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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

VAL WEST et al., Plaintiffs and Appellants, v. ARENT FOX LLP et al., Defendants and Respondents.	B272273 (Los Angeles County Super. Ct. No. BC499863)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon and Gail Ruderman Feuer, Judges. Dismissed in part and affirmed in part.

Degani Law Offices, Orly Degani, for Plaintiffs and Appellants.

Arent Fox, Jerrold Abeles and Collin Seals, for Defendant and Respondent Arent Fox LLP.

Giovanniello Law Group, Alexander F. Giovanniello and Danielle M. VandenBos, for Defendant and Respondent Los Angeles Jewish Home for the Aging.

Defendant and respondent Los Angeles Jewish Home for the Aging (JHA) sued plaintiffs and appellants Val West (West)—the daughter of one of JHA's residents—and David Dizenfeld (Dizenfeld)—a family friend and an attorney—for defamation, civil harassment, trespass, and interference with contract. West and Dizenfeld prevailed on an anti-SLAPP special motion to strike JHA's defamation claim. Doubling down, West and Dizenfeld then initiated a separate lawsuit against JHA and its legal counsel, defendant and respondent Arent Fox LLP (Arent Fox), asserting they maliciously prosecuted the first suit. JHA and Arent Fox responded by filing their own anti-SLAPP motions arguing—successfully, as the trial court later ruled—West and Dizenfeld's malicious prosecution claims arose from protected activity and lacked minimal merit. On appeal from the trial court's ruling, the parties agree West and Dizenfeld's malicious prosecution claims arise from protected activity. Thus, we are asked to decide only whether West and Dizenfeld's appeal is timely as to Arent Fox and whether West and Dizenfeld demonstrated a probability of prevailing on their malicious prosecution claims, which mainly target the defamation cause of action asserted by JHA and Arent Fox in the first lawsuit.

I. BACKGROUND

West's mother moved into JHA in 2008 and conflicts soon arose between JHA's staff and West and Dizenfeld regarding her treatment. In July 2009, West and Dizenfeld discussed the situation with Jody Spiegel (Spiegel), an attorney with the nonprofit public interest law firm Bet Tzedek. Spiegel specialized in advocating for nursing home facility residents and their families, and she advised West and Dizenfeld to seek assistance

from the State Long-Term Care Ombudsman. Later that month, the Ombudsman convened a meeting between West, Dizenfeld, West's mother, and JHA personnel.

In February 2010, JHA, represented by Arent Fox, sued West and Dizenfeld for trespass, intentional interference with contractual relations, civil harassment, and defamation. The defamation cause of action (discussed in greater detail, *post*) was predicated on an email Dizenfeld sent to JHA's Chief Operating Officer Brett Fielder (Fielder)—copying Spiegel and others—that complained JHA's staff had refused to provide information about West's mother's medical test results both to West's mother herself and to West.

West and Dizenfeld moved to strike JHA's complaint pursuant to the anti-SLAPP law, Code of Civil Procedure section 425.16.[1] The trial court granted the anti-SLAPP motion in part, striking JHA's defamation cause of action but denying the motion as to JHA's other claims. This court affirmed the trial court's anti-SLAPP ruling. (*Los Angeles Jewish Home for the Aging v. West* (Nov. 14, 2011, B224314 [nonpub. opn.].) West's mother moved out of JHA in early 2011, and JHA later voluntarily dismissed its other causes of action against West and Dizenfeld.

In 2013, West and Dizenfeld (hereafter, plaintiffs) sued JHA and Arent Fox.[2] Plaintiffs asserted two causes of action for

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[1] Undesignated statutory references that follow are to the Code of Civil Procedure.

[2] The 2010 and 2013 actions also named JHA's executive director, Nadine Roisman (Roisman), as a party. Claims by and against Roisman are not at issue in this appeal.

malicious prosecution,[3] along with several other causes of action. JHA responded by filing an anti-SLAPP motion contending plaintiffs' malicious prosecution causes of action, as well as an alleged abuse of process claim, should be stricken. Arent Fox likewise filed an anti-SLAPP motion, though the firm more broadly argued all of the causes of action in which it was named should be stricken. Arent Fox also demurred to the complaint.

The trial court denied Arent Fox's anti-SLAPP motion insofar as it sought to strike plaintiffs' malicious prosecution claims. The court found "there [was a] basis to believe that [JHA and Arent Fox] knew Spiegel was consulted by plaintiffs as an attorney in the matter and that there were ongoing disputes between plaintiffs and [JHA] for a considerable time before the lawsuit was filed, from which malice and lack of probable cause could be inferred." The court granted the anti-SLAPP motion as to several of the other causes of action plaintiffs had alleged against the firm, and the court also sustained without leave to amend Arent Fox's demurrer with respect to two of the remaining

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[3] The first of the two malicious prosecution claims was expressly designated a "SLAPPback," which is a "cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Section 425.16." (§ 425.18, subd. (b)(1); *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 282 (*Soukup*).) The second malicious prosecution cause of action was also predicated on the assertion of the defamation claim in the earlier suit, but additionally asserted JHA and Arent Fox maliciously prosecuted a State Bar complaint against Dizenfeld and an unlawful detainer action against West's mother.

causes of action. Then, when taking up JHA's anti-SLAPP motion (which occurred at a later hearing), the trial court ruled similarly: denying the motion with respect to plaintiffs' malicious prosecution causes of action, but granting the motion as to the abuse of process claim brought by plaintiffs. The upshot of these rulings was that plaintiffs' malicious prosecution claims were all that survived as against Arent Fox, whereas the malicious prosecution claims plus other causes of action (not pertinent to this appeal) survived as against JHA.

By way of a writ petition filed in this court, Arent Fox challenged the trial court's denial of its special motion to strike plaintiffs' malicious prosecution causes of action. We issued an alternative writ ordering the trial court to "vacate that part of [its] October 15, 2013 order denying [Arent Fox's] motion to strike the [malicious prosecution] causes of action as against it, and enter a new and different order granting the motion to strike those causes of action" or show cause why a peremptory writ should not issue. The trial court complied with the alternative writ by vacating its earlier order and granting the special motion to strike plaintiffs' malicious prosecution claims as against Arent Fox, which were the last remaining claims against the firm.

West (but not Dizenfeld) appealed the trial court's order granting Arent Fox's special motion to strike. While that appeal was pending, the trial court granted a motion for judgment on the pleadings filed by JHA concerning certain of the other causes of action in which JHA was named (i.e., causes of action other than the malicious prosecution claims at issue in this appeal). Plaintiffs filed a first amended complaint to account for the judgment on the pleadings ruling, and plaintiffs thereafter filed a

second amended complaint pursuant to a stipulation among all parties.

The stipulation provided Arent Fox was "no longer a party to the action in any capacity, unless the decision on appeal changes the ruling on the motion to strike . . . ." The stipulation's signature page included a short "Order" section for the trial court, which the court signed, that required plaintiffs to file and serve the second amended complaint in the form agreed to and attached to the stipulation. As attached and filed, the second amended complaint listed all causes of action previously alleged against Arent Fox as "dismissed."

West's pending appeal of the order striking the malicious prosecution claims against Arent Fox ultimately changed nothing. We dismissed the appeal because, under section 425.18, subdivision (g), "[t]he sole remedy provided for review of that order was for West as the aggrieved party to petition an appropriate reviewing court for a peremptory writ within 20 days of service of written notice of the order," which West had not done.[4] (*West v. Arent Fox LLP* (2015) 237 Cal.App.4th 1065, 1072 (*West I*).)

Back in the trial court, and obviously aware of the disposition of the malicious prosecution claims as to Arent Fox, JHA filed its own anti-SLAPP motion to strike the malicious

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[4] Section 425.18, subdivision (g) provides: "Upon entry of an order denying a special motion to strike a SLAPPback claim, or granting the special motion to strike as to some but less than all causes of action alleged in a complaint containing a SLAPPback claim, an aggrieved party may, within 20 days after service of a written notice of the entry of the order, petition an appropriate reviewing court for a peremptory writ."

prosecution claims still pending against JHA in the second amended complaint. The trial court granted the motion and, having resolved the other remaining causes of action against JHA by way of demurrer and judgment on the pleadings, entered judgment in JHA's favor. Plaintiffs petitioned for a writ of mandate to overturn the trial court's disposition of JHA's anti-SLAPP motion. We summarily denied plaintiffs' petition and this appeal ensued.

II. DISCUSSION

Plaintiffs challenge the trial court's anti-SLAPP rulings as to both defendants, i.e., the grant of Arent Fox's anti-SLAPP motion in October 2013 and the later grant of JHA's motion in January 2014. We hold the appeal is untimely as to Arent Fox because the firm was dismissed from plaintiffs' action, at the latest, as of June 2015, which means any appeal needed to be noticed far earlier than the notice that triggered this appeal.

With respect to JHA, plaintiffs' appeal is properly before us, but plaintiffs have not shown their causes of action for malicious prosecution have the "'minimal merit'" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*)) necessary to withstand JHA's anti-SLAPP challenge. Plaintiffs have not adequately established JHA lacked probable cause to maintain its defamation claim because a reasonable attorney could conclude (1) the alleged defamatory statement (the email from Dizenfeld to JHA COO Fielder) was not substantially true, and (2) the statement would not be protected under the litigation or common interest privileges. And plaintiffs cannot now argue JHA maliciously prosecuted its civil

harassment cause of action because plaintiffs never advanced that theory in the trial court.

A. Governing Anti-SLAPP Standards

Section 425.16 directs courts, upon motion, to strike claims "arising from any act of [a] person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . , unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) The statute specifically defines an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue'" to include any writing made before a legislative, executive, or judicial proceeding. (§ 425.16, subd. (e).)

Analysis under section 425.16 proceeds in two steps. "At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. . . . If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.)

We review the grant of an anti-SLAPP motion de novo. (*Park*, *supra*, 2 Cal.5th at p. 1067.) Like the trial court, we

conduct our review by "consider[ing] the pleadings, and [the] supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); *Park*, *supra*, at p. 1067.)

B. No Appeal Now Lies From the Order Granting Arent Fox's Anti-SLAPP Motion

When the parties stipulated to plaintiffs filing a second amended complaint, they agreed Arent Fox was "no longer a party to the action in any capacity, unless the decision on appeal change[d] the ruling on the motion to strike . . . ." The trial court signed the associated order on October 3, 2014, and West's appeal (described in the stipulation's proviso just quoted) was dismissed in June 2015. (*West I*, *supra*, 237 Cal.App.4th 1065) Thus, Arent Fox was dismissed as a defendant on October 3, 2014, or certainly by June 17, 2015, when this court dismissed the appeal in *West I*. Plaintiffs' current appeal is therefore untimely with respect to Arent Fox; any appeal needed to be noticed at the latest by December 14, 2015 (Cal. Rules of Court, rule 8.104(a)(1)(C) [180 days from the entry of judgment]), and plaintiffs did not notice this appeal until May 16, 2016.

Plaintiffs' arguments to the contrary are unavailing. They assert the court order approving the stipulation does not bar their appeal because it was not a "'formal order of dismissal.'" The absence of the word "dismiss" from the order, however, does not prevent it from operating as a dismissal, which is the only credible interpretation of the document. (See *Shepardson v. McLellan* (1963) 59 Cal.2d 83, 86 [where order "terminated the action as to one party, and there [was] no indication in the order that it was to be followed by a formal written judgment, it was an

appealable order"]; *McColgan v. Jones, Hubbard & Donnell, Inc.* (1938) 11 Cal.2d 243, 246 [order granting "nonsuit" operated as dismissal under section 581 without needing to use the term "dismissal"]; *McLeran v. McNamara* (1880) 55 Cal. 508, 512 ["If a judgment should have been entered by the clerk [following plaintiff's stipulation of dismissal of certain defendants], it is one of those cases in which the law will presume that to have been done which should have been done"].)

Plaintiffs alternatively contend the condition in the stipulation never came to pass because this court dismissed West's prior appeal only on jurisdictional grounds. The point is unpersuasive. The stipulation contains no language providing or even suggesting the decision to be made on appeal would need to be on the merits.[5] Because the dismissal of West's prior appeal did not "change the ruling on the motion to strike," the order approving the stipulation dismissed Arent Fox from plaintiffs' causes of action.

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[5] Nor is there any basis in the record to claim, as plaintiffs do, that *this* appeal, which did not exist at the time of signing and approval of the stipulation, can somehow be understood to be "the decision on appeal" (also described as the "pending appeal of [the trial court's] ruling granting Arent Fox LLP's Special Motion to Strike") referenced in the stipulation. Plaintiffs' invocation of the discretionary doctrine of judicial estoppel similarly fails because Arent Fox gained no advantage from the position it took in *West I*. (*Stratton v. Beck* (2017) 9 Cal.App.5th 483, 495; see also *West I*, *supra*, 237 Cal.App.4th at pp. 1071-1072.)

C. Plaintiffs Have Not Shown a Probability of Prevailing Against JHA on Their Malicious Prosecution Claims

1. Plaintiffs' contention that JHA's defamation cause of action was brought without probable cause lacks minimal merit

After the trial court granted JHA's anti-SLAPP motion, plaintiffs timely petitioned this court for a writ of mandate. Because we summarily denied the petition, plaintiffs' claims of error are reviewable on appeal. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 895 [summary denial of writ petition accompanied by "[a] short statement or citation explaining the basis" of the denial does not operate as law of the case].)

Plaintiffs' causes of action alleging JHA maliciously prosecuted its earlier defamation claim indisputably arose from protected activity—the filing of a lawsuit. We proceed, therefore, to step two of the anti-SLAPP inquiry, which requires plaintiffs to "'"demonstrate that the [malicious prosecution claims are] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by [plaintiffs] is credited."' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741, fn. omitted.)

The tort of malicious prosecution protects a person's "'interest in freedom from unjustifiable and unreasonable litigation' [citation] . . . ." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 882, italics omitted (*Sheldon Appel*).) "The tort consists of three elements. The underlying action must have been: (i) initiated or maintained by, or at the direction of, the defendant, and pursued to a legal termination in favor of the malicious prosecution plaintiff; (ii) initiated or maintained

without probable cause; and (iii) initiated or maintained with malice. [Citations.]" (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775-776 & fn. 1 (*Parrish*).) Because malicious prosecution actions have "the potential to impose an undue 'chilling effect' on the ordinary citizen's willingness to report criminal conduct or to bring a civil dispute to court, . . . the tort has traditionally been regarded as a disfavored cause of action" and "the elements of the tort have historically been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim." (*Sheldon Appel*, *supra*, at p. 872.)

Because the trial court struck JHA's defamation claim as a SLAPP, plaintiffs can easily satisfy the first element of a malicious prosecution claim, i.e., that the prior litigation be terminated in plaintiffs' favor. (See *Soukup*, *supra*, 39 Cal.4th at p. 292.) Plaintiffs do not, however, carry their burden to show a probability of prevailing with respect to the second element of a malicious prosecution claim, namely, that JHA lacked probable cause to maintain its defamation cause of action.[6]

The bar for establishing probable cause is "low." (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1047.) A cause of action lacks probable cause when it is legally untenable, meaning "'any reasonable attorney would agree [the claim] is totally and completely without merit.'" (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 885, citation omitted.) In other words, a party lacks probable cause to pursue a cause of action "'either if he relies upon facts

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[6] Our resolution of the probable cause issue obviates any need to address malice.

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.' [Citation.] 'In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.' [Citation.]" (*Soukup*, *supra*, 39 Cal.4th at p. 292.)

The determination of probable cause is an "'objective matter.'" (*Soukup*, *supra*, 39 Cal.4th at p. 292, citation omitted; *Sheldon Appel*, *supra*, 47 Cal.3d at p. 881.) Where the facts pertaining to probable cause are not in dispute, we resolve the issue as a matter of law. (*Sheldon Appel*, *supra*, at p. 881.) Under the applicable anti-SLAPP standard, plaintiffs must demonstrate a probability of proving JHA proceeded with a defamation claim no reasonable attorney would believe was viable. (*Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 685, disapproved of on another ground by *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239.)

A cause of action for defamation arises from "'(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.' (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 529, p. 782, citing Civ. Code, §§45-46 and cases.)" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) JHA, in its suit against plaintiffs, alleged an email sent by Dizenfeld on February 3, 2010, defamed JHA.[7] Dizenfeld addressed the email to JHA's

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[7] The complaint indicated JHA's defamation cause of action was based on publications in addition to Dizenfeld's February 3 email, but all parties to this appeal, including JHA, treat this February 3 email from Dizenfeld as the sole basis of JHA's defamation claim.

Chief Operating Officer Fielder, and he copied JHA's executive director Roisman, other JHA personnel, and Bet Tzedek attorney Spiegel on the message.

The email sent by Dizenfeld states: "This will serve to document the call and voicemail message from [West] and me jointly to you today, as well as to [Roisman] earlier. [¶] As you and [Roisman] know, [JHA] personnel have been refusing to share *with [West's mother] and [West]* the medical information requested by [West's mother] pursuant to and for discussion with [West's mother's] off-site PPO endocrinologist, including [West's mother's] glucose testing numbers. As nurse Cindy stated to [West], citing instructions from her supervisors: 'they told me not to give you anything.' All this despite the fact that you have a notarized copy of the Power of Attorney for [West] and Instructions given to [JHA] by [West's mother]." (Emphasis ours.) JHA's theory was that Dizenfeld copied Spiegel on the email to malign JHA with Bet Tzedek, an organization that serves "the same Los Angeles community JHA serves," and thereby endanger the "good repute [JHA] enjoys with organizations such as Bet Tzedek."

Plaintiffs contend no reasonable attorney would have considered JHA's defamation claim tenable because Dizenfeld's statements in his February 3 email were true and JHA knew they were true. Plaintiffs' contention is at best half-right, and being only half-right proves fatal to their ability to establish the requisite prima facie case that JHA proceeded with its defamation claim relying on facts it had no reasonable cause to believe to be true.

To support their contention that JHA knew Dizenfeld's email was true, plaintiffs rely on a report issued by the

Department of Social Services (DSS) after an investigation in March 2010, approximately one month after Dizenfeld sent the email. The report reveals JHA staff admitted they had refused to provide West, on one occasion, with her mother's glucose reading because they had been instructed to refer any calls from West to JHA's Administrator or Director of Nursing.

A defamation cause of action will not lie if its basis is "substantially true." (*Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 860 (*Reed*); *Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1181 ["It is sufficient if the *substance* of the charge is proven true, irrespective of slight inaccuracy in the details"].) "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' [Citations.] Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' [Citations]." (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 517 (*Masson*).)

Here, the record cannot support a determination that a reasonable attorney in JHA's position would have known or suspected Dizenfeld's email was substantially true. JHA's counsel stated in a declaration that he had investigated the substance of the email and found it to be untrue. And notably missing from the DSS report is any information about whether JHA provided West's mother (as distinguished from West) with her own glucose readings when she asked for them, which was one of Dizenfeld's factual representations. Rather, and to the contrary, there is evidence in the record that DSS determined

JHA had, in fact, been providing West's mother with her glucose results.[8]

Dizenfeld's accusation that JHA failed to provide West's mother with her own medical test results cannot be deemed a "'slight inaccuracy,'" a "'slight discrepancy,'" or a "'semantic hypertechnicality'" that has no effect on the substantial truth of the email. (*Reed*, *supra*, 248 Cal.App.4th at p. 861, citations omitted.) If Dizenfeld's email had represented only that JHA was refusing to give West's mother's test results to a third party (i.e., West, as her mother's designated representative) the email's accusations would have carried less of a "'sting.'" (*Campanelli v. Regents of the University of California* (1996) 44 Cal.App.4th 572, 581-582.) Because the email as drafted instead contained a significantly more egregious accusation of wrongdoing—refusing to provide a patient with her own test results—it is not probable plaintiffs can prove JHA complained of defamation while believing the email was substantially true.[9] (*Masson*, *supra*, 501

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[8] On our own motion, we judicially notice the entire record in appellate case number B255973 to avoid any ambiguity as to whether the full record was noticed on plaintiff's motion.

[9] West's mother, in a declaration, stated JHA refused to inform her of her glucose results during the week preceding Dizenfeld's email. Plaintiffs suggest this presents a factual dispute that should be decided by a jury and therefore resolved in their favor for purposes of anti-SLAPP analysis. Plaintiffs' contention is misplaced. The existence vel non of probable cause depends on the suing party's good faith basis for pursuing a claim, not on its comparison of competing evidence. (*Parrish*, *supra*, 3 Cal.5th at p. 781.) If there is no factual dispute, "it is the court which decides whether such facts constitute probable cause or not." (*Sheldon Appel*, *supra*, 47 Cal.3d at p. 881.) Here,

U.S. at p. 517; *Reed*, *supra*, at p. 861; *Metabolife Internat., Inc. v. Wornick* (9th Cir. 2001) 264 F.3d 832, 849; see also *Hoffman v. Washington Post Co.* (D.D.C. 1977) 433 F.Supp. 600, 603 [court considers truth of publication "as a whole," meaning libel defendant "may not avoid liability by proving that the imputation was true in part"].) Thus, plaintiffs have not demonstrated the requisite minimal merit for their contention JHA pursued a defamation cause of action that no reasonable attorney would believe was viable.

Plaintiffs additionally contend JHA lacked probable cause to bring its defamation claim because the litigation privilege obviously applied. This privilege applies not only to statements made during the course of litigation and other official proceedings. (Civ. Code, § 47, subd. (b).) The privilege also extends to prelitigation statements that "relate[ ] to litigation that is contemplated in good faith and under serious consideration." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 (*Action Apartment*); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057 [privilege may

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even though the record might reveal a dispute over whether or not West's mother actually received her glucose results, there is no dispute that JHA believed the email to be false and a DSS investigator determined West's mother was provided with her own test results, which would corroborate that belief. Considering the state of the anti-SLAPP record concerning the circumstances under which JHA maintained its defamation claim, plaintiffs have no prospect of showing probable cause was lacking because JHA relied on facts (the falsity of Dizenfeld's email, at least in substantial part) without reasonable cause to believe them to be true.

extend to conduct that precedes or follows trial].) Plaintiffs assert the applicability of the litigation privilege to Dizenfeld's February 3 email was apparent on the face of the email because JHA knew Spiegel was a Bet Tzedek attorney who specialized in advocacy for nursing home residents and that plaintiffs had consulted with Spiegel regarding issues with JHA.

We conclude JHA could have reasonably believed the litigation privilege would not apply and that the defamation claim did not, therefore, entirely lack merit on that basis. Prior to the February 3 email, plaintiffs had consulted with Spiegel just once, approximately seven months earlier. Plaintiffs apprised JHA they had met with Spiegel, but communications relating to her involvement indicate she was helping plaintiffs to amicably resolve their issues with JHA. In order for a prelitigation communication to be privileged, however, "the contemplated litigation must be *imminent*," meaning "the parties are negotiating under the actual threat of impending litigation." (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 35; see also *id.* at p. 34 [for privilege to apply, there must also be "some actual verbalization of the danger that a given controversy may turn into a lawsuit"].) In light of the the low probable cause threshold, we find it improbable that plaintiffs would be able prove JHA believed Dizenfeld's email concerned impending litigation—particularly considering (i) the content of the email, which did not raise the prospect of litigation, (ii) the evidence Spiegel had not been involved in plaintiffs' dispute for the past six to seven months, and (iii) the fact that Spiegel's prior involvement was not in the context of seriously anticipated litigation.

We further conclude on the anti-SLAPP record that it is improbable plaintiffs would be able to show a reasonable attorney would have known or strongly suspected the common interest privilege posed a bar to JHA's defamation cause of action. The common interest privilege protects a party from defamation liability for making "a statement to others on a matter of common interest . . . so long as the statement is made 'without malice.'" (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1196 (*Lundquist*); Civ. Code, § 47, subd. (c).) Here, a reasonable party in JHA's position could certainly believe Dizenfeld maliciously made the representation that JHA refused to provide West's mother with her own glucose test results.

To establish malice under Civil Code section 47, subdivision (c), the defamation plaintiff must show the statement arose "'"from hatred or ill will, evidencing a willingness to vex, annoy or injure another person."' [Citation.]" (*Lundquist*, *supra*, 7 Cal.4th at p. 1204; see also *Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 354 [malice is shown if "'"'"the publication was motivated by hatred or ill will towards the [defamation] plaintiff *or* . . . the [defamation] defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff[']s rights"'"'"].) Considering the record in this case, which manifests substantial animosity between West and Dizenfeld on the one hand, and JHA, on the other, we cannot say no reasonable attorney could have believed Dizenfeld's statement was motivated by ill will or an intent to annoy.

Because "the undisputed facts establish the existence of probable cause [for JHA's defamation claim] as a matter of law, there is no showing [plaintiffs] can make to demonstrate a

likelihood of succeeding on the merits of [their] malicious prosecution complaint" for purposes of defending against JHA's anti-SLAPP motion. (*Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, 1450.)

2. Plaintiffs forfeited the contention that JHA's civil harassment cause of action was brought without probable cause

In addition to their contentions regarding JHA's defamation claim, plaintiffs assert they have shown a probability of prevailing because JHA maliciously prosecuted its civil harassment claim against them without probable cause. This is not an argument plaintiffs made in the trial court, and we decline to address it in the first instance on appeal.

We harbor significant doubt that plaintiffs' second amended complaint should be construed to assert a malicious prosecution claim predicated on JHA's earlier assertion of a civil harassment cause of action against plaintiffs. Plaintiffs' second cause of action for malicious prosecution (count two of the complaint) states it is based on JHA's defamation cause of action, JHA's State Bar complaint against Dizenfeld, and the unlawful detainer action JHA asserted against West's mother—the civil harassment claim garners no mention. The second cause of action does incorporate the entirety of the complaint's preliminary allegations by reference, and those preliminary allegations do contain two sentences stating JHA "maliciously and abusively alleged and filed" a "groundless" civil harassment claim, but the civil harassment claim is not specifically alleged as a basis for the second cause of action (unlike the defamation claim, which is also referred to in the preliminary allegations).

Moreover, plaintiffs' *first* cause of action for malicious prosecution—one that likewise incorporates the complaint's preliminary allegations by reference—includes a footnote which states plaintiffs' intention to amend that cause of action to add JHA's claims for civil harassment, trespass, and intentional interference with contractual relations once those claims were terminated in plaintiffs' favor.[10] If plaintiffs' complaint insufficiently alleges malicious prosecution based on the civil harassment claim, plaintiffs may not rely on the civil harassment claim to contend the trial court's anti-SLAPP ruling was error. (See *Kreeger v. Wanland* (2006) 141 Cal.App.4th 826, 834-835 [where complaint's malicious prosecution count was based on one theory, court would not strike the count as a SLAPP in reliance on arguments there was no probable cause to proceed on theories that were not pled]; see also *Shanahan v. State Farm General Ins. Co.* (2011) 193 Cal.App.4th 780, 788 [even though sexual battery count incorporated preliminary averments by reference—including reference to 2003 incident—court concluded plaintiff's claim was not based on 2003 incident because the count "specifically alleged" it was based on a 2005 incident and plaintiff's deposition testimony "effectively disavowed any reliance" on the 2003 incident as a basis for her claim].)

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[10] The footnote suggests plaintiffs' incorporation by reference of the preliminary allegations in the first cause of action was not meant to extend to JHA's civil harassment cause of action mentioned therein; if the contrary were true, there would be no need to later amend. It stands to reason the same is true regarding the second cause of action for malicious prosecution, particularly because it incorporates the paragraphs comprising the first cause of action and all earlier paragraphs.

However, even if the second amended complaint is read quite liberally to assert a malicious prosecution claim premised on JHA's civil harassment cause of action, plaintiffs' conduct in the trial court prevents them from relying on that theory on appeal. In all the relevant trial court proceedings, none of the parties—including plaintiffs—ever treated plaintiffs' malicious prosecution claims as being premised on JHA's civil harassment cause of action. Plaintiffs are not entitled to advance this theory for the first time on appeal. (See *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592; *County of Los Angeles v. Southern California Edison Co.* (2003) 112 Cal.App.4th 1108, 1118; see also *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12 [where parties all proceeded under presumption their dispute was controlled by one theory, court would not consider alternate theory never raised in the trial court]; 9 Witkin, California Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459.) In a scenario where it is dubious plaintiffs relied on JHA's civil harassment cause of action as a basis for their malicious prosecution claim in the first place, it would be particularly "'unjust to [JHA]'" (*Fergus v. Songer* (2007) 150 Cal.App.4th 552, 572) to permit plaintiffs to seek reversal based on an argument never raised below. (*Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 621.)

DISPOSITION

Plaintiffs' appeal is dismissed insofar as it purports to challenge the trial court's ruling on Arent Fox's anti-SLAPP motion. The order granting JHA's section 425.16 special motion to strike plaintiffs' malicious prosecution claims is affirmed. Arent Fox and JHA shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.