
Chris Gregerson,

Plaintiff,

v.

[OCP], a Minnesota Corporation; [owner of OCP], Morgan Smith, Boris Parker, and Vladimir Kazaryan; Smith & Raver, LLP, Saliterman & Siefferman, PC, and Bassford Remele, PA, Minnesota Law Firms,

Defendants.

Case Type: OTHER CIVIL
Court File No.: 27-CV-09-13489
Judge: John Q. McShane

**PLAINTIFF'S MEMORANDUM OF
LAW IN OPPOSITION TO DEFEN-
DANT'S MOTION FOR SUMMARY
JUDGMENT**

(note: following a settlement with the Original Corporate Plaintiff [OCP] and it's owner, their name has been redacted from documents being posted online. This brief is otherwise unaltered)

Introduction

Plaintiff Chris Gregerson wrote a web page in 2005 describing [OCP]'s refusal to pay for a photo they used. [OCP] sought legal representation from defendants Morgan Smith, and later Boris Parker. They brought seven causes of action against Gregerson over the web page. All seven claims were either abandoned, dismissed on summary judgment, or ruled against following trial. Gregerson presented no defense at trial, as defendant Parker did not identify any statements on Gregerson's web page that were false.

There is no valid cause of action against a party who makes truthful statements, even if others don't like what is written. [OCP] and defendants Smith and Parker knew Gregerson's statements were true, but represented a fantastic, alternate story that a mysterious stranger, met in a sauna and paid in cash, created Gregerson's photos months to years after Gregerson had already published the photos on his web site. There was no independent evidence to support this story, and the defendants had actual knowledge it was false.

[OCP] - Our client, [owner of OCP], is lying...

Rebecca Moos, Bassford Remele, Exhibit A.

On the eve of trial, when speaking to Boris Parker...I asked...which statements of mine on my web page were alleged to be false. Parker replied "It's not a question of being false, it's a question of damaging my client."

Pl.'s memo supporting punitive damages, Gregerson Aff. at no. 30.

I. LEGAL STANDARD FOR LACK OF PROBABLE CAUSE

A claim for malicious prosecution requires the plaintiff show that the earlier proceeding was brought without probable cause or a reasonable belief it could prevail on the merits. This element was challenged by the Parker Defendants in their motion for summary judgment.

An attorney avoids liability for malicious prosecution in he "...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...". *Hoppe v. Klapperich*, 28 N.W.2d 780 (Minn. 1947). Probable cause is lacking where a litigant or his attorney relies upon facts which he has no reasonable cause to believe to be true or seeks recovery upon a legal theory which is untenable under the facts known to him. *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 594-595.

A. An attorney's reliance upon a client's claims

The Parker Defendant's argued that an attorney is entitled to rely upon his client's claims as true. This does not apply when a client does not claim personal knowledge of the facts necessary to support a claim. An attorney should never "totally rely on the uncorroborated word of h[is] client and hearsay witnesses for all of the key contentions of the case." *Gartenbaum v Beth Isr. Med. Ctr.* (1998, SD NY) 26 F Supp 2d 645, 647.

In deciding whether he or she may rely solely on a client for the facts that are at the foundation of a claim, "the attorney should determine if the

client's knowledge is direct or hearsay and check closely the plausibility of the client's account—particularly if the information is secondhand.”

See *Brueggeman v. Jerome Foods, Inc.*, 227 Wis. 2D 531 N.W.2d 744, 754 (1999).

B. Advance notice the client's claims are false

When an attorney is informed prior to the litigation that his client's claims are mistaken, he cannot proceed without evidence to support a favorable judgment.

...when a party is put on notice a fundamental element of its case is disputed, it should not proceed without evidence sufficient to support a favorable judgment on that element or at least information affording an inference such evidence can be obtained...Hammer lacked probable cause to sue Arcaro on the guarantee because it had no objective, reasonable basis in the facts known to it for a belief Arcaro's purported signature was genuine.

Arcaro v. Silva and Silva Enterprises Corp. (1999) 77 Cal.App.4th 152, 156.

When the attorney initiates the action, he or she is entitled to rely on information provided by the client “...Unless the attorney has notice that the client is providing material false information or factual mistakes...”

Morrison v. Rudolph (2002) 103 Cal.App.4th 506, 512. Minnesota and California appellate courts have upheld malicious prosecution judgments against individuals who attempted to collect debts after having been informed by the other party that their signature was forged. The California court wrote that an attorney can't rely on his client's claims “...where the attorney is on notice of specific factual mistakes in the client's version of events.” *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 626. An attorney who becomes aware of such specific verifiable facts, even after initiating the action, may be liable for malicious prosecution if he or she continues to prosecute the action. *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973.

C. An attorney's knowledge is a jury question

The Plaintiff in the instant action has alleged the defendant attorneys knew their client's claims were false, and they were provided evidence which a reasonable person would consider to show their client was lying (See Plaintiff's memo supporting punitive damages and attached exhibits). In the underlying action, Judge Montgomery found there was no evidence to support the client's version of events, which were "highly implausible" Complaint Ex. A, ¶ 13-15. Whether or not the defendant attorneys knew their client was lying is a fact question for a jury.

A dispute over the defendant's knowledge or belief in the facts on which the action is based presents a factual question that is appropriately submitted to a jury. [cites]

Siebel v. Mittlesteadt (2004) 118 Cal.App.4th 406, 413.

...the belief of the defendant in a state of facts is itself a fact which it is proper to submit to the jury for its consideration;

Franzen v. Shenk (1923) 192 Cal. 572, 576-577, 221 P. 932. The allegation that the action was prosecuted with knowledge of the falsity of the claim is a sufficient statement of lack of probable cause. See *Pulvermacher v. Los Angeles Coordinating Committee*, 61 Cal. App. 2d 704, 707 [143 P.2d 974].

D. Noerr-Pennington doesn't shield malicious prosecution defendants

The Parker defendants have cited the Noerr-Pennington doctrine as providing protection for an attorney accused of malicious prosecution. The case they cited describes malicious prosecution as being *outside* the protection of Noerr-Pennington.

Noerr-Pennington framework essentially mirrors the first two elements of malicious prosecution under Minnesota law. A lawsuit lacking in probable cause and pursued without a reasonable belief of possible success is simply an objectively baseless or "sham" lawsuit, and a lawsuit brought with malicious intent is one that is subjectively motivated by bad faith.

Porous Media Corporation, v. Pall Corporation, 186 F.3d 1077 (8th Cir. 1999).

II. EVIDENCE OF LACK OF PROBABLE CAUSE

A. The original dispute

The original dispute between Gregerson and [owner of OCP] didn't involve a disagreement over facts. [owner of OCP] agreed he used Gregerson's photo, he just refused to pay for it. The story that he paid someone named “Zubitskiy” for the photo was his excuse for refusing to pay Gregerson, but [owner of OCP] did not deny the photo was Gregerson's, he just didn't want to “pay twice”. [owner of OCP] declined Gregerson's offer to prove the photo was his, saying “I know it's your photo”.

Gregerson brought an action in small claims court. During a mandatory mediation session, Gregerson produced a large, detailed print of the image. [owner of OCP] was present, along with defendant Morgan Smith (representing [OCP]). The mediator, seeing Gregerson's high-quality, detailed photo, stated “I think it's his photo, can we agree on that?”. [owner of OCP] and Smith agreed. They still objected to paying Gregerson fair market value for the photo. The case was dismissed without prejudice based on jurisdiction. Pl.'s memo supporting punitive damages, Gregerson affidavit at no. 7-14.

B. Advance notice that [OCP] had purchased stolen property

Based on these facts describing the original dispute, which have not been challenged in this case, Gregerson put [OCP] and counsel on notice that [OCP] had purchased stolen photos (assuming [owner of OCP]'s story about buying the photos was even true). Gregerson provided a copy of the photo on his website, the web address where they could see his body of similar work, and showed a high-resolution print of the photo. He offered to provide the digital high-resolution file, but was turned down.

Defendants Smith and Parker were aware their client had purchased stolen property. They

had no evidence to support a different finding, e.g. that Zubitskiy owned the photos (the Zubitskiy sales agreement did not specify what photos were being sold or who created them). Smith and Parker made no effort to develop such evidence by, for example, attempting to locate Zubitskiy to confirm if he was the true photographer. There was no reasonable basis to believe they could impeach Gregerson's certificate of copyright ownership, prior publication, possession of the high-resolution file, first-hand testimony, and possession of out-takes. The court wrote:

...If [owner of OCP] had been acting in good faith...[owner of OCP] would have offered to fairly compensate Gregerson and then seek reimbursement from "Zubitskiy", the person who allegedly sold the photograph to [OCP]...[owner of OCP]'s bad faith...is the moral equivalent of "theft"...

Judge Mark Wernick, April 10th, 2006 (Complaint Ex. H, pp. 10-11).

C. Web page about the dispute

Gregerson published a web page describing the dispute in terms that were not challenged at the time. Judge Mark Wernick described this web page essay as follows.

...what Gregerson described in his essay; namely 1) Someone [Zubitskiy] stole the photograph from Gregerson, 2) [OCP] profited from using the stolen photograph, 3) Gregerson wrote a letter to [OCP] advising about the theft, 4) [OCP] ignored Gregerson's letter, 5) after Gregerson reached [owner of OCP] by telephone, [owner of OCP] told Gregerson that Gregerson would have to sue [OCP] to get any compensation, 6) during that telephone conversation, [owner of OCP] lied to Gregerson by saying that [OCP] only published the photo in the yellow pages ad, when in fact [OCP] had published the photo on its website, 7) after Gregerson sued [OCP] in conciliation court, [owner of OCP] failed to bargain in good faith, offering Gregerson a mere 11% (\$200) of Gregerson's market value calculation (\$1,800)...Based on this description of the relevant events (none of which [OCP] specifically refuted in its letter to Gregerson or in its Com-

plaint) Gregerson's headline, "[OCP]'s president [owner of OCP] and Intellectual Property Theft" is not actionable as a matter of law.

Judge Mark Wernick, April 10th, 2006, order (Complaint Ex. H, pp. 9-10). Judge Ann D.

Montgomery later described the web page as follows (Complaint Ex. A, ¶ 18):

...Plaintiff posted on his website an essay about the dispute and a picture of [owner of OCP]. Plaintiff has continued to use his website as a forum for discussing the dispute....The comments posted on Plaintiff's website include criticism of Defendants by Plaintiff, comments posted by visitors to the website, and comments by [owner of OCP]. Plaintiff's website comments include a detailed description and chronology of all the events relating to this litigation...

D. Defamation lawsuit over the web page

Defendant Smith and Raver, LLP, sent Gregerson a letter demanding he remove the web page based on "numerous false statements" which they refused to identify. Complaint Ex. G. Gregerson responded with an offer to remove anything false if they can show it was false. Pl.'s memo supporting punitive damages, Gregerson affidavit at no. 17. Smith and Raver did not reply. On October 24th, 2005, Smith obtained an *ex-parte* TRO shutting down the web page, and filed a defamation lawsuit against Gregerson on behalf of [OCP]. Complaint Ex. I.

Neither the demand letter nor the complaint identified anything written by Gregerson that was false. Even after trial, judge Montgomery wrote "Defendants did not identify any specific comments by Plaintiff that were false.". Complaint Ex. A., p. 18.

In discovery during the defamation suit, Smith claimed Gregerson's web page falsely stated [OCP] published Gregerson's photo. Pl.'s memo supporting punitive damages, Ex. B, p. 8.

On February 23rd, 2006, Gregerson served Smith with a motion for sanctions alleging the Zubitskiy sales agreement (exhibit A of the defamation complaint) was forged, as the person

who allegedly signed it, Michael Zubitskiy, does not exist. The court postponed hearing the motion, but Judge Wernick wrote that this allegation was credible and “[owner of OCP] would be well advised to find the elusive Mr. Zubitskiy” if he intends to pursue his defamation claim. Complaint Ex. H, p. 13. Without any independent evidence that Zubitskiy existed, [owner of OCP] and Smith (and later Parker) pursued the defamation claim over Gregerson's truthful web page.

E. Federal counterclaims over the web page

Boris Parker later brought seven counterclaim against Gregerson over the web page in response to a copyright infringement lawsuit Gregerson filed against [OCP] in March, 2006. They were (1) trademark infringement, (2) deceptive trade practices, (3) interference with prospective contractual relations, (4) appropriation of name and likeness, (5) unjust enrichment, (6) cyberpiracy, and (7) injunction. The counterclaims and briefs supporting them alleged [OCP] “lawfully purchased” the disputed photos from Michael Zubitskiy in March, 2004. Complaint Ex. L, ¶ 44.

III. DEFENDANTS HAD NO REASONABLE BELIEF THE CLAIMS THEY REPRESENTED COULD PREVAIL ON THE MERITS

A. Parker and Smith had no evidence the web page was untrue

Gregerson's claim that he created and owned the Skyline and Kenwood photos was supported by all available and admissible evidence. The court found on summary judgment there was “no genuine dispute as to ownership of the photos in question”. Further, during a mandatory mediation session, Smith and [owner of OCP] admitted the Skyline photo was Gregerson's. During his deposition, [owner of OCP] admitted he had no evidence Zubitskiy took the Skyline photo.

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

A: I am not aware.

Deposition of [owner of OCP], Pl. memo for punitive damages, Ex. C (34:19-21). Smith and Parker had “no credible evidence to support the belief that Zubitskiy exists or was the source of the controverted photos”, according to the court. Complaint Ex. A, ¶ 13. The story of a mystery-man photographer and a cash transaction following a one-time sauna encounter (with a summertime photo being taken in winter) was self-evident as fantasy from the beginning.

B. Parker and Smith knew [owner of OCP]'s claims were false

Parker and Smith did not attempt to locate Zubitskiy. They did not call or subpoena the health club where Zubitskiy supposedly met [owner of OCP], or pursue [owner of OCP]'s cell phone records to trace the alleged incoming call from Zubitskiy. Only after Gregerson produced an “affidavit of not found” did [owner of OCP] and Smith contact an investigator, who also could find no trace of Zubitskiy. Defendant Boris Parker and [owner of OCP] are both members of the local Russian community, but although Zubitskiy was described as a Russian speaker/immigrant, they did not use their community associations to try to locate Zubitskiy (no phone calls, etc.). Smith and Parker were engaged in willful blindness as to evidence confirming Zubitskiy was fictional.

C. The claims against Gregerson lacked evidentiary and/or legal support

There was not probable cause or a reasonable belief the legal claims against Gregerson could prevail on the merits. The claims are described below.

Defamation

The claim was filed on October 24th, 2005, by Morgan Smith. On April 26th, 2006, Boris Parker took over (he is still listed as the attorney of record for the case on pa.courts.mn.us, see exhibit B, Register of Actions for 27-cv-05-016185). The case was removed to federal court and consolidated with Gregerson's copyright claim, and ruled to be dismissed on August 31st, 2007.

Note: this court's order denying punitive damages, in its background section, described the case removed to federal court as a state court copyright claim in which Gregerson was the plaintiff. The copyright claim existed in federal court, the removed case was this defamation claim. Gregerson was the defendant, not the Plaintiff. See Ex. B and Complaint at Ex. I, J.

Once the case was removed, the federal court picked up where the state court left off, as though everything done in the state court had in fact been done in the federal court. *Savell v. Southern Ry.*, 93 F.2d 377, 379 (5th Cir.1937). "The pleadings as already filed stand as if they had been filed in federal court." *Murray v. Ford Motor Company*, 770 F2d 461 (5th Cir. 1985). Federal Rules of Civil Procedure 81(c), Removed Actions, states repleading isn't necessary.

(1) Applicability.

These rules apply to a civil action after it is removed from a state court.

(2) Further Pleading.

After removal, repleading is unnecessary unless the court orders it.

Boris Parker initially filed a redundant defamation counterclaim on August 28th, 2006. Complaint Ex. L, p. 14. On October 3rd, in a memo supporting dismissal of the counterclaims, Gregerson wrote:

[OCP] must also overcome the issue of estoppel, as they already have a claim for defamation against Gregerson over the same webpage before this court.

Parker amended the counterclaims to remove this second cause of action for defamation, and at a hearing on Nov. 17th, Gregerson agreed the defamation *counterclaim* was dismissed, leaving the original defamation claim. Gregerson had served an answer to the defamation claim on April 26th, 2006. On May 10th, 2006, the state court ruled [OCP] could not dismiss it as a matter of right. Reply memo supporting punitive damages, Ex. B, no. 14, order of Judge Wernick.

On April 9th, 2007, Boris Parker filed a memo to compel production of email by Gregerson with keywords including “Zubitskiy” and “Michael Zubitskiy”, arguing it was needed to support [OCP]'s defamation claim:

“Defendants believe this information is relevant and vital because it may lead to discovery of vital information relating to Defendants’ defamation claim, . . .”

Exhibit C, Def.'s memo to compel discovery at pp. 3, 9.

Defendants Smith and Parker had no evidence to show Gregerson's web page was false. The court ruled there was no genuine dispute as to Gregerson's ownership of the photographs, and no credible evidence to support the belief that Zubitskiy existed. The abandonment of this claim is consistent with this lack of evidentiary support.

Unjust enrichment

The unjust enrichment claim was filed August 28th, 2006, by defendant Boris Parker and dismissed on summary judgment on August 31st, 2007. Complaint Ex. L, p. 14. It alleged Gregerson was unjustly enriched \$100,000. In discovery, Parker did not identify any people who provided this money to Gregerson or when. There was no testimony from [owner of OCP] or any other evidence to support this claim. The court ruled it was “purely speculative”. Def.'s memo supporting dismissal, Ex. F, Memorandum Opinion and Order, pp. 16. There was no basis for a reasonable belief this claim could prevail on its merits.

Trademark infringement.

The trademark infringement claim was filed August 28th, 2006, by defendant Boris Parker and dismissed on summary judgment on August 31st, 2007. The court found:

...affiants...do not give specific examples of customers or individuals in the real estate business becoming confused as to whether [OCP] sells photographs or whether Gregerson is affiliated

with [OCP]. It is highly unlikely that someone looking for any of [OCP]'s services became confused and accidentally bought photographs instead.

...Gregersons website contains critical commentary about Defendants, and Gregerson's use of Defendants trade and service marks is intended to catalogue and describe the contents of his website...The Court concludes that Defendants have failed to demonstrate on the record the existence of specific facts which create a genuine issue for trial with respect to likelihood of confusion.

Id., p. 10. No evidence of consumer confusion ever existed, or any other evidence to support a reasonable belief this claim could prevail on it's merits.

Cyberpiracy

Parker claimed Gregerson was guilty of cyberpiracy in his summary judgment memorandum dated July 26th, 2007. The court dismissed this claim on August 31st, 2007. It alleged Gregerson's web page filename, “[OCP].html”, was a domain name that infringed on [OCP]'s trademark. The court resolved this issue by using a dictionary.

Defendants have failed to create a genuine issue of material fact...with respect to [http://www.cgstock.com/essays/\[OCP\].html](http://www.cgstock.com/essays/[OCP].html), the internet address in question, www.cgstock.com is the domain name.

Id., p. 11. There was no reasonable basis to believe this claim could prevail.

Appropriation of name and likeness

On summary judgment, the court wrote:

...Arguably, the use of Defendants names may bring Gregerson increased consumer traffic to his commercial website.

Id., p. 15. However, following trial, the court found the defendants had no evidence to support this claim.

Defendants...failed to prove that Plaintiffs website experienced any increase in traffic whatso-

ever. Even assuming they had, Defendants presented no evidence demonstrating a causal connection between Plaintiff's use of Defendants' name and [owner of OCP]'s picture and an increase in traffic to Plaintiff's website.

Complaint Ex. A, p. 18. There was never any evidence that Gregerson benefited from his publication of [owner of OCP]'s name or photo, and no basis to believe this claim could prevail. Gregerson used [owner of OCP]'s name and photo to identify [owner of OCP], which is not actionable.

Deceptive trade practices

Judge Montgomery allowed [OCP]'s claims of deceptive trade practices to proceed, despite Gregerson's argument there was no evidence he made any false statements. The court relied upon Parker's representation that there were false statements on Gregerson's web page.

Defendants have submitted evidence that Gregerson has posted, or allowed others to post, comments on his commercial photography website that, if untrue or misleading, make damaging comments about Defendants' business. See Parker Aff. [Docket No. 99] Exs. E, F. Whether or not the comments are true is not the subject for summary judgment consideration.

Def.'s memo supporting dismissal, Ex. F, Memorandum Opinion and Order, p. 11. At trial, however, "Defendants did not identify any specific comments by Plaintiff that were false." Complaint Ex. A, p. 18. Parker led the court to believe there were false statements of fact on Gregerson's web page. Parker knew there were no false statements.

Interference with prospective contractual relations

On summary judgment, the court ruled:

Gregerson argues that he is entitled to summary judgment on this claim because all statements he made about the Defendants on his website are true... Although Gregerson is correct that truth is a defense to liability, all of Gregerson's

statements on his website have not yet proven to be true. See *Glass Serv. Co. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 871 (Minn. Ct. App. 1995) ("no liability for interference on part of one who merely gives truthful information to another").

Def.'s memo supporting dismissal, Ex. F, Memorandum Opinion and Order, p. 12. The Court allowed this claim to proceed to trial because of Parker's representation that Gregerson made false statements on his web page. Parker knew this was not true, and he did not question Gregerson at trial about the truth of his statements. Complaint Ex. A, p. 18, ¶ 1. Gregerson prevailed without mounting any defense to this claim.

D. The Zubitskiy conundrum

[owner of OCP]'s story about Zubitskiy is not only unbelievable, but physically impossible. He claims Zubitskiy took photos in March of 2004 that Gregerson published on his website in January, 2004, and November, 2002. Gregerson's publication of the photos on his site *prior* to Zubitskiy's creation of the photos was never explained, or how Zubitskiy allegedly took the summertime Kenwood photo in early March, 2004. Boris Parker provided a theory to explain this late in the case:

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

See exhibit D, Def.'s reply memo supporting summary judgment, pp. 6-7. There was no evidence to support this allegation, it was as much pure fantasy as the first version of events. Boris Parker lacked a reasonable basis to believe his client's story, yet sought damages of \$1,149,000.00 against Gregerson based on this version of events.

E. Zubitskiy and the forged sales agreement were relevant

The court allowed [OCP] to avoid summary judgment on claims of deceptive trade practices and interference with contractual relations because Parker alleged Gregerson's web page contained damaging false statements. The web page stated that [owner of OCP] infringed on Gregerson's photos and lied about Michael Zubitskiy. Gregerson also had an unclean hands affirmative defense and standing motion for sanctions, both over the fact that [owner of OCP] forged the Zubitskiy photo agreement, which was used as evidence in the defamation action.

On October 24th, 2007, Gregerson emailed Parker asking him to agree to stipulate that “Zubitskiy” was not relevant to the counterclaims. Boris Parker did not respond (Pl.'s reply memo for punitive damages, Ex. G).

F. Third-party comments were not a separate factual issue

[OCP] and Parker never requested Gregerson remove any comments cited in their briefs. At trial, Parker did not challenge the truth of any third-party comments. [OCP] and counsel did not bring any claims against the authors of those comments.

Judge Mark Wernick had earlier ruled that [owner of OCP]'s conduct was “the moral equivalent of theft” (Complaint Ex. H, p. 11), and also that “If the statement is true in substance, the inaccuracies of expression or detail are immaterial.” (Id. p. 8). The third-party comments were re-statements of Gregerson's allegations that [owner of OCP] stole his photos and lied about it. There was no evidence to show these third-party comments were factually untrue, but even so, Parker cited no legal authority holding Gregerson accountable for statements made by others. The alleged “mafia” comment was actually posted by [owner of OCP] himself, which was shown in trial exhibit P45. Pl.'s reply memo supporting punitive damages, Ex. E.

IV. OBVIOUS FALSEHOOD

Gregerson alleges [owner of OCP]'s claims are an obvious falsehood. Defendants disagree. This is a question of fact for a jury. The Plaintiff has raised a genuine dispute as to

whether the defendants knew their client's claims were false. The defendants were aware of evidence a reasonable person would consider to show [owner of OCP]'s story was not true. They inexplicably refused to pursue [owner of OCP]'s story, despite the necessity of finding supporting evidence. This was willful blindness on their part.

When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, *Franzen v. Shenk* (1923) 192 Cal. 572, [221 P. 932], and similar cases hold that the jury must resolve the threshold question of the defendant's factual knowledge or belief.

Sosinsky v. Grant, 8 Cal. Rptr.2d 552 (Ct. App. 1992).

V. MALICE

Whatever is done willfully and purposefully, if it be at the same time wrong and unlawful and that known to the party, is of legal contemplation malicious.

Allen v. Osco Drug, Inc., 265 N.W.2d 639, 644 n.6 (Minn. 1978).

"The malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward plaintiff but exists when the proceedings are instituted primarily for an improper purpose." (*Albertson v. Raboff*, supra, 46 Cal. 2D 375, 383.)...It does not necessarily infer the presence of anger or vindictiveness. It is sufficient if it appear that the former suit was commenced in bad faith to vex, annoy or wrong the adverse party. (*Hudson v. Zumwalt*, 64 Cal. App. 2d 866, 872 [149 P.2d 457].) The plaintiff is not required to prove that the prosecutor was inspired by personal hostility, a grudge, or ill-will. ...Like any other fact in issue, malice may be proved by direct evidence or may be inferred from all the circumstances in the case.

Albertson v. Raboff (1956) 46 Cal. 2d 375, 389 [295 P.2d 405]. 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, and (2) were aware of [owner of OCP]'s malice and knowingly acted to further it. Pl.'s reply memo supporting punitive damages, Gregerson's affidavit at nos. 5-7.

VI. CONSPIRACY

The Parker defendants have requested summary judgment on the conspiracy claim because the Plaintiff claims the conspiracy was only implied by conduct of the parties. However, "No formal agreement is necessary to constitute an unlawful conspiracy." *Prestressed Concrete, Inc. v. Bladholm Bros. Culvert Co.*, 498 N.W.2d 274, 277 (Minn. App. 1993), review denied (Minn. May 28, 1993). Conspiracy may be proven by circumstantial evidence, as Gregerson alleges in this case. *Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n*, 891 F.2d 1473, 1481 (10th Cir. 1989). "There is seldom direct proof of the agreement underlying an unlawful conspiracy." *Bell v. United States*, 251 F.2d 490, 1958 (8th Cir.). "...we have held that a mutual implied understanding is sufficient. If there is a concert of design, it is not essential that there be a participation by each conspirator in every detail of its execution. A conspiracy may be proved and in fact is usually proved by circumstantial evidence..." *Marx v. United States*, 86 F.2d 245, 250 (8th Cir.). Conspiracy may be proved by circumstantial evidence and may be implied by the surrounding circumstances or by inferences from the actions of the parties. *United States v. Jain*, 93 F.3d 436, 440 (8th Cir. 1996).

Both the defendant attorneys, Smith and Parker, are alleged to have known, along with their client, Gregerson made no false statements. They worked together to bring legal claims against him, knowing he was exercising his free speech rights.

VII. CONCLUSION

Plaintiff has established a genuine issue for trial that the defendants brought claims

against him without probable cause or a reasonable belief they could prevail on the merits. Plaintiff has provided evidence of both actual and implied malice. There is sufficient evidence to show their client's claims were an obvious falsehood and the defendants knew they were false. The defendants motion for summary judgment should be denied.

Respectfully submitted,

Dated: _____

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