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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

LAWRENCE PASTERNACK, Plaintiff and Respondent, v. THOMAS B. MCCULLOUGH, JR. et al., Defendants and Appellants.	B272097 (Los Angeles County Super. Ct. No. SC121723)

APPEAL from an order of the Superior Court of Los Angeles County. Nancy L. Newman, Judge. Reversed.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Bartley L. Becker and Caroline E. Chan for Defendants and Appellants.

Hatton, Petrie & Stackler, Gregory M. Hatton, Arthur R. Petrie, II and John A. McMahon for Plaintiff and Respondent.

This malicious prosecution action arises from a collection action brought against Lawrence Pasternack by Thomas McCullough, Jr. and his law firm (collectively, McCullough) on behalf of Easton Builders Corporation (Easton). After Pasternack prevailed in the collection action and settled with Easton on other claims, he sued McCullough for malicious prosecution. McCullough appeals from a denial of his special motion to strike the malicious prosecution complaint under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)[1] Among other things, McCullough contends Pasternack cannot demonstrate a probability of prevailing because the trial court in the underlying collection action denied Pasternack's motion for nonsuit; the denial established as a matter of law that McCullough and his client's collection claim was legally tenable under the interim adverse judgment rule. We reverse the order denying the anti-SLAPP motion.

FACTS

On November 9, 2006, Pasternack closed escrow on a $7 million vacation home in Palm Desert. Vision West Investments, LLC was the developer on the project, and Easton, a general contractor, built the home for Vision West. Curtis Dunham is the sole owner of Easton, and he co-owns Vision West with David McFarland. As part of the sale, Vision West agreed to add a bedroom to the home for $65,000. That amount was held in escrow pending completion of the bedroom by Easton. Easton worked on the bedroom addition between November 2006 and February 2007.

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[1] All further section references will be to the Code of Civil Procedure unless otherwise specified.

Pasternack became dissatisfied with Easton's work, however, and hired other contractors to make repairs to the home. These contractors advised him of significant issues with the house, including construction defects, encroachments upon adjoining lots, and illegal setbacks. He warned Dunham and McFarland to keep away from his property and threatened them with litigation.

In February 2007, Southern California Gas Company sent a past due bill for $3,600.42, which was addressed to Easton at the home purchased by Pasternack. This bill included service from November 2006 to February 2007 and was unusually high, apparently due to a faulty system installed in the pool and spa area. Dunham issued a check from Vision West's account to pay the bill. He later testified Easton reimbursed Vision West for the payment. Meanwhile, the escrow company refused to release the $65,000 sum to Vision West for the bedroom addition.

The Collection Action

On March 20, 2007, McCullough, representing Vision West and Easton, filed suit against Pasternack, his wife, and the escrow company. (*Vision West v. Pasternack* (Super. Ct. Riverside County, 2007, No. INC065760).) Vision West asserted claims against the Pasternacks for breach of the purchase agreement and account stated. It also alleged the escrow company breached the escrow agreement by refusing to release the $65,000 for the bedroom addition. In the third cause of action, Easton alleged a claim against Pasternack for "money had and received" to collect $3,600.42 for the natural gas bill Easton purportedly paid for the property. Attached to the complaint were copies of the bills.

Pasternack cross-complained against Vision West, alleging, among other things, construction defects, fraud, and breach of contract. In a separate action, Pasternack sued Easton and others for fraudulently concealing construction defects in the home. (*Pasternack v. Hubbard* (Super. Ct. Riverside County, 2011, No. INC10009154).) The separate action was later consolidated for all purposes with the underlying action. Vision West ultimately dismissed its causes of action against Pasternack and the escrow company.[2]

Easton's $3,600.42 collection claim was bifurcated and tried separately to the court. Dunham testified Easton paid for all the utilities during construction of the home, but utilities should have been transferred upon close of escrow. He recalled all utility accounts except for the natural gas bill were transferred to Pasternack. Dunham testified he controlled the bank accounts for Vision West and Easton. Vision West paid the past due natural gas bill on behalf of Easton and was reimbursed by Easton in the form of two checks, one for $2,000 and another for $1,600. Dunham was unable to find a copy of the $1,600 check to Vision West, however.

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[2] Shortly before this matter came on calendar, McCullough requested we take judicial notice of the Fourth District's unpublished decision involving Pasternack's separate malicious prosecution action against Vision West. We decline to do so as it involves a different defendant and different facts. McCullough's request for judicial notice is denied. (*Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1137, fn. 1 [request for judicial notice denied where the matter to be judicially noticed is unnecessary to the resolution of the appeal]; Evid. Code, § 452.)

Pasternack moved for nonsuit after Easton rested, arguing Easton failed to prove its claim. The trial court denied the motion. Pasternack testified for the defense. He stated he did not spend much time at the property while Easton added the bedroom because it was dirty and dusty and the power was not working in parts of the house. He estimated he spent two nights at the home during that time. He did not pay any of the natural gas bills between November 2006, when escrow closed, and March 2007, when the gas company transferred the account to him. He testified his natural gas bills since then have been less than $10 a month, not $1,000 a month, as they were during the time Easton worked on the property. Pasternack believed the high charges were a result of a faulty system installed in the pool and spa area. He testified he was currently renting another house in the same area because the house sold to him had significant defects.

In a minute order filed on March 14, 2012, the trial court found in favor of Pasternack and ordered Easton to take nothing on its money had and received cause of action. No final judgment could be entered at that time, however, because there remained causes of action between Pasternack and Easton in the construction defect matter. As a result, the trial court noted its ruling would become part of any final judgment subsequently entered.

Pasternack's First Malicious Prosecution Lawsuit

In July 2012, Pasternack sued Easton, Dunham, and McCullough for malicious prosecution, alleging Easton's $3,600.42 collection claim was filed maliciously, without probable cause, and for the sole purpose of extracting a general release of Pasternack's (then unfiled but threatened) construction defect-

related claims against Easton and Dunham, among others. The trial court granted the defendants' anti-SLAPP motions, finding the action was premature because Pasternack's complaint against Easton was still pending. Thus, there was no final judgment showing a termination in favor of Pasternack. The order was affirmed on appeal by our colleagues in the Fourth District. (*Pasternack v. McCullough* (2015) 235 Cal.App.4th 1347, 1358.)[3]

While the appeal was pending, Pasternack settled with Easton and Dunham as to all his claims against them. He abandoned his appeal as to them, but not as to any claims against McCullough.

The Present Malicious Prosecution Action

With only McCullough remaining, Pasternack filed the present malicious prosecution action in Los Angeles County Superior Court against McCullough on December 2, 2013. Pasternack alleged McCullough conspired against him with Easton by advising Easton to sue Pasternack in an effort to obtain a universal settlement, including any compulsory cross-claims Pasternack may have had for construction defects. Pasternack alleged a final judgment was entered on February 23, 2015, after he settled with Easton and Dunham.

McCullough filed a special motion to strike the complaint under the anti-SLAPP statute. The trial court denied McCullough's anti-SLAPP motion, finding the underlying case arose from protected activity, but that Pasternack had fulfilled

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[3] The previous lawsuits were filed in Riverside County, presumably because that was where Dunham, McFarland, Easton, and Vision West were located.

his burden to establish a probability of prevailing. McCullough timely appealed.

DISCUSSION

McCullough challenges the trial court's denial of his anti-SLAPP motion on a number of grounds. We conclude the denial of Pasternack's nonsuit motion in the underlying collection case demonstrates the collection claim was legally tenable and thus, Pasternack has failed to establish a probability of prevailing on his malicious prosecution claim. As a result, we need not address McCullough's other challenges to the denial of the anti-SLAPP motion.

I. The Anti-SLAPP Statute and the Standard of Review

The anti-SLAPP statute states, "[a] cause of action against a person arising from any act of that 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 shall be subject to a special motion to strike, 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 anti-SLAPP statute is to be broadly construed to encourage continued participation in matters of public significance. (§ 425.16, subd. (a).)

Consideration of a special motion to strike under the anti-SLAPP statute involves a two-step process. First, the defendant must make a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) If that showing is made, the burden shifts to the plaintiff to demonstrate a probability of prevailing on his claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

In deciding whether the two prongs of the anti-SLAPP statute have been met, the trial court considers " 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) A plaintiff is not required "to *prove* the specified claim to the trial court." (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 412.) Instead, the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim. (*Ibid.*)

The Supreme Court has defined the probability of prevailing burden as follows: " '[T]he plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' [Citations.]" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 88–89.) The court must "accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law." (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 468–469.)

We review de novo an order denying a motion to strike under the anti-SLAPP statute. *(Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) Accordingly, we employ the same two-step procedure as the trial court did to determine whether the anti-SLAPP motion was properly denied. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 444.)

II. Pasternack Has Not Established a Probability of Prevailing

Here, we are concerned only with the second prong of the anti-SLAPP test—whether Pasternack has established a probability of prevailing. The parties do not dispute the first prong has been satisfied. Indeed, "every Court of Appeal that has addressed the question has concluded that malicious prosecution causes of action fall within the purview of the anti-SLAPP statute." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.)

In order to establish a probability of prevailing, Pasternack has the burden to show the three elements of a malicious prosecution claim. That is, the underlying action was: "(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." (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 775 (*Parrish*).)

McCullough contends the trial court's denial of Pasternack's motion for nonsuit in the underlying collection action means Pasternack cannot demonstrate the second element of a malicious prosecution claim. Instead, under the interim adverse judgment rule, the denial of the nonsuit motion establishes as a matter of law that the underlying collection action was initiated or maintained with probable cause.

1. The Interim Adverse Judgment Rule

The interim adverse judgment rule holds that a judgment or ruling on the merits in favor of the plaintiff in the underlying case, unless obtained by fraud or perjury, establishes probable

cause to bring the underlying action in a subsequent malicious prosecution claim, even if that ruling is overturned on appeal or by a later ruling of the trial court. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817 (*Wilson*); *Parrish, supra,* 3 Cal.5th at p. 776.)

For example, courts have consistently held that a denial of a defense summary judgment motion in the underlying action may be used to establish probable cause in a subsequent malicious prosecution action even if judgment is ultimately entered against the former plaintiff unless the denial was based on technical grounds or fraud or perjury. (*Parrish, supra,* 3 Cal.5th at p. 777.) "This rule reflects a recognition that '[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.' " (*Id.* at p. 776, quoting *Wilson, supra,* 28 Cal.4th at p. 818.)

The California Supreme Court's analysis in *Wilson, supra,* 28 Cal.4th at page 817, is instructive. In *Wilson,* the California Supreme Court considered whether the interim adverse judgment rule applied to the trial court's denial of an anti-SLAPP motion in the underlying action. The court held the denial of the anti-SLAPP motion established probable cause to defeat a subsequent malicious prosecution suit when it required the trial court to decide a parties' probability of prevailing. In reaching this conclusion, the court affirmed cases in which summary judgment motions, directed verdicts, and other efforts at pretrial termination of the underlying case led to a finding of probable cause in a subsequent malicious prosecution case. (*Wilson, supra,* 28 Cal.4th at pp. 818–819.)

Of relevance to this case, the court noted that motions for nonsuit could be used to establish probable cause under the interim adverse judgment rule. (*Wilson, supra,* 28 Cal.4th at p. 824.) In doing so, the court examined *Lucchesi v. Giannini & Uniack* (1984) 158 Cal.App.3d 777 (*Lucchesi*). In *Lucchesi*, the plaintiffs in the underlying action sought to cancel a deed and quiet title on a property, and the trial court denied a defense motion for summary judgment. Judgment was entered for the defense. (*Wilson, supra,* 28 Cal.4th at p. 823.)

In the defendant's subsequent malicious prosecution action, the *Lucchesi* court rejected the application of the interim adverse judgment rule because the record did not disclose whether denial of summary judgment in the underlying action rested on technical or procedural grounds rather than on a finding that triable issues of material fact existed. According to the *Wilson* court, the *Lucchesi* court's reasoning to this point was "indisputably correct." (*Wilson, supra,* 28 Cal.4th at p. 823.)

The *Wilson* court, however, took issue with *Lucchesi's* further holding that even a denial of summary judgment based on a determination that triable issues of fact existed or a denial of a motion for nonsuit did not establish probable cause in a subsequent malicious prosecution action because it "falls short of a hearing on the merits." (*Wilson, supra,* 28 Cal.4th at p. 824.) The *Wilson* court instead held, "Denial of a defense summary judgment motion on grounds that a triable issue exists, or of a nonsuit, while falling short of a determination of the merits, establishes that the plaintiff has substantiated, or can substantiate, the elements of his or her cause of action with evidence that, if believed, would justify a favorable verdict. As also discussed above, a claimant or attorney who is in possession

of such evidence has the right to bring the claim, even where it is very doubtful the claim will ultimately prevail." (*Ibid.*)

2. The Motion for Nonsuit in the Underlying Action

After Easton's case in chief, Pasternack orally moved for nonsuit in the underlying action. Citing to the relevant jury instruction (CACI No. 370), he argued Easton failed to prove the elements of a claim for money had and received. Specifically, Pasternack contended the natural gas was not provided for Pasternack's benefit since he was rarely there during the time period at issue and Easton did not pay the natural gas bill, Vision West did. Pasternack also highlighted the inconsistencies in Dunham's testimony. In particular, he argued Dunham testified he reimbursed $2,000 to Vision West even before the gas company issued its bill. Pasternack theorized that the $2,000 deposit from Easton was actually to cover other checks written by Dunham from the Vision West account. In support, Pasternack highlighted Dunham's admission that the Vision West bank account had insufficient funds to cover other checks it had written when Dunham funded the account with the $2,000 check from Easton.

McCullough, who represented Easton during trial, argued the natural gas bill was addressed to Easton and the account was opened by Easton. Further, Dunham testified he wrote the checks from Vision West's account with the understanding that it was paying on behalf of Easton. McCullough cited to Dunham's testimony that he reimbursed Vision West with two checks, one for $2,000 and one for $1,600. He contended that was enough to meet Easton's burden at that stage of the proceedings.

Relying on *Rotea v. Izuel* (1939) 14 Cal.2d 605, the trial court noted that a traditional claim for money had and received required the defendant himself to actually receive the money, not a third party. Pasternack agreed that was an element of the claim, but acknowledged Easton was relying on a different theory of recovery under which Pasternack allegedly made an implicit agreement to reimburse Easton for the utility bill. However, he argued Dunham admitted Pasternack never agreed to reimburse Easton. After this short colloquy, the trial court denied the motion for nonsuit.

3. Analysis

McCullough contends the interim adverse judgment rule applies in this case to establish probable cause to bring the underlying collection action. We agree.

A nonsuit requires the trial court to determine whether, after the plaintiffs' case in chief, and "disregarding conflicting evidence, giving to the plaintiffs' evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiffs' favor, it can be said that there is no evidence to support a jury verdict in [plaintiffs'] favor." (*Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583.) Thus, denial of the nonsuit motion in the underlying action required the trial court to find that there was evidence to support a jury verdict in Easton's (and McCullough's) favor. That finding demonstrates Easton had probable cause to bring and maintain the action through trial. (*Wilson, supra,* 28 Cal.4th at p. 824.)

Wilson teaches us that denial of "a nonsuit, while falling short of a determination of the merits, establishes that the plaintiff has substantiated, or can substantiate, the elements of

his or her cause of action with evidence that, if believed, would justify a favorable verdict." (*Wilson, supra,* 28 Cal.4th at p. 824.) Thus, an attorney "who is in possession of such evidence has the right to bring the claim, even where it is very doubtful the claim will ultimately prevail." (*Ibid.*)

Pasternack challenges the application of the interim adverse judgment rule in this case, contending there was no indication the ruling was made on the merits, *Wilson* is no longer valid, and Easton's evidence was fraudulent or perjured. We are not persuaded.

The reporter's transcript discloses the trial court denied the motion for nonsuit on the merits. When he moved for nonsuit, Pasternack argued that Easton failed to prove the elements of its money had and received claim. Pasternack did not argue any procedural or technical deficiencies defeated Easton's claim. Neither did the trial court mention any. Instead, it noted Easton had not proven one of the elements for a traditional claim for money had and received. Given Pasternack's acknowledgment that Easton was pursuing another theory of recovery, the trial court apparently became satisfied that Easton had presented sufficient evidence to survive a nonsuit. It is clear from the record that the trial court's denial of the nonsuit motion was not based on a technical or procedural deficiency.[4]

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[4] In its ruling, the trial court in this action denied the anti-SLAPP motion, in pertinent part, because it found the record on the nonsuit motion to be "so sparse" that it could not determine whether the denial was made on procedural grounds or on the merits. It noted the minute order stated only "motion for non-suit denied" without identifying which party brought the motion or what arguments were made. The trial court's failure to review the reporter's transcript, which provides the details the court

Further, we disagree that *Wilson* was completely abrogated by statute in 2005 by Assembly Bill 1158. In 2005, the Legislature "narrowly abrogated" *Wilson* by amending subdivision (b)(3) of section 425.16 to prohibit the use in any subsequent case or later in the same case of a court's anti-SLAPP determination of a probability of prevailing. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1158 (2005–2006 Reg. Sess.) as amended Aug. 15, 2005, pp. 6–7.) Thus, *Wilson's* analysis as to the effect of a denial of summary judgment or nonsuit remains persuasive.[5]

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sought, can be attributed to McCullough's failure to cite to it in his papers. McCullough instead only directed the court to the "so sparse" minute order in his memorandum of points and authorities, despite including the entire reporter's transcript for the collection action trial. This oversight led to the trial court's denial of the anti-SLAPP motion. Fortunately for McCullough, on appeal, we "must [] independently determine, from our review of the record as a whole, whether [Pasternack] has established a reasonable probability that he would prevail on his claims." (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645.) Our review of the entire record discloses the arguments and reasons underlying the denial of the nonsuit.

[5] We acknowledge that *Wilson's* analysis regarding the denial of nonsuit motions is dicta because it is not necessary to its holding. Nevertheless, we choose to follow this sage advice: "Generally speaking, follow dicta from the California Supreme Court." (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.) "This is especially true when, as here, the Supreme Court has reached well beyond the holding necessary to its opinion to express its broader view." (*Aviles-Rodriguez v. Los Angeles Community College Dist.* (2017) 14 Cal.App.5th 981, 990.)

Indeed, our colleagues in Division 5, after careful examination of the legislative history behind Assembly Bill 1158, concluded, "Nothing in the 2005 amendment to section 425.16, subdivision (b)(3) changes the well established rule of law applicable to a malicious prosecution complaint that the denial of a summary judgment motion in the underlying action establishes probable cause to file that lawsuit." (*Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 550.) As the California Supreme Court chose to equate the effects of a denial of a summary judgment motion with the denial of a nonsuit motion, we likewise conclude nothing in Assembly Bill 1158 changes or invalidates *Wilson's* nonsuit analysis.

Finally, we are not persuaded by Pasternack's contention that the nonsuit ruling was reached by fraud or perjury. It is well established that the interim adverse judgment rule does not apply to a judgment or ruling on the merits if it was obtained by fraud or perjury. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 384.) In *Roberts,* the court held that "if denial of summary judgment was induced by materially false facts submitted in opposition, equating denial with probable cause might be wrong. Summary judgment might have been granted but for the false evidence. (For that matter, a jury verdict also might be induced by materially false testimony, raising a good argument that no conclusive presumption of probable cause should arise.)" (*Ibid.*)

That did not happen here because the trial court's denial of the nonsuit motion was not induced by false facts unknown to the trial court and only discovered after its ruling. Instead, the trial court was made aware of the purportedly false facts used by Easton to survive the nonsuit motion. The only "fraud or perjury"

Pasternack cites to in support of this argument are inconsistencies in Dunham's testimony, which occurred prior to the motion for nonsuit.[6] Pasternack highlighted these inconsistencies in his argument on the motion for nonsuit. Thus, the trial court was well aware of the alleged perjury at the time it made its decision on the nonsuit motion.

The record shows Pasternack's trial attorney conducted a vigorous cross-examination of Dunham during Easton's case in chief to discredit him. This occurred prior to the motion for nonsuit. Dunham admitted he failed to disclose the $2,000 reimbursement check to Vision West from Easton during discovery, lending credibility to Pasternack's argument that McCullough and Dunham manufactured evidence to show reimbursement of the natural gas bill. Dunham also testified he opened the account for Easton when the gas meter was installed in November 2006, after escrow closed. This testimony contradicted Dunham's theory that all utility accounts should have been transferred to Pasternack at close of escrow and it was merely an oversight that the natural gas account was not. Dunham further admitted Vision West paid the natural gas bill as well as all the other utility bills for that property, and Pasternack never agreed to reimburse anyone for payment of the natural gas bills.

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[6] In support of his argument, Pasternack cites in a footnote to those parts of the record when Dunham testified during Easton's case in chief, before the nonsuit motion, and not to any evidence presented during the defense's case. Indeed, Pasternack's appellate brief contains five pages documenting the misstatements in the underlying case, all of which relate to inconsistencies in Dunham's testimony and not to Pasternack's testimony.

It is apparent the trial court in the collection action was well aware of Pasternack's theories regarding Dunham's purported perjury or fraud at the time it ruled on the nonsuit motion. The inconsistencies in Dunham's testimony and in Easton's theory of the case were highlighted by Pasternack's trial counsel during argument on the motion for nonsuit. Thus, the court's denial of the motion for nonsuit was not induced by materially false and misleading facts or evidence.

DISPOSITION

The order denying McCullough's special motion to strike under the anti–SLAPP statute is reversed. On remand, the superior court shall enter a new order granting the motion to strike. McCullough to recover his costs and fees pursuant to section 425.16, subdivision (c)(1), as determined by the superior court on remand.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.