CASE NO. A10-863

State of Minnesota
In Court of Appeals

Chris Gregerson,

Plaintiff/Appellant

vs.

[Original Corporate Plaintiff][1], and [Owner of OCP],

Defendants,

Morgan Smith and Smith & Raver, LLP,

Defendants/Respondents,

Boris Parker, Saliterman & Siefferman, PC, and Bassford Remele, PA,

Defendants/Respondents,

and Vladimir Kazaryan,

Defendant/Respondent

APPELLANT'S BRIEF, ADDENDUM, AND APPENDIX

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1 As a result of a settlement with the original corporate plaintiff and it's owner, I am not publishing the names of those parties on-line. They have been replaced with generic terms in this brief. It is otherwise unchanged.

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LEGAL ISSUES

I. Did the district court err in granting respondents summary judgment on appellant's malicious prosecution claim based on lack of a genuine issue of material fact regarding (a) lack of probable cause for the underlying litigation and (b) malice?

The trail court held appellant failed to establish respondents knew their client was lying, and granted respondents summary judgment for lack of a genuine issue of material fact on the element of probable cause for the underlying litigation. The trial court also held there was no evidence of malice. Appellant raised these issue in his memorandum opposing summary judgment (AA-175) and preserved it by filing a timely appeal (AA-195).

Apposite authority:

Hoppe v. Klapperich, 28 N.W.2d 780 (Minn. 1947)

Dunham v. Roer, 708 N.W.2d 552 (Minn. App. 2006)

Allen v. Osco Drug, Inc., 265 N.W.2d 639 (Minn. 1978).

Sierra Club Foundation v. Graham, 85 Cal. Rptr. 2D 726 (1999)

II. Did the trial court err in finding respondents are not liable under Minn. Stat. §§ 481.07-.071?

In ruling on a motion to dismiss for failure to state a claim by the Parker defendants, the trial court held that respondents were not liable for damages under this statute because there was no attorney-client relationship between the plaintiff and defendants (Add. 5). Appellant opposed the dismissal (Plaintiff's memorandum of law in opposition to defendants motion to dismiss) and preserved the issue by filing a timely appeal (AA-195).

Apposite authority:

Baker v. Ploetz, 616 N.W.2d 263 (Minn. 2000)

Gilchrist v. Perl, 387 N.W.2d 412 (Minn. 1986)

Love v. Anderson, 240 Minn. 312 (1953)

Minn. Stat. §§ 481.07-.071

III. Did the district court abuse its discretion in denying appellant's motion to amend his Complaint to seek punitive damages based on lack of a *prima facie* case the defendants showed a deliberate disregard for the rights of others?

The court held that the Plaintiff's evidence did not provide *prima facie* proof the defendants showed a deliberate disregard for the rights of others. The Appellant raised this issue in his memorandum supporting punitive damages (AA-103) and preserved the issue by filing a timely appeal (AA-195).

Apposite authority:

Thompson v. Hughart, 664 N.W.2d 372 (Minn. Ct. App. 2003)

Gilchrist v. Perl, 387 N.W.2d 412 (Minn.1986)

Seltzer v. Morton, 154 P.3d 561 (Mont. 2007)

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IV. Did the trial court err in dismissing appellant's claim for abuse of process for failing to state a claim upon which relief can be granted?

The court held respondents engaged in a legitimate use of process to protect their client's business interests when bringing claims against Gregerson to shut down his web site. Appellant raised this issue in his memorandum of law opposing dismissal (Plaintiff's memorandum of in opposition to defendants motion to dismiss) and preserved it by filing this timely appeal (AA-195).

Apposite authority:

Kittler & Hedelson v. Sheehan Props., Inc., 295 Minn. 232, 203 N.W.2d 835 (1973).

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STATEMENT OF THE CASE

This case was brought in Hennepin County District Court and came before the Honorable John Q. McShane, judge of District Court. Plaintiff Gregerson (appellant) alleged malicious prosecution and abuse of process against a corporation ([Original Corporate Plaintiff]), it's owner ([Owner of OCP]), their attorneys (Morgan Smith, Esq., and Boris Parker, Esq.) and the attorney's respective law firms. The defendants had brought seven claims against Gregerson from 2005 to 2008 over a web page Gregerson published which described [Original Corporate Plaintiff]'s use Gregerson's photo without permission. Gregerson prevailed on all seven claims in the underlying litigation. After filing the instant action, appellant settled with [Original Corporate Plaintiff] and it's owner, [Owner of OCP], and is proceeding against the attorneys and their firms.

In the underlying litigation, Gregerson claimed (and the court found) [Original Corporate Plaintiff] made false factual claims and provided a forged sales agreement for the Skyline photo to the court. An employee of [Original Corporate Plaintiff], Vladimir Kazaryan, falsely notarized the forged sales agreement. Kazaryan is a defendant/respondent in the instant action on a claim of aiding and abetting malicious prosecution.

Appellant alleges the attorneys knew their client's factual claims were false, and they lacked evidentiary and legal support for the litigation against Gregerson. Appellant further alleges the respondents had malice, and knowingly furthered their client's malice. Appellant's prayer for relief sought triple his actual damages under Minn. Stat. §§

481.07-.071.

Boris Parker, Saliterman & Siefferman, and Bassford Remele (the Parker defendants) brought a motion to dismiss for failure to state a claim. The trial court dismissed appellant's claim for abuse of process and ruled the defendants are not liable for damages under Minn. Stat. §§ 481.07-.071. The claim for malicious prosecution (and conspiracy to commit same) were not dismissed.

Gregerson moved to amend his complaint to add a claim for punitive damages. The trial court denied this motion, and the respondents subsequently moved for summary judgment. The trial court found there was no genuine issue of material fact as to the elements of lack of probable cause and malice, and granted the respondents summary judgment. This appeal follows.

STATEMENT OF FACTS

Appellant Chris Gregerson is a photographer who licenses his images through a web site, www.phototour.minneapolis.mn.us (also located at www.cgstock.com). In May of 2005, appellant saw photo #2891 from his website (the “Skyline photo”, Add. 27) on the inside cover of the Twin Cities Dex directory. It was being used in a full-page ad for [Original Corporate Plaintiff] (Add. 28) without Gregerson's knowledge or consent (Affidavit of Gregerson, AA-123 at no. 5).

Gregerson sent a letter to [Original Corporate Plaintiff] explaining his ownership of the photo and that a licensing fee was due. After receiving no reply, Gregerson called [Original Corporate Plaintiff] and spoke to it's owner, [Owner of OCP]. [Owner of OCP]

said he received the letter, but having paid someone named "Michael Zubitskiy" for the photo, he would not pay Gregerson. He declined Gregerson's offer to prove his ownership of the photo, saying "I know it's your photo". (Id. at nos. 6-8). [Owner of OCP] said he would not pay the licensing fee because was not willing to pay twice for the same photo, and Gregerson would have to sue if he wanted payment. He refused to provide any contact information for "Zubitskiy", and threatened to sue Gregerson for harassment if he was contacted again (Id. at no. 8).

There was no dispute as to Gregerson's ownership of the photo, just whether [Original Corporate Plaintiff] would pay without being sued. Appellant filed a claim in Hennepin County conciliation court, heard August 21st, 2005. Respondent Morgan Smith, Esq., appeared with [Owner of OCP] as attorney for [Original Corporate Plaintiff]. In a mandatory mediation session, both agreed the photo was Gregerson's, but smith argued that copyright claims are the jurisdiction of federal courts (Id. at nos. 9-11). While [Owner of OCP] offered a $200 settlement, Smith suggested zero. The case was dismissed without prejudice after Smith argued there was exclusive federal jurisdiction over copyright issues (Id. at nos. 12-14).

Gregerson's web page about [Original Corporate Plaintiff]

In September of 2005, Gregerson wrote a web page in the "essays" section of his website which he summarized in the website's table of contents as follows:

> `[Original Corporate Plaintiff] Financial and copyright violation`
>
> `An account of an as-yet unresolved case of`

```
copyright violation by a Minneapolis financial
services company (run by Andres [sic] [Owner of
OCP]). They published a photo from this website in
their full-page phone book ad without permission,
and refused to pay the licensing fee.
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Add. 29. The page described [Owner of OCP] and Smith's position in small claims court, conceding the photo [Original Corporate Plaintiff] published was Gregerson's but not wanting to pay the licensing fee unless sued in federal court (Add. 30).

[Owner of OCP] became aware of the web page, and contacted respondent Morgan Smith. In letter to [Owner of OCP], Smith agreed to “...drive Mr. Gregerson away...” (AA-147). On October 4th, respondent Smith & Raver, LLP, sent a letter to Gregerson demanding he remove the entire web page, refusing to cite which portions were false (AA-40). Gregerson wrote back offering to remove any comments on the web page that could be shown to be false (Complaint, AA-6 at ¶36). There was no reply.

Defamation lawsuit and TRO

On October 24th, 2005, Morgan Smith filed a Complaint against Gregerson for defamation on behalf of his client, [Original Corporate Plaintiff] (AA-55). Exhibit A of the defamation Complaint was a sales agreement with “Michael Zubitskiy” for “photos and graphic images” (Add. 32). It had been forged and fraudulently notarized by respondent Vladimir Kazaryan (Findings of fact, conclusions of law, and order for judgment, *Gregerson v. [Original Corporate Plaintiff] et. al.*, AA-25,26 at ¶¶ 16,17). A temporary restraining order was obtained based on the defamation lawsuit, shutting down appellant's web page from Oct. 26th until after Judge Mary DuFresne ruled the TRO was

an unconstitutional prior restraint on October 31st (Complaint, AA-6, ¶ 38).

[Original Corporate Plaintiff] (through respondent Smith) now alleged Gregerson was not the owner of the Skyline photo, but that it was created by "Michael Zubitskiy" (see interrogatory answers, *[Original Corporate Plaintiff] v. Gregerson*, AA-127 at nos. 4,5, and First amended Complaint, *[Original Corporate Plaintiff] v. Gregerson*, AA-62 at ¶¶ 17.5, 17.6, 17.10, 17.18). Respondent Boris Parker maintained, in subsequent federal counterclaims, [Original Corporate Plaintiff] "lawfully purchased" the photo from "Zubitskiy" (Answer and counterclaims, *Gregerson v. [Original Corporate Plaintiff]*, AA- 91 at ¶¶ 39, 44).

[Owner of OCP]'s deposition

[Owner of OCP] was deposed on Feb. 13th, 2006, in the presence of Morgan Smith. He stated he was entitled to use stolen property, if he bought it in good faith.

> Q. Do you believe it's fair to use that property if you paid someone and got permission even if it wasn't from the owner?
>
> A. Yes. Yes, I purchased – because this – when I was buying it I thought I was buying from the owner.

Deposition of [Owner of OCP], AA-135, pp. 12:15-20. He stated he was not challenging Gregerson's copyright to the photo:

> Q. You haven't asked me to produce the high-resolution file for the photo our out-takes that show that I was at the time and location the photo was produced or a wider version of the same image. Such evidence logically might – might suggest or support the argument that I am the original photographer. Do you have an

interest in that kind of documentation or evidence?

A. No.

Q. Can you tell me why you're not interested in it?

A. Yes, I can.

Q. And why is that?

A. Because I'm not questioning your copyright on the picture.

Q. Do you meant to say that you don't challenge my copyright, while at the same time you assert that you have the rights necessary to use the image?

MR.SMITH: I make my same objection as before about what legal rights the witness or the company has. This witness in not a legal expert and can't render an opinion about what his right are or draw a legal conclusion, so I object.

Deposition of [Owner of OCP], Feb. 13th, 2006 (AA-138, pp. 22:12-23:12).

Gregerson produced his certificate of copyright registration for the Skyline photo, [Owner of OCP] did not challenge it and admitted he had no evidence Zubitskiy took the photo.

Q. I'd like to show you another document, it's a copyright registration from the U.S. Copyright Office for photos published on my web site in the year 2004 (indicating)...

Q. Do you have any specific concerns at this time about the – the copyright – Certificate of Copyright Registration, Exhibit E, being genuine?

A. The certificate looks genuine to me.

Q. Can you tell me why you believe more strongly that Michael Zubitskiy is the photographer

rather than myself?

A. Because I bought a picture from him.

Q. When you buy something from someone, you assume that it's theirs, that's what has happened in this case with this photo?

A. Correct.

Q. Are you aware of any evidence Michael Zubitskiy took the photo?

A. I an not aware.

Id., AA-140,141, pp. 33:9-34:21.

“Zubitskiy” shown to be fictional

[Owner of OCP] said “Zubitskiy” was a web developer and photographer, but the name “Michael Zubitskiy” does not appear anywhere on the world-wide web (AA-39). In discovery, [Original Corporate Plaintiff] admitted having no contact information for “Zubitskiy”, past or present, and claimed the $850 paid to him for the photo was in cash (Complaint, AA-8 at ¶ 47). A skip-trace search by ProLegal turned up no records of any kind for “Michael Zubitskiy” (AA-151). The gym where [Owner of OCP] claimed he met Zubitskiy had no records for him (AA-153).

Gregerson filed a motion for sanctions against [Original Corporate Plaintiff] and Smith based on [Owner of OCP]'s forgery of the Zubitskiy sales agreement, and Smith filing a Complaint not grounded in fact or legally tenable, noting it was impossible for Smith to believe (in good faith) that Zubitskiy was the true owner of the Skyline photo. (Complaint, AA-8,9 at ¶¶ 51-55). The attached exhibits showed there was no locatable person in Minnesota named “Michael Zubitskiy”. The court postponed a hearing on the

motion, but called the allegations "...serious, and on their face, credible" (Order, AA-43, n. 1).

Federal court involvement

Gregerson file a copyright claim in federal court over [Original Corporate Plaintiff]'s use of his photos (*Gregerson v. [Original Corporate Plaintiff]*, 2008 WL 451060 (D. Minn. Feb. 15, 2008)). Respondent Boris Parker, Esq., represented [Original Corporate Plaintiff] in that action.

Discovery revealed [Original Corporate Plaintiff] was using a second photo from Gregerson's web site in it's advertising. The photo was #2258 from Gregerson's web site, and showed a large residence in the Kenwood neighborhood of Minneapolis in summer (the "Kenwood photo", AA-174). Gregerson took the photo in August 8th, 2002, and published it on-line in November, 2002. [Owner of OCP] claimed he also got this photo from "Zubitskiy", who created both photos in March of 2004.

State court order on [Original Corporate Plaintiff]'s defamation complaint

Gregerson moved to dismiss the defamation claim against him, and the Honorable Mark Wernick issued an order on April 10th, 2006 (AA-42). He ruled "...The Complaint fails to state a claim for relief under the substantive law of defamation." (AA-52) because it objected only to the title of Gregerson's essay. The court found "Neither the headline of Gregerson's essays nor the essays themselves accuse [Original Corporate Plaintiff] of being guilty of 'theft'" (AA-50), as Smith had alleged in [Original Corporate Plaintiff]'s Complaint (AA-56,57 at nos. 11-13). Judge Wernick stated that [Owner of

OCP] and his lawyer were acting in bad faith:

> If [Owner of OCP] were acting in good faith...he would have offered to fairly compensate Gregerson and seek reimbursement from 'Zubitskiy', the person who allegedly sold the photograph to [Original Corporate Plaintiff]...[Owner of OCP]'s bad faith...is the moral equivalent of theft...

AA-51,52. Judge Wernick also noted [Original Corporate Plaintiff]'s lawyer's demand letter (AA-40) that Gregerson remove the entire web page was in bad faith:

> [Original Corporate Plaintiff]'s bad faith in connection with the theft of Gregerson's photo is also reflected in the October 4th, 2005, letter that [Original Corporate Plaintiff]'s lawyer wrote to Gregerson. Exhibit F. The letter demanded that Gregerson remove the *entire* essay from Gregerson's website. [Original Corporate Plaintiff]'s lawyer surely knew he could only ask Gregerson to remove those statements in the essays that were allegedly false...[Original Corporate Plaintiff]'s lawyer made no effort to describe to Gregerson what statements in the essay were allegedly false. The lawyer's letter appears to be a bullying tactic designed to cause Gregerson to refrain from making statements which [Original Corporate Plaintiff] knew Gregerson was entitled to make.

AA-52. The judge left the door open for [Original Corporate Plaintiff] to file an amended complaint, but advised [Original Corporate Plaintiff] to “find the elusive Mr. Zubitskiy” if they wished to proceed (AA-54).

Respondent Smith served an amended complaint on April 20th, 2006, which stated what was specifically alleged to be false on Gregerson's web page. Although judge Wernick had already ruled the essay did not accuse [Original Corporate Plaintiff] of theft, the amended Complaint still argued defamation occurred because “Plaintiff [[Original

Corporate Plaintiff]] has never committed an act of theft" (First amended Complaint, *[Original Corporate Plaintiff] v. Gregerson*, AA-61 at ¶ 17.2). The amended Complaint further cited as defamatory Gregerson's claim he owned the Skyline photo (Id. at ¶ 17.4, AA-62 at ¶ 17.5, "No evidence has been offered that Defendant [Gregerson] owned the photo..."). It cited Gregerson's statements that [Owner of OCP] had "shown bad faith" (Id. At ¶ 17.7), and that Zubitskiy did not exist (AA-64 at ¶¶ 17.20-17.24), but noted "Plaintiff ...has determined that the costs and difficulty in finding Mr. Zubitskiy are prohibitively high" (Id. At ¶ 17.23). A claim for appropriation of name and likeness of [Owner of OCP] was added to the Complaint, based on [Owner of OCP]'s name and image appearing on Gregerson's web page.

Removal of the defamation action to federal court

On April 26th, 2006, respondent Smith withdrew as counsel for [Original Corporate Plaintiff]. At a status conference on May 26th, 2006, respondent Boris Parker appeared on behalf of [Original Corporate Plaintiff] in the state court defamation action. He asked to remove the case to federal court to be consolidated with Gregerson's copyright lawsuit, based on the actions sharing the same nexus of operative facts. On June 12th, 2006, Boris Parker filed [Original Corporate Plaintiff]'s first amended Complaint for defamation in federal court, included the forged Zubitskiy photo agreement as exhibit A. Complaint, AA-11 at ¶¶ 65-71.

Federal Counterclaims

On August 28th, Boris Parker filed five additional counterclaims against

Gregerson over his web page: deceptive trade practices, trademark infringement, interference with contractual and business relations, injunction, and unjust enrichment (AA-86). He alleged Gregerson's web site called [Original Corporate Plaintiff] "...thieves engaged in fraudulent business conduct..." (AA-92 at ¶ 46).

Summary Judgment in federal court

On August 31st, 2007, federal district court judge Ann D. Montgomery found that "...there is no genuine dispute as to the ownership of the photos in question." (Memorandum opinion and order, AA-74). [Original Corporate Plaintiff]'s claim against Gregerson for unjust enrichment was dismissed as "purely speculative" (Id., AA-84), the claims for trademark infringement and cyberpiracy were also dismissed (Id., AA-78,79). The Court found the defamation lawsuit against Gregerson was not being pursued, and was dismissed:

> There has also been no further mention or pursuit of any removed, consolidated state court claims. Therefore, to avoid any future confusion, the Court finds Defendants' removed, consolidated state court claims to be dismissed...

Id., AA-70,71 n. 1. The claims for deceptive trade practices and interference with prospective contractual relations were allowed to proceeded to trial based on the allegation that "...Gregerson has disparaged [[Original Corporate Plaintiff]'s] business through false or misleading representations of fact." (Id., AA-80). "...truth is a defense to liability..." (AA-81), but "Whether or not the comments are true is not the subject for summary judgment consideration." (Id., AA-80). The order said the trial would not

address “how Defendants procured the photographs” (Id., AA-76) (this was reversed later, before trial).

Respondent Bassford Remele's internal comments

On the day of the summary judgment order, John M. Anderson (of respondent Bassford Remele, PA) emailed Boris Parker about the order, asking “Does it eliminate the need for your client to testify about his purported acquisition of the photographs from the mystery seller?” (Add. 37). A September 12th, 2007, email between Anderson and Parker (copied to Rebecca Moos and Greg Bulinski) stated “The order on the SJ motions resolves any ethical issue regarding the truthfulness of the client's testimony...” (Add. 38) On October 29th, 2007, Bassford Remele CEO Rebecca Moos wrote a note that “[Original Corporate Plaintiff] – our client, [Owner of OCP], is lying about buying picture from person who can't be located.” (Add.36).

Parker alleges Gregerson and Zubitskiy were extorting [Original Corporate Plaintiff]

In a summary judgment memorandum in the underlying litigation, Boris Parker alleged Gregerson was working with Zubitskiy to extort [Original Corporate Plaintiff].

> “...Plaintiff [Gregerson] set up Defendants by providing his photographs to a third party [Zubitskiy] who then disseminated them for a price to unsuspecting victims [[Original Corporate Plaintiff]]...in order to allow Plaintiff to extort money and claim unreasonable and unfounded damages..."

See [Owner of OCP]'s reply memorandum of law re summary judgment, AA-193,4.

Allegation the web page was false abandoned before trial

In a phone conversation on the eve of trial, appellant Gregerson made a final, verbal request to Mr. Parker that he identify what on the web page was alleged to be false. Parker replied that “It's not a question of being false, it's a question of it damaging my client” (Affidavit of Gregerson, AA-126 at no. 30).

Findings of fact, conclusions of law, and order for judgment

Following trial in November, 2007, the federal district court found that “Defendants did not identify any specific comments by Plaintiff that were false.” (AA-37). The court found “...Defendants presented no evidence demonstrating a causal connection between Plaintiff's use of Defendants' name and [Owner of OCP]'s picture...” and any benefit to Gregerson (AA-37). Gregerson prevailed on all remaining counterclaims, and was awarded statutory damages for willful infringement by [Original Corporate Plaintiff].

> The Court finds there is no credible evidence to support the belief that “Zubitskiy” exists or was the source of the controverted photos. It is highly implausible...[AA-24 at ¶ 13]
>
> Defendants did not procure the Skyline and Kenwood photos from Zubitskiy, rather, they unlawfully procured them from Plaintiff’s website. [AA-26 at ¶ 17].
>
> By unlawfully obtaining Plaintiff’s photos from his website, where it was clear both that use of Plaintiff’s photos was only available for a fee and that the photos were copyright protected, Defendants flagrantly disregarded Plaintiff’s rights as a copyright owner. [AA-30]

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BASED ON LACK OF A GENUINE ISSUE OF MATERIAL FACT REGARDING (A) LACK OF PROBABLE CAUSE FOR THE UNDERLYING LITIGATION AND (B) MALICE.

Standard of review

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

Standard for attorney liability for malicious prosecution

The requirements for a claim against an attorney for malicious prosecution were noted in the trial court's summary judgment order:

> If an attorney proceeds upon facts stated to him by his client, believing those facts to be true, and if those facts, if true, would constitute probable cause for instituting such a prosecution, then the attorney is exonerated and not liable for malicious prosecution. *Hoppe*, 28 N.W.2d at 792.

Add. 20 (quoting *Hoppe v. Klapperich*, 28 N.W.2d 780, 792 (Minn. 1947)). Under this standard, an attorney would be liable if he proceeds on his client's claims without

“believing those facts to be true”, and he is immune only if the facts “...would constitute probable cause for instituting [the litigation]”. Under this standard, the respondents in the instant action are entitled to summary judgment only if there is no genuine issue of material fact as to (1) the defendants belief in their client's claims, and (2) the existence of probable cause for the underlying litigation.

The standard for probable cause in civil litigation

The standard for probable cause (relative to a claim of malicious prosecution) is “...such facts and circumstances as will warrant a cautious, reasonable and prudent person in the honest belief that his action and the means taken in prosecution of it are just, legal and proper.” *First Nat’l Bank of Omaha v. Marquette Nat’l Bank,* 482 F. Supp. 514, 523 (D. Minn. 1979), aff'd, 636 F.2d 195 (8th Cir. 1980). Missouri courts have described probable cause as "...a belief in the facts alleged, based on sufficient circumstances to reasonably induce such belief by a person of ordinary prudence...plus a reasonable belief...the claim may be valid under the applicable law." *Brockman v. Regency Fin. Corp.*, 124 S.W.3d 43, 47 (Mo.App. W.D.2004).

Standard for *lack* of probable cause

For a malicious prosecution Plaintiff to show lack or probable cause, he or she must prove a negative. This has been addressed in Missouri by allowing slight proof.

> Proving lack of probable cause involves proving a negative, so the slightest amount of proof is all that is necessary to make a *prima facie* case.

Brockman v. Regency Fin. Corp., 124 S.W.3d 43, 47 (Mo.App. W.D.2004). “If

any material part of the evidence showing existence or want of probable cause is in conflict, a fact issue exists that is sufficient to make a submissible case." *Ehrhardt v. Herschend*, 294 S.W.3d 58, 59, 61 (Mo. App. S.D. 2009). The Minnesota Supreme Court addressed this point in 1912.

> It has been held that the final determination of a civil action in a defendant's favor constitutes *prima facie* want of probable cause, shifting the burden of proof on that issue upon the defendant.

Nelson v. International Harvester Co., 117 Minn. 298, 135 N.W. 808 (1912).

California's supreme court found lack of probable cause occurs when a litigant "...relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him...Probable cause, moreover, must exist for every cause of action advanced in the underlying action." *Soukup v. Law Offices of Herbert Hafif*, 46 Cal.Rptr.3d 638,663 (2006).

The Parker Defendant's motion for summary judgment

Respondents moved for summary judgment, arguing that Gregerson "...has no admissible evidence that the Parker defendants knowingly submitted false evidence...or they knowingly or recklessly asserted false fraudulent defenses or false counterclaims when representing their clients..." (Parker Defendants Memorandum in support of Summary Judgment, p.2). Appellant opposed the motion, arguing there was evidence creating a genuine dispute as to whether respondents knew their client was lying, and whether the claims against Gregerson had probable cause (AA-175-190). In his memorandum, appellant emphasized the note written by Bassford Remele CEO Rebecca

Moos stating "Our Client, [Owner of OCP], is lying..." (Add. 36). He also emphasized his phone call with respondent Boris Parker just before trial in which Parker conceded the claims against Gregerson over his web page were "...not a question of being false, it's a question of damaging my client" (affidavit of Gregerson, AA-126 at no. 30).

The trial court's decision

The trial court ruled there was lack of a genuine issue of material fact on the elements of probable cause and malice, and granted summary judgment to respondents.

> ...Plaintiff has failed to offer evidence beyond general assertions and averments to support his malicious prosecution and conspiracy claims and therefor has failed to create a genuine issue of material fact for trial.
>
> ...Plaintiff has offered numerous assertions that cast doubt on the truthfulness of [Owner of OCP]'s claims. However, these assertions do not create a genuine issue of material fact for trial on a claim of malicious prosecution because they do not establish that the Defendants did not or could not believe those facts to be true.

Add.22, 23. Appellant appeals this decision on several grounds, argued below.

A. THE TRIAL COURT IGNORED EVIDENCE CREATING A GENUINE DISPUTE THAT DEFENDANTS KNEW THEIR CLIENT WAS LYING

Under the standard described in *Hoppe v. Klapperich* (supra), respondents would be liable for malicious prosecution if they knew their client's claims were false. This standard is found in foreign cases as well, e.g. *Sierra Club Foundation v. Graham*, 85 Cal. Rptr. 2D 726,737 (1999) ("absence of probable cause can be shown by proof that the initiator commenced the prior action knowing that his or her claims were false"). Appellant produced evidence on the record showing respondents did not believe their

client or rely upon his claims as true, summarized below.

Direct evidence

1. Bassford Remele, P.A., CEO, Rebecca Moos, noted Oct. 29th, 2007 that:

   ```
   “[Original Corporate Plaintiff] – client, [Owner of
   OCP], is lying about buying picture from person who
   can't be located.” (Add. 36)
   ```

2. At a meeting with Morgan Smith and [Owner of OCP] in August, 2005, both agreed the disputed photo belonged to Gregerson (affidavit of Gregerson, AA-124 at nos. 9-12). They only reversed their position once the litigation against Gregerson began. See, e.g., answer to interrogatory no. 4, AA-127, and answer to interrogatory no. 2, AA-131 (“...Plaintiff never published a photo from Defendant's web site.”).
3. Appellant asked Parker in discovery if he believed [Owner of OCP]'s claims in the underlying litigation; Parker refused to answer (Parker's interrogatory answers at no. 1, AA-155) on the grounds it was irrelevant.
4. Appellant asked Smith in discovery if he believed [Owner of OCP]'s claims in the underlying litigation; he declined to say believed [Owner of OCP] (Smith's responses to plaintiff's discovery requests at no. 1, AA-157,158).

Circumstantial evidence

“The proof of knowledge may be by circumstantial evidence.” *State v. Al-Naseer*, 734 N.W.2d 679,688 (Minn. 2007). Actual knowledge is described in a New Mexico supreme court decision (citing Minnesota law) as “knowledge sufficient to impress a

reasonable man, i.e., knowledge obtained in the daily affairs of life, but not absolute certainty." *Collins v. Big Four Paving, Inc.*, 77 N.M. 380, 383, 423 P.2d 418, 420 (1967).

1. **Findings of fact by the federal trial court.** In the underlying litigation, the court found "...there is no credible evidence to support the belief that 'Zubitskiy' exists or was the source of the controverted photos. It is highly implausible..." (AA-24 at no. 13). This supports appellant's allegation that [Owner of OCP]'s claims were understood by respondents to be false.

2. **The respondents were put on notice [Owner of OCP]'s claims were false.** By January, 2006, Gregerson had produced his certificate of copyright registration for the Skyline photo to [Original Corporate Plaintiff] and Smith (see, e.g., deposition of [Owner of OCP], AA-140, pp. 33:9), *prima facie* proof of ownership under federal law (Title 17 U.S.C. § 410(c)). On February 23rd, 2006 (in his memo supporting sanctions), Gregerson provided clear evidence there was no person named Zubitskiy in the United States (see, e.g., affidavit of not found, AA-151, letter from LifeTime Fitness, AA-153, web search, AA-39). Gregerson also showed he published the Skyline photo on his website on January 13th, 2004 (Add. 27), in advance of the alleged creation of the photo by Zubitskiy in March, 2004. This is sufficient evidence for a reasonable person to have actual knowledge Gregerson created the photo.

3. **The respondents failed to look for Zubitskiy.** [Original Corporate Plaintiff], while represented by Smith, stated in discovery no effort had been made to locate Zubitskiy (interrogatory answers at no. 13, AA-128). Had respondents been relying upon [Owner of OCP]'s claims as true, it was essential they locate Zubitskiy to support [Owner of OCP]'s otherwise hearsay claim Zubitskiy took the photo. The Honorable Mark Wernick pointed this out explicitly in his April 10th, 2006, order ("...if [Original Corporate Plaintiff] intends to pursue its defamation claim....[Owner of OCP] would be well advised to find the elusive Mr. Zubitskiy...", AA-54). Yet, none of the respondents called the gym where [Owner of OCP] claims he met "Zubitskiy", or subpoenaed the gym for member records for "Zubitskiy". Instead, they took the position that "...the costs and difficulty in finding Mr. Zubitskiy are prohibitively high" (*[Original Corporate Plaintiff] v. Gregerson* amended Complaint, AA-64 at ¶ 17.23).
4. **Boris Parker moved to quash Gregerson's subpoenas to locate Zubitskiy.** When Gregerson served subpoenas to locate Zubitskiy (e.g. to Qwest for any unlisted photo numbers), respondent Parker moved to quash the subpoenas, despite having no standing to object on behalf of third-parties who had no objections. The court denied the motion (Complaint, AA-11,12 at ¶¶ 76-79), which appeared to be an effort to suppress additional evidence Zubitskiy was fiction, which Parker already knew.

5. **[Owner of OCP] claimed the Kenwood photo was also taken in March, 2004, despite depicting summertime weather**. See Kenwood photo along with photos actually taken in Marc, AA-174. The federal trial court noted this as an example of contradictions in [Owner of OCP]'s testimony (AA-25 at ¶ 14).

6. **Respondents had no plausible explanation for Gregerson's possession of the photo if Zubitskiy was the creator**. Boris Parker alleged Gregerson was conspiring with "Zubitskiy" to extort [Original Corporate Plaintiff] (AA-193,194).

> Plaintiff set up Defendants by providing his photographs to a third party [Zubitskiy] who then disseminated them for a price to unsuspecting victims [[Original Corporate Plaintiff]]...in order to allow Plaintiff to extort money...

The above evidence on the record creates a genuine issue for trial on respondent's actual knowledge their client's claims were false.

B. THE TRIAL COURT IGNORED EVIDENCE SHOWING RESPONDENTS LACKED PROBABLE CAUSE FOR THE UNDERLYING LITIGATION

The trial court's summary judgment order ended it's analysis of probable cause upon concluding appellant had not established respondent's knew their client was lying. The court did not address the second prong of liability, if the claims lacked probable cause (legal tenability under the facts). There is evidence showing a genuine dispute on this issue.

1. **Respondents never had any basis to deny Gregerson's copyright**

ownership. Gregerson produced a certificate of copyright registration, *prima facie* proof of copyright ownership under federal statute, and [Owner of OCP] admitted he had no evidence that Zubitskiy created the photo:

> Q: Are you aware of any evidence Michael Zubitskiy took the photo?
>
> A: I an not aware.

Deposition of [Owner of OCP] (AA-141, pp. 34:19-21). [Owner of OCP] further stated it was OK to buy stolen property and use it as your own:

> Q. Do you believe it's fair to use that property if you paid someone and got permission even if it wasn't from the owner?
>
> A. Yes. Yes, I purchased – because this – when I was buying it I thought I was buying from the owner.

Id., AA-135, pp. 12:15-20. [Original Corporate Plaintiff]'s claim to have "lawfully purchased" Gregerson's Skyline photo from Zubitskiy remained a central factual allegation in the claims against Gregerson (Answer and Counterclaims, AA-91 at ¶¶ 39, 44; interrogatory answers, AA-127 at nos. 4, 5).

2. **[Owner of OCP] lacked personal knowledge.** Respondent's client, [Owner of OCP], never claimed to have personal knowledge of the source of the photo.

Q. ...Do you have any way of knowing whether or not Michael Zubitskiy took the photo that he gave you from this web page?

A. I do not.

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Q. Have you attempted to contact Michael Zubitskiy to
ask him about whether he took the picture from this
web page?

A. I haven't.
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[Owner of OCP] deposition, AA-137, pp. 18:17-24. [Owner of OCP] only claimed he “believed” Zubitskiy took the photo and owned the copyright (Id., p. 9:2-4).

3. **The notarization was found to be fraudulent.** The [Original Corporate Plaintiff] employee who notarized the Zubitskiy photo agreement (Add. 32), respondent Vladimir Kazaryan, lost his notarial commission over this fraudulent notarization. This occurred during the course of the proceedings, while Boris Parker was representing [Original Corporate Plaintiff]. Gregerson provided [Original Corporate Plaintiff] with a copy of the Department of Commerce consent decree (Add. 33), which was an exhibit at trial, but Parker did not amend or withdraw any of [Original Corporate Plaintiff]'s claims that the transaction was the “lawful purchase” of photos from Zubitskiy.

4. **Boris Parker abandoned the allegation the web page contained any false statements just before trial.** In a phone call on the eve of trial, Gregerson made a final request of Parker to identify what was allegedly false on his web page. Parker replied “It's not question of being false, it's a question of damaging my client”. (Affidavit of Gregerson, AA-126 at no.

30). This would appear to remove even the pretext of probable cause.

5. **At trial, "[[Original Corporate Plaintiff]] did not identify any specific comments by Plaintiff that were false"** (Findings of fact, conclusions of law, and order for judgment, AA-37). This is consistent with no. 4, above, that there was no genuine dispute that the web page was false.

For these reasons, the trial court's summary judgment on the element of "lack of probable cause" of appellant's malicious prosecution claim should be reversed.

C. THE TRIAL COURT IMPROPERLY APPLIED THE MINNESOTA RULES OF PROFESSIONAL CONDUCT TO PROVIDE RESPONDENTS WITH IMMUNITY FROM A CIVIL CLAIM FOR MALICIOUS PROSECUTION

The trial court based it's summary judgment ruling partly on the Minnesota Rules of Professional Conduct.

> ...Defendants not only were entitled to believe their client's disputed testimony, but had a professional obligation to resolve doubts about the veracity of their client's testimony in their client's favor. See *Minn. R. Prof. C.* 3.3(a)(3) & Comment [8]. For these reasons, Plaintiff has failed to create a genuine issue of material fact...

Order and Memorandum Re Summary Judgment, Add. 23. This is beyond the purpose and scope of the rules, which describe themselves as "...a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority..." (Minn. R. Prof. C., Scope, P. 20). The rules clarify that "The law, both procedural and substantive, establishes the limits within which an advocate may proceed." (Id. at Rule 3.1, Meritorious claims and contentions, Comment [1]). The trial

court's application of these rules to dismiss a malicious prosecution claim against an attorney is outside the function and scope of the rules, and contradicted by case law on malicious prosecution claims against attorneys (e.g. *Hoppe v. Klaperich*, supra*)*.

D. THE TRIAL COURT INCORRECTLY REQUIRED APPELLANT ESTABLISH DEFENDANTS KNEW THEIR CLIENT WAS LYING TO AVOID SUMMARY JUDGMENT

The trail court's decision stated there was no genuine issue of material fact because the Plaintiff did "...not establish that the defendants did not or could not believe..." their client's claims (Add. 23). "Establish" means "to put beyond doubt : prove" (Merriam-Webster Online Dictionary. 2010). A plaintiff is not required to prove the elements of a claim to avoid summary judgment, which can only be granted to a defendant if "...there is no genuine issue as to any material fact..." (Minn. R. Civ. P. 56.03), with the evidence viewed most favorable to the non-moving party.

E. THE TRIAL COURT'S DECISION CREATES CONFLICTING OUTCOMES FROM THE SAME TRANSACTION

There is "...a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). The trial court's summary judgment order is in direct conflict with findings of fact from the federal trial. Judge McShane wrote "...there has been no definitive evidence presented either in the previous litigation or in this case that [Owner of OCP]'s claims about Zubitskiy were untrue." (Add. 22). The federal trial court found "...Zubitskiy is fictional and the 3/19/04 Agreement is fraudulent..." (Findings of fact, conclusions of law, and order for judgment, AA-25,26 at ¶¶ 16,17). The federal trial court

dismissed the claim against Gregerson for unjust enrichment because it was "purely speculative" (Memorandum opinion and order, AA-84), while the trial court in the instant action ruled respondents had "...probable cause and a good faith basis for asserting their claims against Gregerson..." (Add.22). These two conflicting results from the same transaction further support the case is not ripe to be decided on summary judgment.

F. THE TRIAL COURT ERRED IN FINDING NO GENUINE DISPUTE AS TO THE ELEMENT OF MALICE

Under Minnesota law, the element of malice in a claim for malicious prosecution against an attorney is satisfied if the attorney was motivated by ill will, or knowingly furthered his client's malice.

> ...an action for damages for malicious prosecution lies against an attorney if...he knew of his client's malicious motives or if he himself was actuated by malice;
>
> ...If he will knowingly sell himself to work out the malicious purposes of another, he is a partaker of that malice as much as if it originated in his own bosom.
>
> ...he is morally and legally just as much liable as if he were prompted by his own malice against the injured party.

Hoppe v. Klapperich (supra). Malice can also potentially be inferred by a jury based on lack of probable cause. "[W]ant of probable cause is evidence of malice for the consideration of the jury;". *Wheeler v. Nesbitt*, 65 US 544, 551 (1861). This standard was upheld in *Allen v. Osco Drug, Inc.*, 265 N.W.2d 639, 644 n.6 (Minn. 1978).

In his Memorandum of law opposing summary judgment, appellant addressed (1) the existence of implied malice based on lack of probable cause, (2) evidence Smith and

Parker had shown malice towards Gregerson, and (2) evidence they were aware of [Owner of OCP]'s malice and acted to further it.

> The plaintiff alleges the defendants brought claims with knowledge of its falsity, which meets the requirement of malice in an action for malicious prosecution. Prosser on Torts [2d ed.] p. 666. The Plaintiff has also produced evidence that (1) the defendants had malice towards him [affidavit of Gregerson, AA-170,171 at nos. 5-7], and (2) were aware of [Owner of OCP]'s malice [[Owner of OCP]'s public comments attacking Gregerson, AA-148] and knowingly acted to further it.

AA-190,1. In granting summary judgment to respondents, the trial court ruled:

> Since there is no evidence in the record to establish any malicious intent whatsoever on the part of the Defendants, Plaintiff has failed to create a genuine issue of material fact on this element.

Add. 23. Evidence of malice on the record is summarized below.

1. **Boris Parker was malicious toward Gregerson.** After serving a motion for summary judgment to Boris Parker in 2006, Parker called Gregerson to say he would not accept service of papers for [Original Corporate Plaintiff]. When Gregerson was confused and said he did not understand why, Parker demanded “You speak English, don't you!?!” (Affidavit of Gregerson, A-170,1 at nos. 5,6).

2. **Boris Parker threatened Gregerson's wife in court.** After a hearing in federal court on June 26th, 2007, Boris Parker harangued Gregerson as he joined his wife in the courtroom seating area. Parker lashed out at

Gregerson over anonymous comments on his web site, and demanded "How would you like it if I did that to your wife!" (Id., A-171 at no. 7). Parker's behavior was hostile enough to draw the attention of Judge Montgomery's bailiff, who advised Gregerson and his wife later they could exit the courtroom because "It's OK, they're gone now" (Id.).

3. **The court found Smith & Raver's conduct "appeared to be a bullying tactic"**. In the underlying defamation litigation, Judge Mark Wernick wrote that "The lawyer's letter [from Smith & Raver] to Gregerson appears to be a bullying tactic designed to cause Gregerson to refrain from making statements which [Original Corporate Plaintiff] knew Gregerson was entitled to make." (Order, AA-52). Conduct ruled to be "apparent bullying" is evidence of malice.

4. **Smith shared [Owner of OCP]'s bad faith**. At a mediation session in August, 2005, Smith and [Owner of OCP] acknowledged [Original Corporate Plaintiff] had published Gregerson's photo (Affidavit of Gregerson, A-124 at nos. 10,11), but refused to review published pricing guides Gregerson brought to determine the fair-market value. Smith said Gregerson deserved zero for [Original Corporate Plaintiff]'s use of his photo because Gregerson had not sued in federal court, the correct jurisdiction (Id). This behavior was described by Judge Mark Wernick as "bad faith" (Order, A-51,52).

Appellant's evidence on the record creates a genuine dispute as to respondent's malice towards him, as well as implied malice. The trial court did not consider evidence respondent's were aware of [Owner of OCP]'s malice (AA-148) and acted to further it. The trial court's summary judgment decision should be reversed.

II. THE TRIAL COURT ERRED IN FINDING RESONDENTS WERE NOT LIABLE UNDER MINN. STAT. §§ 481.07-.071

Appellant's Complaint cited Minn. Stat. §§ 481.07, 481.071 in the prayer for relief (AA-19 at B) and Count III: vicarious liability for malicious prosecution (AA-17 at ¶¶ 112,113). Upon a motion to dismiss by the Parker defendants, the trial court ruled the defendants were not liable for damages under this statute because Gregerson did not have an attorney-client relationship with them.

Standard of review

"Statutory construction is a question of law, which this court reviews de novo." *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007). "Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court." *Davies v. W. Publ'g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001). For the purpose of review of this issue on appeal, there is no dispute that Gregerson was not a client of the defendants; they were the attorneys of his adversary.

Minnesota Statutes §§ 481.07 and 481.071

> 481.071 MISCONDUCT BY ATTORNEYS
>
> Every attorney or counselor at law who shall be guilty of any deceit or collusion, or shall consent thereto, with intent to deceive the court or any party...shall forfeit to the party injured

treble damages, to be recovered in a civil action.

Add. 41. The relevant language in § 481.07 is the same (Id). The definition of the "party" entitled to damages under this statute is discussed in *Baker v. Ploetz*, 616 N.W.2d 263 (Minn.2000) , at 268, 270-272 (citations and quotations omitted):

> ...Party, in the legal sense, means "[o]ne by or against whom a legal suit is brought." Black's Law Dictionary 1144 (7th ed.1999).
>
> ...The "party" referred to is clearly a party to an action pending in a court in reference to which the deceit is practiced...

"The common law gives the right of action and the statute [M.S.A. 481.07] the penalty." *Love v. Anderson*, 240 Minn. 312, 316 (1953).

Appellant's claim under Minn. Stat. §§ 481.07 and 481.071

Appellant's Complaint alleged the defendant's had "...intent to deceive the court..." (AA-3, ¶ 14), and cited these statutes in his prayer for relief.

> B Against Defendants Morgan Smith, Boris Parker, Smith & Raver, Saliterman & Siefferman, and Bassford Remele, jointly and severally, triple Plaintiff's damages under Minnesota Statutes §§ 481.07 and 481.071...

AA-19 at B. Appellant explained "That statute is cited in the Complaint to provide advance notice Gregerson may seek damages under it, which would presumably come after a finding of liability and calculation of damages." (Plaintiff's memorandum of law in opposition to Defendant's motion to dismiss, p. 5).

The trail court's decision

The trial court wrote:

> 3. Plaintiff Gregerson's claims for relief under

> <u>Minn. Stat. §§ 481.07 and 481.071 do not provide a private cause of action.</u>
>
> Defendant's motion to dismiss Plaintiff's claim for liability under these sections must be granted. The Minnesota Court of Appeals made clear in the case of *Milavetz, Gallop, & Milavetz, P.A. v. Hill*, 1998 WL 422229 (Minn. Ct. App. 1998), that an attorney-client relationship between a plaintiff and a defendant is an essential element of liability under §§ 481.07 and 481.071. As a result, defendants cannot be held liable under those statutes in this case...

Order and memorandum re defendant's motion to dismiss, Add. 5. The trail court relied upon *Milavetz, Gallop, and Milavetz, PA, v. Hill* (supra), an unpublished decision in which a law firm sought damages under these statutes as part of a claim against an adversary's attorney for “attorney misconduct” (construed by the court to be a claim for attorney malpractice). The *Milavetz* decision stated:

> ...the firm could not maintain an action for violation of the statutes setting out penalties for attorney misconduct...because it was not in an attorney-client relationship with Hill....An essential element for an attorney malpractice action is an attorney-client relationship.

The decision confirmed precedent that an attorney-client relationship is required for an attorney malpractice action. It did not, however, re-interpret the phrase “any party” in Minn. Stat. §§ 481.07-481.071 to be limited to “any client”. The trial court thus erred in concluding Minnesota case law limits the availability of damages under Minn. Stat. §§ 481.07 and 481.071 to parties who are a client of the attorney accused of misconduct. The trial court's decisions on this issue should be reversed.

III. THE TRIAL COURT ABUSED IT'S DISCRETION IN DENYING APPELLANT'S MOTION TO AMEND THE COMPLAINT TO CLAIM PUNITIVE DAMAGES

Standard of review

"The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004) (citing *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)). The Court of Appeals reviews the district court's decision to deny a motion to add a claim for punitive damages based on the abuse of discretion standard. See *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 904 (Minn. App. 2009).

The trial court's decision

The trial court ruled there was no evidence the defendants knew of the falsity of [Owner of OCP]'s claims, and this defeated appellant's motion to claim punitive damages.

> The Defendants had [Owner of OCP]'s sworn testimony to rely on when asserting their defenses and counterclaims against Plaintiff in the prior action. That fact, coupled with a lack of evidence as to Defendant's actual knowledge of the falsity of [Owner of OCP]'s claims, is sufficient to defeat Plaintiff's motion.

Order and memorandum denying plaintiff's motion to amend, Add. 15. This ignored evidence on the record showing Bassford Remele knew their client was lying:

> Our client, [Owner of OCP], is lying about buying pictures from person who can't be located...

Add. 36. There is also no claim on record by Smith and Parker they believed [Owner of OCP]'s claims (both refused to answer interrogatories on that point, AA-155

and AA-157,158). Yet the trial court wrote “Defendants insist they believed [Owner of OCP]'s statements were true when made,...” (Add. 14).

In the underlying litigation, Gregerson claimed to own the Skyline photo published by [Original Corporate Plaintiff], and was sued for saying so on-line. Smith and Parker had no “objectively reasonable basis for denying the claim” by Gregerson, and could be sanctioned for doing (*Gibson v. Coldwell Banker Burnet*, 659 NW 2d 782,788 (Minn. App. 2003)). Smith and his client even agreed, prior to defamation lawsuit, that the Skyline photo was Gregerson's (AA-124 at no. 10). The evidence shows a *prima facie case* that respondents had a flagrant disregard for Gregerson's rights as a copyright holder as well as his right to free speech. The trial court's denial of appellant's motion to amend the Complaint to claim for punitive damages should be reversed.

Public policy considerations

There is a public policy against baseless litigation to silence critics (a.k.a. “SLAPP” lawsuits). Such claims may fail in court, but still serve their purpose of chilling free speech. Targets may give in because they lack resources to fight the suit, regardless of it's merits. While the doors of the courthouse must remain open to genuine disputes, they are not open to baseless litigation.

> ....[W]hen the litigation is groundless and motivated by malice the balance tips in favor of the policy of redressing the individual harm inflicted by that litigation.

Siebel v. Mittlesteadt, 62 Cal.Rptr.3d 155, 159 (2007).

IV. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S ABUSE OF PROCESS CLAIM FOR FAILING TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Standard of review

In reviewing cases dismissed for failure to state a claim on which relief can be granted, the only question before the reviewing court is “whether the complaint sets forth a legally sufficient claim for relief.” *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). “When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief.” *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008).

Appellant's claim for abuse of process

A claim for abuse of process requires earlier litigation had an ulterior purpose, and the defendant used the process to achieve something not within the scope of the proceedings. *Kittler & Hedelson v. Sheehan Props., Inc.*, 295 Minn. 232, 203 N.W.2d 835, 840 (1973). Abuse of process uses litigation as “...a form of extortion, and it is what is done in the course of negotiation rather than the issuance or any formal use of the process itself, which constitutes the tort." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 121, at 898 (5th ed.1984). The appellant's Complaint alleged:

[Original Corporate Plaintiff] Demands Gregerson Suspend All Speech About [Original Corporate Plaintiff]

35. ...[Original Corporate Plaintiff] did not identify any false statements on the web page, yet insisted it be removed and Gregerson make no further public

statements about [Original Corporate Plaintiff]...

36. Gregerson answered the letter by offering to remove any statements that [Original Corporate Plaintiff] could show were false. [Original Corporate Plaintiff] did not respond, but instead sued Gregerson for defamation.

...

73. [Original Corporate Plaintiff] never asked Gregerson to remove any false statements from his web page, or remove any comments posted by visitors. The demand made was that Gregerson remove the web page entirely, post no other pages, and drop his copyright claims.

75 ...This litigation was used to pressure Gregerson to remove the page entirely, which was beyond the scope of the proceedings.

Complaint, AA-6 and AA-12. The Complaint thus alleges the underlying litigation was used to compel Gregerson to refrain from publishing any material about [Original Corporate Plaintiff], whether or not it was true, which is beyond the scope of a defamation claim (or any of the other claims brought against Gregerson).

The trial court's decision

> Defendants' motion to dismiss Gregerson's abuse of process claim should be granted. Defendants' attempt to shut Gregerson's website down through prosecuting their federal counterclaims was not an improper ulterior motive, but...a legitimate use of process to prevent potential harm to the Defendants.

Order and memorandum re defendant's motion to dismiss, Add. 7. The federal counterclaims used to “shut Gregerson's website down” included unjust enrichment, trademark infringement, and appropriation of name and likeness, which cannot lawfully “shut down” a critical website. If successful, those claims can only result in the payment

of damages, removal of trademarks, and removal of name and likeness – not depriving the opponent of their freedom of speech about a dispute.

CONCLUSION

Appellant respectfully requests this court:

a) Reverse the trial court's summary judgment order (and judgment) and remand the case for trial, with a jury to determine the fact issue of the respondent's actual knowledge their client was lying;

b) Reverse the trial court's ruling that defendants are not liable for damages under Minn. Stat. §§ 481.07-071;

c) Reverse the trial court's denial of appellant's motion to amend the Complaint to claim punitive damages (and permit discovery of defendant's financial condition);

d) Reverse the trial court's order dismissing appellant's claim for abuse of process.

Respectfully submitted,

____________________ ______________________________________

date

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Certificate of Compliance

I hereby certify that appellant's brief in case no. A10-863 complies with Minnesota Rules of Appellate Procedure 132.01 Subd.3(a)(1) and that the brief contains 9,071 words and uses a 13 point font. It was was prepared with OpenOffice version 3.0.

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