.*, 793 P.2d 620, 623 (Colo. App. 1990). To prevail on a claim for malicious prosecution, a plaintiff must establish five elements: (1) the defendant's contribution to bringing a previous case against the plaintiff; (2) the ending of the previous case in favor of the plaintiff; (3) lack of probable cause; (4) malice; and (5) damages. *Hewitt v. Rice*, 154 P.3d 408, 411 (Colo. 2007). Only the third element — lack of probable cause — is at issue in this appeal.

¶ 13 Probable cause generally requires that there be "a belief held in good faith by the [claimant in the previous case] in the guilt of the [defendant]" and that the belief be "reasonable and prudent." *Montgomery Ward*, 129 Colo. at 508, 272 P.2d at 646; *accord Salazar v. Pub. Tr. Inst.*, 2022 COA 109M, ¶ 27. Our supreme court has described probable cause in this context in various ways — for instance, as an "honest belief in guilt supported by facts sufficiently strong to warrant that belief in a cautious [person]," *Smith v. Hensley*, 107 Colo. 180, 184, 109 P.2d 909, 911 (1941); an "honest and reasonable belief that [someone] committed [a particular act]," *O'Malley-Kelley Oil & Auto Supply Co. v. Gates Oil Co.*, 73 Colo. 140, 143, 214 P. 398, 399 (1923); and "a state of facts and circumstances as would lead a [person] of ordinary caution and prudence and good conscience, impartially, reasonably, and without prejudice, upon the facts within his knowledge, to believe that the person accused is guilty," *Clement v. Major*, 1 Colo. App. 297, 301, 29 P. 19, 20 (1892) (citations omitted).

IV. Malicious Prosecution

¶ 14 In analyzing Schnelle's malicious prosecution claim, the trial court noted that cases from other jurisdictions generally fall into

two camps on the question of how the denial of a defense summary judgment or directed verdict motion affects a later determination of probable cause for a malicious prosecution or similar claim.

¶ 15 In one camp, several courts have held that the denial of such a motion creates a presumption of probable cause. *See, e.g.*, *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1080-81 (8th Cir. 1999); *Havilah Real Prop. Servs., LLC v. Early*, 88 A.3d 875, 884-86 (Md. Ct. Spec. App. 2014); *Roberts v. Sentry Life Ins.*, 90 Cal. Rptr. 2d 408, 413-14 (Ct. App. 1999); *Monroe v. Sigler*, 353 S.E.2d 23, 25-26 (Ga. 1987); *see also Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002) (applying the same rule following the denial of a motion to dismiss an earlier lawsuit under the state's anti-SLAPP, or strategic lawsuit against public participation, statute). These courts have recognized limited means to rebut the presumption, such as by showing that the previous ruling was on procedural or technical grounds rather than on the merits, was the result of fraud or corruption, or was obtained by false evidence. *See, e.g.*, *Havilah*, 88 A.3d at 886 n.20; *Monroe*, 353 S.E.2d at 25; *Wilson*, 50 P.3d at 741. And one court indicated that the presumption might not apply

if the previous ruling was "tentative" rather than "firm." *Porous Media*, 186 F.3d at 1081.

¶ 16 One of the reasons courts have given for adopting this rule is premised on the procedural standards for summary judgment and directed verdict motions. As the Eighth Circuit noted, the federal standards for both types of motions require a court to resolve any factual disputes in the nonmovant's favor, give the nonmovant the benefit of all reasonable inferences from the evidence, and deny the motion if reasonable jurors could find for the nonmoving party. *Id.* at 1080-81. Thus, the court explained, the denial of such a motion "demonstrate[s] that the [claims] and the evidence supporting them had met this exacting test, *i.e.*, that reasonable jurors could differ as to whether [the claimant] should prevail." *Id.* at 1080. And "[i]f reasonable jurors could find in [the claimant's] favor, it follows that there was probable cause for bringing the [claims], that is, they were pursued with a reasonable belief of success." *Id.*; *see also Roberts*, 90 Cal. Rptr. 2d at 413 (applying similar reasoning under the California rules).

¶ 17 Another reason courts have given for adopting this rule is the public policy of promoting access to the courts and, accordingly,

discouraging claims like malicious prosecution. *See, e.g.*, *Havilah*, 88 A.3d at 886; *Roberts*, 90 Cal. Rptr. 2d at 413; *Monroe*, 353 S.E.2d at 25-26.

¶ 18 In the other camp, several courts have considered the denial of summary judgment or a directed verdict not as presumptive proof but, at most, as a factor to consider in determining whether there was probable cause to support a claim. *See, e.g.*, *Eskamani v. Auto-Owners Ins. Co.*, 2020 UT App 137, ¶¶ 20-31; *Bacon v. Reimer & Braunstein, LLP*, 2007 VT 57, ¶¶ 6-8; *Wolfinger v. Cheche*, 80 P.3d 783, 789-92 (Ariz. Ct. App. 2003); *Kirk v. Marcum*, 713 S.W.2d 481, 485 (Ky. Ct. App. 1986).

¶ 19 These courts have applied various rationales in declining to apply a presumption of probable cause. One court reasoned that under the procedural rules of that state (Arizona), a court could deny summary judgment even if there was no genuine dispute over a material fact, meaning that some meritless claims could survive. *Wolfinger*, 80 P.3d at 791. Another court reasoned that, with the "minimal showing necessary to defeat [a directed verdict] motion" — given that a court must draw all fair and rational inferences in favor of the claimant and can grant the motion only if the evidence is

insufficient to support a verdict for that party — "the denial of [such] a motion . . . does not establish that a plaintiff had probable cause to institute the civil proceeding." *Kirk*, 713 S.W.2d at 485.

¶ 20 And several courts have declined to apply a presumption based largely on the circumstances in which the underlying motion was resolved. *See, e.g.*, *Eskamani*, ¶¶ 30-31 (reasoning that the summary judgment ruling addressed only some of the elements of a claim, the others not having been challenged at that time); *Bacon*, ¶¶ 7-8 (reasoning that the summary judgment ruling occurred early in the case, before "any significant discovery," and "contain[ed] little analysis of the facts or law"); *Wolfinger*, 80 P.3d at 790-91 (reasoning that after denying summary judgment, the court granted judgment as a matter of law).

¶ 21 In an opinion that was later reversed on other grounds, a division of this court joined the second camp — at least with respect to an abuse of process claim. *See Health Grades*, ¶ 31.

¶ 22 In concluding that the abuse of process claim wasn't foreclosed by the denial of summary judgment on the underlying claims, the division reasoned that "[a] summary judgment motion may be denied for a number of reasons," such as a desire to avoid

"sift[ing] through the voluminous documents filed in support of or against it"; a sense that "further development of the case will sharpen the facts and law at issue, lead to a more accurate or just decision, or enhance the court's legal analysis"; or a conclusion that "a trial will actually consume less court time than would be needed to determine the summary judgment motion." *Id.* at ¶ 32 (citation omitted). The division also noted that the summary judgment ruling "contain[ed] little analysis of the facts or law as they relate[d] to [the claimant's] claims" and, thus, couldn't be considered a qualitative determination that there was reasonable factual support or substantial legal justification for those claims. *Id.* at ¶ 35.

¶ 23 In concluding that the abuse of process claim also wasn't foreclosed by the denial of a motion for a directed verdict on the underlying claims, the division reasoned that such a motion "may be denied because a jury verdict is less likely to be reversed on appeal and, if the verdict is contrary to the court's view of the reasonableness of the claims, the court can still correct the result with a judgment notwithstanding the verdict." *Id.* at ¶ 33. The division also remarked that the trial court's ruling consisted of "only one sentence" and didn't "include specific findings that [the

claimant's] claims were not devoid of a reasonable factual basis." *Id.* at ¶¶ 38-39.

¶ 24 The division nonetheless reversed the judgment in favor of the plaintiff on the abuse of process claim for another reason — that the trial court should've applied a heightened standard in assessing the jury's verdict on that claim. *Id.* at ¶¶ 41-45. It was on this basis that the supreme court reversed, concluding that the heightened standard didn't apply and, therefore, that the jury's verdict should be affirmed. *Boyer*, ¶¶ 15-16. The supreme court's decision didn't address the impact of the underlying summary judgment and directed verdict rulings. *See generally id.*

¶ 25 Of course, a claim for abuse of process is different than one for malicious prosecution. Most notably, an abuse of process claim — which provides a remedy for the bringing of otherwise-proper litigation in order "to coerce or compel a result that couldn't normally be obtained via the ordinary use of process" — doesn't include an element of probable cause. *Parks*, ¶¶ 11-12.

¶ 26 Still, we agree with the conclusion the division reached in *Health Grades*, albeit for slightly different reasons. *See Chavez v. Chavez*, 2020 COA 70, ¶ 13 (even in the absence of a reversal by

the supreme court, one division of the court of appeals isn't bound by the determination of another division).

¶ 27 Unlike the division in *Health Grades*, ¶ 32, we don't presume that a trial court would deny a meritorious summary judgment motion simply to avoid sifting through voluminous documents, encourage further development of the case, or save time. Rule 56 actually *requires* a court to grant summary judgment if a properly filed motion satisfies its standards. *See* C.R.C.P. 56(c) ("The judgment sought *shall* be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.") (emphasis added); *see also Antero Treatment LLC v. Veolia Water Techs., Inc.*, 2023 CO 59, ¶ 19 ("'Shall' is mandatory unless there is a clear indication otherwise." (quoting *Walton v. People*, 2019 CO 95, ¶ 13)).

¶ 28 The same isn't true of a directed verdict motion. Rule 50 doesn't include the type of mandatory language that appears in Rule 56. *See* C.R.C.P. 50. And our supreme court has established stringent standards for directed verdict motions, holding that they

should be granted "[o]nly in the clearest of cases, where reasonable minds can draw but one inference from the evidence." *Garcia v. Colo. Cab Co.*, 2023 CO 56, ¶ 19 (quoting *Lyons v. Nasby*, 770 P.2d 1250, 1256 (Colo. 1989)). Thus, we agree with the *Health Grades* division's supposition that a trial court may err on the side of denying a motion for a directed verdict to allow the jury to resolve an issue, as a jury verdict is less likely to be reversed on appeal and could be corrected after trial, if necessary, by granting a motion for judgment notwithstanding the verdict. *Health Grades*, ¶ 33.

¶ 29 We also have more fundamental concerns about a rule that would automatically bar a malicious prosecution claim, simply because of an earlier decision denying summary judgment or a directed verdict. Such a rule would give preclusive effect to the earlier denial, notwithstanding that it almost certainly wasn't subject to any potential appellate review. Absent some exception, such as a decision denying a claim to qualified immunity or granting a cross-motion for summary judgment, "[w]e do not review a denial of a motion for summary judgment because it is not a final order." *State Farm Mut. Auto. Ins. Co. v. Goddard*, 2021 COA 15, ¶ 54. Nor can a party immediately appeal the denial of a mid-trial

motion for a directed verdict; and if the jury later finds in the moving party's favor, that party won't have any basis to appeal the earlier adverse ruling. *See Potter v. Thieman*, 770 P.2d 1348, 1350 (Colo. App. 1989) (Parties who are not aggrieved by a judgment "have no standing to appeal from it."). But what if the denial of the motion for summary judgment or a directed verdict was erroneous? Under this rule, it would have preclusive effect regardless.

¶ 30 Essentially, we would be applying issue preclusion to the question of whether there was sufficient evidence to support the underlying claim, but without satisfaction of the requirements of issue preclusion. Under the doctrine of issue preclusion, "once a particular issue is finally determined in one proceeding, parties to this proceeding are barred from re-litigating that particular issue again in a second proceeding." *Foster v. Plock*, 2017 CO 39, ¶ 13. The doctrine applies only if (1) the first proceeding was decided on a final judgment on the merits; (2) the issue in the second proceeding is identical to an issue that was actually adjudicated in the first proceeding; (3) the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in the first proceeding; and (4) the party against whom issue preclusion is

asserted was a party or in privity with a party in the first proceeding. *Id.* We question whether the denial of a motion for summary judgment or a directed verdict could satisfy the second element of actually adjudicating an issue — even the issue of whether a claimant had sufficient support for a particular claim.[2]

¶ 31 But even assuming this element could be satisfied, issue preclusion doesn't apply if the determination of an issue in the first proceeding wasn't capable of being reviewed on appeal. *See State*

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[2] Because the definition of probable cause in our case law seems to include a subjective as well as an objective component — both that the plaintiff in the earlier case believed in good faith the defendant had engaged in wrongful conduct and that the plaintiff's belief was reasonable — it would seem that an earlier summary judgment or directed verdict ruling shouldn't have a preclusive effect. After all, even if the earlier ruling signified that there was sufficient evidence to support the claim, that wouldn't address whether for some other reason the plaintiff didn't in good faith believe in the merits of the claim. We don't rule on that basis, however, because we conclude that there is some uncertainty as to whether there actually is a subjective component to the element of probable cause. Our state supreme court has consistently treated this element as presenting a question of law, *see, e.g.*, *Montgomery Ward & Co. v. Pherson*, 129 Colo. 502, 507, 272 P.2d 643, 646 (1954); as noted earlier, the supreme court has used varying descriptions of probable cause, some of which suggest there is a subjective element to it, and some of which don't; and some courts in other jurisdictions have held that probable cause is a largely objective issue, and that issues concerning the plaintiff's subjective beliefs are more relevant to the separate element of malice, *see, e.g.*, *Sheldon Appel Co. v. Albert & Oliker*, 765 P.2d 498, 505-09 (Cal. 1989).

Farm Fire & Cas. Co. v. Mason, 697 P.2d 793, 795 (Colo. App. 1984) ("[W]e adopt the view set out in Restatement (Second) of Judgments § 28 ([Am. L. Inst.] 1982) that relitigation of the same issue in a subsequent action between the parties is not precluded if the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action."); *see also* Restatement (Second) of Judgments § 28 cmt. a ("[T]he availability of review for the correction of errors has become critical to the application of preclusion doctrine."); Restatement (Second) of Judgments § 27 cmt. h ("If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.").

¶ 32 Finally, we note that individual circumstances relating to how a particular summary judgment or directed verdict motion was

resolved make any categorical rule applying a presumption hard to maintain. As explained above, even the cases applying a presumption have recognized different ways to rebut it, such as showing that the previous ruling was on procedural or technical grounds, was the result of fraud or corruption, or was obtained by false testimony. One court adopting the presumption approach indicated that it might not apply if the earlier ruling was "tentative." *Porous Media*, 186 F.3d at 1081. And those cases declining to apply a presumption have offered various reasons, based on the individual circumstances in a particular case, for not doing so. For instance, the division in *Health Grades* expressed concern that the summary judgment and directed verdict rulings included little analysis of the factual basis for the claims. *Health Grades*, ¶¶ 35, 38-39. If so many circumstances might arise that make application of preclusion in a particular case unjustified, then it seems to us that a categorical rule simply doesn't work.

¶ 33 For all these reasons, we decline to adopt any presumption and instead hold that previous rulings on summary judgment and directed verdict motions are among the factors that may be considered in determining the existence of probable cause. We

therefore conclude that the trial court's denial of Schnelle's motions for summary judgment and a directed verdict in the previous case do not necessarily preclude her malicious prosecution claim in this case, though they are matters that may properly be considered in the determination of probable cause. Accordingly, we affirm the trial court's denial of defendants' motion to dismiss the malicious prosecution claim.

V. Disposition

¶ 34 The order is affirmed to the extent that it denied defendants' motion to dismiss the malicious prosecution claim, and the case is remanded to the trial court for further proceedings.

JUDGE FOX and JUDGE KUHN concur.