

COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

Trial Court: District County District Court
Trial Court Judge: Hon. Charles R. Greenacre
Case No.: 2013 CV 9

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Plaintiff/Appellant:

Toni Andre

v.

Defendants/Appellees:

Lena Meredith; Harold Meredith; USC, Inc.

COURT USE ONLY

Case No. 2014 CA 516

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PLAINTIFF-APPELLANT'S OPENING BRIEF

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that to the best of his knowledge this Plaintiff-Appellant's Opening Brief complies with all requirements of C.A.R. 28 and C.A.R. 32.

Pursuant to C.A.R. 28(g), the undersigned certifies this Plaintiff-Appellant's Opening Brief contains 9,489 words, excluding the caption page, table of contents, table of authorities, certificate of compliance with the word limit, certificate of service, signature block, and any addendum containing statutes, rules, and regulations.

KILLIAN DAVIS Richter & Mayle, PC

Duly authorized original signature on file at the offices of KILLIAN DAVIS Richter & Mayle, PC pursuant to C.R.C.P. 121, section 1-26(9).

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STATEMENT OF THE ISSUES

1. Does a finding in a preliminary criminal hearing that the prosecution had probable cause to bring one or more counts against a criminal defendant create a rebuttal presumption of probable cause in a subsequent malicious prosecution action brought by the former criminal defendant against private third parties where the private third parties' allegations resulted in the finding of probable cause?

2. In a preliminary criminal hearing to determine if the prosecution has probable cause, all inferences must be drawn in favor of the prosecution and all evidence is to be viewed in a light most favorable to the prosecution. If a finding of probable cause in a preliminary criminal hearing creates a rebuttal presumption of probable cause in a subsequent malicious prosecution action, can the rebuttal presumption be used to obtain summary judgment against the former criminal defendant when all inferences must be drawn in her favor and all evidence must be viewed in a light most favorable to her?

3. Is summary judgment proper when it is based on a rebuttable presumption claimed for the first time by a moving party in the moving party's reply brief?

STATEMENT OF THE CASE

I. THE NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This controversy arises out of the arrest and criminal prosecution of Toni Andre due to allegations made by Lena Meredith and Harold Meredith. Trial Court File (“TCF”), pp. 2–10. Andre was formerly employed by USC, Inc. TCF, pp. 87–88. After Andre left USC, Inc. for other employment, Lena Meredith and Harold Meredith contacted the Delta Police Department and alleged that Andre stole money from the company by issuing unauthorized checks and initiating unauthorized transactions on the company’s credit card.¹ TCF, pp. 5–6 (¶¶ 37–38, 45); pp. 28–29 (¶¶ 18, 22).

As a result of Lena Meredith’s and Harold Meredith’s allegations, Andre was arrested and charged with 16 felony counts of theft, unauthorized use of a financial transaction device, and identity theft. TCF, p. 7 (¶ 57); p. 29 (¶ 27). All of the charges against Andre were ultimately dismissed. TCF, p. 7 (¶ 58); p. 26 (¶ 2). The criminal case against Andre lasted almost two years and resulted in substantial harm to Andre. *See* TCF, pp. 6–7 (¶¶ 51–56, 58); p. 26 (¶ 2); p. 29 (¶¶ 25–26).

¹ Andre alleged in her complaint that Lena Meredith and Harold Meredith were acting within the scope of their employment and authority with USC, Inc. when they made the allegations about Andre to the Delta Police Department. TCF, pp. 7–8. Andre’s complaint included respondeat superior allegations against USC, Inc. TCF, pp. 7–8. These allegations were not contested by USC, Inc. on summary judgment. *See* TCF, pp. 120–131.

Andre subsequently filed a civil action against Lena Meredith, Harold Meredith, and USC, Inc., asserting a malicious prosecution claim against each defendant.² TCF, pp. 2–10. The Merediths filed a summary judgment motion, arguing that the finding in the preliminary criminal hearing that the prosecution had probable cause for one charge was binding under the principle of collateral estoppel. TCF, pp. 125–130. Andre argued that collateral estoppel did not preclude her from establishing that the Merediths lacked probable cause in making the allegations to the police. TCF, pp. 179–184. The Merediths, for the first time in their reply brief, argued that the finding of probable cause in the preliminary criminal hearing created a rebuttal presumption of probable cause and that Andre did not present evidence to overcome the presumption in opposing the Merediths’ request for summary judgment. TCF, pp. 197–199.

The trial court granted summary judgment to defendants on Andre’s claim of malicious prosecution, ruling that the Merediths were entitled to the rebuttal presumption and that Andre did not present any evidence to overcome the rebuttal presumption. TCF, pp. 201–206. Andre timely appealed the court’s rulings on summary judgment. TCF, pp. 207–215.

² Andre will refer to Lena Meredith, Harold Meredith, and USC, Inc. collectively as “the Merediths” for the purpose of referring to the defendants in her malicious prosecution action.

II. STATEMENT OF THE FACTS

A. Andre's Employment at USC, Inc. and Gifts Given to USC, Inc. Employees

Andre began working at USC, Inc. in March 2006. TCF, p. 3 (¶ 10); p. 26 (¶ 2). Andre was the office manager. TCF, pp. 3 (¶ 11); p. 26 (¶ 2). As the office manager, Andre was an authorized signor on USC, Inc.'s checking account. TCF, p. 3 (¶ 12); p. 26 (¶ 2). Andre was also responsible remitting payment for the company's credit card bill. TCF, p. 3 (¶ 14); p. 26 (¶ 2).

As alleged in Andre's complaint, while Andre was employed at USC, Inc., Lena Meredith, the owner of USC, Inc., routinely authorized or gave employees substantial amounts of personal property, vacations, and cash. *See* TCF, pp. 3–4 (¶¶ 16–20). During Andre's employment with USC, Inc., Lena Meredith authorized Andre to use company funds for a vacation to Fiji. TCF, p. 4 (¶¶ 23–24). Lena Meredith also authorized Andre to use company funds to pay Andre's attorney fees in California in a divorce and child custody case. TCF, p. 4 (¶ 25).

Andre also alleged in her complaint that in 2009 Aaron Hale, a USC, Inc. employee, and Lena Meredith agreed that Hale would go on unemployment to save the company money. TCF, p. 4 (¶ 21). The company would then supplement his loss of income by paying his wife an amount to essentially make up the difference in his lost pay, while Hale continued to work for USC, Inc. TCF, p. 4 (¶ 21). After devising the above referenced plan, Lena Meredith instructed Andre to write

periodic checks to Joni Hale (Hale's wife). TCF, p. 4 (¶ 22). Andre was also given a Jeep Grand Cherokee ("the Jeep") by Harold Meredith, Lena Meredith's husband, after he began working for USC, Inc. TCF, p. 87 (¶¶ 8–9, 15). The Jeep was given to Andre as a gift because USC, Inc. was no longer providing her with a company car. TCF, p. 87 (¶¶ 4–7). Neither Harold Meredith or Lena Meredith, nor anyone else from USC, Inc., conditioned the gift of the Jeep on Andre's continued employment with the company. TCF, p. 87 (¶¶ 10–14). The title for the Jeep was transferred to Andre. TCF, pp. 81–86; 87 (¶ 16). The title transfer documents reflect Andre's acceptance of the Jeep as a gift. TCF, p. 86; p. 88 (¶17).

B. The Merediths Alleged that Andre Stole from USC, Inc. after Andre Resigned Her Employment with the Company

Andre was an at-will employee at USC, Inc. TCF, p. 5 (¶¶ 35–36); p. 26 (¶ 2); p. 28 (¶ 17). In January 2010, Andre was recruited and offered a position at TK Mining Services. TCF, p. 88 (¶ 20). Andre accepted the position with TK Mining Services and gave her two-weeks notice. TCF, p. 88 (¶ 21). On February 1, 2010, while Andre was still working for USC, Inc., the Merediths became upset at Andre for leaving her employment with USC, Inc. and for keeping the Jeep that was given to her as a gift. TCF, p. 88 (¶¶ 22–27). Lena Meredith told Andre that she was not happy with her decision and that it was going to hurt Andre in the pocket book. TCF, p. 88 (¶ 28).

Shortly after Andre left USC, Inc., the Merediths contacted the Delta Police Department and alleged that Andre had stolen from the company by issuing unauthorized checks and initiating unauthorized transactions on the company's credit card. TCF, p. 6 (¶¶ 45–46); p. 29 (¶ 22). The Merediths also alleged that Andre paid her California legal fees with company funds without authorization and that Andre stole the Jeep by not returning it when she stopped working for USC, Inc. TCF, p. 6 (¶¶ 47–48); p. 29 (¶ 22).

C. Andre Was Arrested and Criminally Prosecuted

As a result of the Merediths' allegations, Andre was arrested and charged with 16 felony counts of theft, unauthorized use of a financial transaction device, and identity theft. TCF, p. 7 (¶ 57) p. 29 (¶ 27). Andre was not charged for theft of the Jeep. TCF, pp. 135–136. Andre's arrest and the charges were reported on the front page of the Delta County Independent. TCF, p. 79.

A preliminary hearing was held on October 5, 2010, before the Honorable Sandra K. Miller. TCF, pp. 137–138. Of the 16 felony charges, only two were brought by the prosecution before Judge Miller. TCF, pp. 137–138. The other 14 charges were dismissed voluntarily by the prosecution. TCF, pp. 135–136. At the preliminary hearing, the prosecution presented witness testimony from Lena Meredith, Harold Meredith, and Cindy Groskopf, the USC, Inc. accountant. TCF, pp. 122, 137. The prosecution offered seventeen exhibits that were admitted. TCF,

p. 137. Andre did not testify at the preliminary hearing, did not present testimony from any witnesses, and offered one exhibit that was admitted. TCF, pp. 137–138.

Judge Miller found that the prosecution had probable cause for one count and no probable cause for the other count. TCF, p. 138. As a result of the preliminary hearing, Andre was bound over to the district court for arraignment on one felony count. TCF, p. 138.

D. The Prosecution Dismissed Its Case against Andre Shortly Before the Start of the Trial

On June 18, 2012, Andre attended a pretrial hearing. TCF, pp. 144, 189. Trial of the one felony count that remained was scheduled to begin on July 10, 2012, before the Honorable Charles R. Greenacre. TCF, p. 143. The June 18th pretrial conference was the last scheduled pretrial conference before the July 10th trial. *See* TCF, pp. 134–145, 189.

At the June 18th pretrial hearing, the prosecution requested dismissal of the remaining count against Andre. TCF, pp. 144, 189. The court granted the prosecution's request for dismissal. TCF, pp. 144, 189. The prosecution moved for dismissal after a June 1, 2012, meeting with the Merediths. TCF, p. 169. Andre was given instructions regarding sealing the court records. TCF, pp. 144, 189. No criminal charges have been filed against Andre subsequent to the June 18th dismissal. TCF, p. 189.

SUMMARY OF THE ARGUMENT

A division of the Colorado Court of Appeals has held that if a person charged with a criminal offense is bound over to the district court after a preliminary hearing, the findings of the preliminary hearing establish a rebuttable presumption of probable cause in a subsequent malicious prosecution action against private third parties. This holding is not supported by any other case law regarding malicious prosecution actions against private third parties. The purpose of rebuttable presumptions is not furthered by recognizing a rebuttable presumption in a subsequent malicious prosecution action brought by the former criminal defendant against private third parties who made the allegations that resulted in the finding of probable cause. Thus, the trial court erred in ruling that a rebuttable presumption of probable cause applies in this action.

If a finding of probable cause in a preliminary criminal hearing creates a rebuttal presumption of probable cause, the rebuttable presumption cannot be used to obtain summary judgment against Andre. In the preliminary criminal hearing, all inferences were drawn in favor of the prosecution and all evidence was viewed in a light most favorable to the prosecution. The rebuttal presumption therefore cannot be used to obtain summary judgment against Andre because it is inconsistent with well-established legal principles that the court, in deciding a motion for summary judgment, must view the evidence in the light most favorable

to the non-moving party and all reasonable inferences must be drawn in favor of the non-moving party. Thus, the trial court erred in granting summary judgment against Andre based on the rebuttable presumption.

The Merediths argued in their summary judgment motion that collateral estoppel barred Andre from re-litigating probable cause in her malicious prosecution action against the Merediths. The Merediths did not claim that a rebuttal presumption existed or argue that Andre should have to overcome the rebuttal presumption to survive summary judgment. Andre therefore only addressed the collateral estoppel argument in her response brief. Andre did not need to introduce any evidence that the Merediths lacked probable cause in order to defeat the Merediths' collateral estoppel argument. The Merediths, for the first time in their reply brief, argued that a rebuttal presumption existed. Thus, the trial court erred in granting summary judgment against Andre based on the rebuttable presumption because it was raised for the first time in the Merediths' reply.

ARGUMENT

I. LEGAL STANDARD FOR SUMMARY JUDGMENT

All three issues presented arise from the trial court's ruling entering summary judgment against Andre. "Under C.R.C.P. 56(c), summary judgment is proper only when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue as to any fact and that the moving party is entitled to

judgment as a matter of law.” *Cont’l Airlines v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). “The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party.” *Id.* “The nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party.”

Stapleton v. Pub. Employees Ret. Assoc., 2013 COA 116, ¶21.

II. A FINDING IN A PRELIMINARY CRIMINAL HEARING THAT THE PROSECUTION HAD PROBABLE CAUSE SHOULD NOT CREATE A REBUTTAL PRESUMPTION OF PROBABLE CAUSE IN A SUBSEQUENT MALICIOUS PROSECUTION ACTION AGAINST PRIVATE THIRD PARTIES

A. Standard of Review and Preservation of the Issue

The Court reviews summary judgment orders de novo. *Robinson v. Legro*, 2014 CO 40, ¶10. Andre preserved this issue by opposing the Merediths’ summary judgment motion. TCF, pp. 163–188.

B. The Only Colorado Appellate Authority Which Holds that A Rebuttable Presumption Exists Cites A Decision Regarding the Rebuttable Presumption as It Applies in § 1983 Claims

The tort of malicious prosecution includes the following elements: “(1) the defendant contributed to bringing a prior action against the plaintiff; (2) the prior action ended in favor of the plaintiff; (3) no probable cause; (4) malice; and (5) damages.” *Hewitt v. Rice*, 154 P.3d 408, 411 (Colo. 2007). Andre is only aware of one Colorado appellate case which holds that the no probable cause element of a

malicious prosecution claim against a private third party is subject to a rebuttable presumption based on the criminal court finding that the prosecution had probable cause. *See Schenck v. Minolta Office Sys., Inc.*, 802 P.2d 1131 (Colo. App. 1990). In *Schenck*, the Court held that: “As a general rule, if a magistrate binds over a person charged with a criminal offense, this establishes a rebuttable presumption of probable cause for purposes of a subsequent malicious prosecution claim.” *Schenck*, 802 P.2d at 1134. The *Schenck* court did not discuss the exceptions to this “general rule.” *See id.*

The *Schenck* court cited *Wigger v. McKee*, 809 P.2d 999 (Colo. App. 1990), for the proposition that a probable cause finding in a criminal case creates a rebuttable presumption of probable cause in a subsequent malicious prosecution action. This is not the holding of *Wigger*.

Earl Wigger and his wife brought several claims against numerous entities and individuals affiliated with Arapahoe County. *Id.* at 1001–02. The Wiggers’ claims arose from Mr. Wigger’s criminal prosecution on two counts of alleged sexual assault on a child. *Id.* Mr. Wigger was acquitted of the charges after a trial. *Id.* at 1002. The Wiggers’ complaint included claims for “violation of their Fourth and Fourteenth Amendment rights, enforceable pursuant to 42 U.S.C. § 1983 (1982); malicious prosecution; negligence; outrageous conduct; and defamation.”

Id. The entities and individuals each obtained summary judgment on all of the Wiggers' claims against them, including the malicious prosecution claims. *Id.*

On appeal, the Wiggers argued that "the trial court erred in ruling as a matter of law that probable cause existed to arrest and prosecute" Mr. Wigger, resulting in summary judgment on both the § 1983 claims and the malicious prosecution claims. *Id.* at 1004–05, 1007. The *Wigger* court addressed the two types of claims separately. *Id.*

With regard to the § 1983 claims, the *Wigger* court noted that: "To support a claim under 42 U.S.C. § 1983, it is necessary for the plaintiff to prove that the defendant (1) has deprived him of a federal right and (2) that he has done so under color of state or territorial law." *Id.* at 1005. The Wiggers, to satisfy the first prong of the test, relied "on their allegation that the defendants caused the denial of Wigger's constitutional rights under the Fourth and Fourteenth Amendments to be free from arrest and prosecution absent probable cause." *Id.* "A judicial finding of probable cause ***under this standard*** after a preliminary hearing is prima facie evidence of probable cause to prosecute, which evidence may be rebutted by proof that the defendant misrepresented, withheld or falsified evidence at the hearing." *Id.* (emphasis added). This was not used to grant summary judgment, however, as the *Wigger* court engaged in a substantial analysis of the facts in the record which gave rise to probable cause. *Id.* at 1006–07. The *Wigger* court upheld the trial

court's determination that, based on the evidence it reviewed, "no reasonable jury could conclude that probable cause did not exist," regardless of the alleged failures of the entities and individuals affiliated with the County. *Id.* at 1007.

With regard to the malicious prosecution claims, the *Wigger* court did not hold that there is a rebuttable presumption or that a rebuttable presumption applied. *See id.* at 1007. Thus, *Schenck's* citation to *Wigger* for this proposition is incorrect. Instead, the *Wigger* court cited the malicious prosecution element of lack of probable cause. *Id.* The Court then held that because it had "already determined that probable cause to prosecute existed irrespective of defendant's action or nonaction, summary judgment on the malicious prosecution claim was proper." *Id.*

§ 1983 claims have different elements and require different analysis than malicious prosecution claims against private third parties. In a § 1983 claim, lack of probable cause for arrest and prosecution is one way to show a violation of an individual's Constitutional rights. *See id.* at 1005. However, lack of probable cause for an arrest or prosecution is not the only type of § 1983 claim. *See, e.g., Cotter v. Bd. of Trustees of Univ. of Northern Colo.*, 971 P.2d 687 (Colo. App. 1998 (freedom of speech and association)); *Sundheim v. Bd. of County Com'rs of Douglas County*, 904 P.2d 1337, 1346–48 (Colo. App. 1995) (violation of substantive due process); *Miller v. Collier*, 878 P.2d 141, 145–46 (Colo. App.

1994) (violation of equal protection). Thus, if there is a rebuttable presumption of probable cause in § 1983 actions based on the criminal court's finding of probable cause it is not outcome determinative. In a malicious prosecution case, failure to overcome a rebuttable presumption of probable cause, if one exists, would be outcome determinative.

Overall, there is no Colorado appellate authority which holds that a rebuttable presumption of probable cause exists in a malicious prosecution action against private third parties based on the criminal court's prior finding that the prosecution had probable cause.

C. The Purpose of Rebuttable Presumptions is Not Furthered By Allowing A Rebuttable Presumption In Subsequent Malicious Prosecution Actions Against Private Third Parties Based on a Finding of Probable Cause in a Criminal Proceeding

1. Legal Standard Regarding Presumptions

Presumptions in civil cases are controlled by Colorado Rule of Evidence 301. Under the rule: "a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast." C.R.E. 301.

"Presumptions are rules of convenience, based on experience or public policy, so certain in their character that when they are established by the

presentation of certain underlying facts the effect is to create a prima facie case upon which judgment may be rendered in the absence of contrary evidence.”

Schenck, 802 P.2d at 1133. “In considering whether to adopt a presumption, courts generally weigh a variety of factors including policy, fairness and probability.”

Moreno v. People, 775 P.2d 1184, 1188 (Colo. 1989) (citing M. Graham, HANDBOOK OF FEDERAL EVIDENCE § 301.6, at 101 (2d ed. 1986)). “[M]ost presumptions are created for a combination of reasons such as ‘to correct an imbalance resulting from one party’s superior access to the proof; social and economic policy considerations; avoidance of an impasse; and probability.’” *Id.* (citing E. Cleary, MCCORMICK ON EVIDENCE § 343, at 968–69 (3d ed. 1984)).

2. The Court Should Not Recognize a Rebuttable Presumption of Probable Cause in a Subsequent Malicious Prosecution Action against Private Third Parties

The Court should rule that a finding of probable cause in a preliminary criminal hearing does not create a rebuttable presumption of probable cause in a subsequent malicious prosecution action against private third parties whose allegations led to the criminal charges and the finding of probable cause. A rebuttable presumption under these circumstances does not further the purpose of judicial recognition and use of rebuttable presumptions.

a. A criminal defendant does not have incentive to fully defend herself at a preliminary criminal hearing

A criminal defendant has “little incentive to litigate the probable cause determination at the preliminary hearing because at such a hearing, all inferences must be drawn in favor of the prosecution and all evidence is to be viewed in a light most favorable to the prosecution.” *Schenck*, 802 P.2d at 1134. The criminal defendant also has little incentive because the criminal defendant has the opportunity to fully and fairly defend herself at trial, where the evidence will be weighed equally and the prosecution will have the burden of proof to prove the charges beyond a reasonable doubt. *E.g.*, *Sanchez v. People*, 2014 CO 29, ¶¶ 14, 17.

The criminal defendant cannot be found guilty based on the preliminary court finding of probable cause. Nor can the criminal defendant obtain a determination of her innocence in the preliminary hearing that would preclude the prosecution from re-filing the charges. *E.g.*, *People v. Noline*, 917 P.2d 1256, 1266 (Colo. 1996). This further reduces the criminal defendant’s incentive to invest time and resources into the preliminary criminal hearing.

Fairness is a factor to be considered in determining whether to recognize a presumption. *See Moreno*, 775 P.2d at 1188. It is not fair to subject a former criminal defendant acquitted of the criminal charges, who had little incentive to contest probable cause at the preliminary hearing, to a rebuttable presumption of

probable cause in a subsequent malicious prosecution action against private third parties whose allegations resulted in the criminal charges and finding of probable cause. The former criminal defendant, in bringing the malicious prosecution action, is alleging that the private third parties lied, misrepresented information, withheld information, or otherwise wrongfully made allegations against her. As a result of these allegations, the former criminal defendant is claiming that she was wrongfully criminally prosecuted.

The former criminal defendant, as the plaintiff in the malicious prosecution action, already has the burden of proving lack of probable cause by a preponderance of the evidence. *See Hewitt*, 154 P.3d at 411. The private third parties, whose alleged wrongful allegations resulted in the criminal charges and the resulting probable cause finding, should not further benefit from a rebuttable presumption in their favor based on their wrongful allegations. If there was probable cause for the private third parties' allegations and there is no genuine issue of material fact, the third parties can request summary judgment and put forth the evidence showing the lack of a triable issue on probable cause. *See C.R.C.P.* 56(b).

It is also unfair to place the burden on the criminal defendant to challenge the probable cause determination in the preliminary criminal hearing. The criminal defendant, usually represented by a criminal defense attorney or public defender,

may not be aware that (1) she has civil claim for malicious prosecution against the private third parties whose allegations resulted in the criminal proceedings or (2) that the preliminary court's determination on probable cause may be used against her in a subsequent malicious prosecution action. Even if the criminal defendant is aware of the law, she likely will want to focus her time and resources on defending herself at trial and not attempting to avoid a probable cause in a preliminary hearing ruling merely to avoid a rebuttable presumption in a subsequent malicious prosecution action.

Additionally, a claim for malicious prosecution cannot be brought until after the criminal proceedings have terminated in favor of the criminal defendant. *See Hewitt*, 154 P.3d at 411 (Colo. 2007). Thus, it is highly unlikely that the criminal defendant will retain counsel to prosecute the malicious prosecution claim until after the preliminary criminal hearing. At this time, it is too late for the attorney prosecuting the malicious prosecution claim to advise the criminal defendant of the implications of the criminal court's probable cause finding.

Lastly, it is unfair to create a rebuttable presumption in a malicious prosecution action against private third parties based on a probable cause determination in a preliminary criminal hearing because the issue of probable cause is different in the two cases. In the preliminary criminal hearing, the question is whether the district attorney, on behalf of the State of Colorado, has

probable cause to pursue the asserted criminal counts. In the malicious prosecution action, the question is whether the defendants had probable cause to make the allegations which were used to bring the criminal charges. This issue is not litigated at the preliminary criminal hearing and thus a rebuttable presumption should not be recognized in favor of the private third parties. *See Schenck*, 802 P.3d at 1134.

b. Public policy favors not vigorously litigating probable cause at the preliminary criminal hearing

Public policy is a factor to be considered in determining whether to recognize a presumption. *See Moreno*, 775 P.2d at 1188. As noted above, criminal defendants currently have minimal incentive to litigate probable cause at a preliminary criminal hearing. *See Schenck*, 802 P.2d at 1134. If a rebuttable presumption is recognized, criminal defendants who are considering a subsequent malicious prosecution action and are aware of the effect of the criminal court's probable cause finding will have greater incentive to litigate probable cause. Public policy does not support this result.

It is in the interest of public policy that probable cause determinations do not become vigorously litigated. The preliminary criminal hearing is not a final resolution of the criminal charges. If the prosecution prevails, the criminal defendant still is afforded the opportunity to fully defend herself at the criminal trial and the prosecution still has the high burden of establishing guilt beyond a

reasonable doubt. If the criminal defendant prevails on the issue of probable cause, the prosecution is not prohibited from later re-filing the charges based on new or additional evidence. Thus, preliminary criminal proceedings do not result in final dispositions.

In the preliminary criminal hearing, Andre introduced only one exhibit on her behalf and called no witnesses. TCF, pp. 134–135. The prosecution only called three witnesses and only introduced 17 exhibits in its effort to support the two felony charges against Andre. This demonstrates that preliminary criminal hearings do not have to be vigorously litigated.

Criminal defendants should not be encouraged to vigorously litigate probable cause, because the result is not outcome determinative in the criminal case regardless of the criminal court's finding. Encouraging criminal defendants to litigate probable cause to protect their potential malicious prosecution action would result in longer preliminary criminal proceedings and unnecessary congestion of the criminal court docket.

Colorado law favors simple resolution of certain criminal or quasi-criminal matters and recognizes that defendants in these matters often plead guilty regardless of their guilt or innocence. Except in limited circumstances, a conviction for violation of the state traffic laws is not admissible as evidence in any court in any civil action. Section 42-4-1713, C.R.S. (2013). This recognizes

that “often citizens will plead guilty to minor offenses under the traffic act rather than suffer loss of valuable time and the expense of a trial.” *Warren v. Marsh*, 11 N.W.2d 528, 531 (Minn. 1943) (cited approvingly by *Ripple v. Brack*, 286 P.2d 625, 627 (Colo. 1955).

“As *Warren* noted, traffic infractions tend to be minor in nature, informally adjudicated, and often uncontested.” *Bullock v. Wayne*, 623 F.Supp.2d 1247, 1256 (D. Colo. 2009). “The Colorado legislature presumably did not want these relatively small infractions to have grave consequences in civil actions where significantly more could be at stake.” *Id.* “Section 42-4-1713 also ameliorates docket congestion in traffic courts; were traffic convictions to carry with them the threat of *res judicata*, the incentive to fight a traffic ticket would grow dramatically and, along with it, the caseload of traffic courts.” *Id.* See also C.R.E. 410 (a plea of *nolo contendere* is not admissible in any subsequent civil or criminal action, or proceeding, against the criminal defendant); *People v. Flores*, 902 P.2d 417, 419–20 (Colo. App. 1994).

c. The rebuttable presumption is not based on high probability of probable cause

The probability of the accuracy of the criminal court’s determination of probable cause is also a factor to consider in determining whether a rebuttable presumption should be recognized. See *Moreno*, 775 P.2d at 1188. In a malicious prosecution action against private third parties, a relevant question is whether the

third parties lied, misrepresented information, withheld information, or otherwise wrongfully made allegations against the criminal defendant. *See Hewitt*, 154 P.3d at 411. Unlike a malicious prosecution claim against the police or the prosecutor, in which the police or prosecutor may have had good cause to initiate criminal proceedings even though false information was provided, in a malicious prosecution claim against private third parties the nature of the claim is that the third parties wrongfully made false allegations against the criminal defendant which resulted in criminal proceedings. This was at least implicitly recognized by the *Schenck* court, which held that the rebuttable presumption disappears upon a showing “that perjured testimony was received during the preliminary hearing in the criminal matter. *Schenck*, 802 P.2d at 1134. If a finding of probable cause is based on the third parties’ false statements, the probability of the probable cause determination being accurate is substantially reduced.

Additionally, as discussed above, criminal defendants have limited incentive to litigate probable cause in the preliminary criminal hearing. The rebuttable presumption, if recognized, would place more significance on a preliminary criminal hearing finding that is not the product of the evidence being fully and fairly weighed.

The Court should therefore rule that the trial court erred in granting summary judgment based on the rebuttable presumption and remand for further proceedings on Andre's malicious prosecution claims.

III. IF A FINDING OF PROBABLE CAUSE IN A PRELIMINARY CRIMINAL HEARING CREATES A REBUTTABLE PRESUMPTION OF PROBABLE CAUSE IN A SUBSEQUENT MALICIOUS PROSECUTION ACTION, THE REBUTTABLE PRESUMPTION CANNOT BE USED TO OBTAIN SUMMARY JUDGMENT

A. Standard of Review and Preservation of the Issue

The Court reviews summary judgment orders de novo. *Robinson v. Legro*, 2014 CO 40, ¶10. Andre preserved this issue by opposing the Merediths' summary judgment motion. TCF, pp. 163–188.

B. No Colorado Appellate Case Has Ruled on whether the Rebuttable Presumption Can Be Used In a Malicious Prosecution Action

It is a matter of first impression in Colorado as to whether a criminal court's finding that the prosecution had probable cause for charges against a criminal defendant can be used to obtain summary judgment against the criminal defendant in a subsequent malicious prosecution action. Andre is aware of only two Colorado appellate cases which implicate the rebuttable presumption in any manner: *Schenck v. Minolta Office Sys., Inc.*, 802 P.2d 1131 (Colo. App. 1990) and *Wigger v. McKee*, 809 P.2d 999 (Colo. App. 1990). Neither opinion addressed

whether the rebuttable presumption could be used to obtain summary judgment against the former criminal defendant.

1. ***Schenck v. Minolta Office Systems, Inc.***

In *Schenck*, the former criminal defendant (Schenck) filed a malicious prosecution action against American Office Equipment Company, Inc. (“AOE”) and two AOE employees (Yosha and Rumley) for reporting him to the authorities for alleged theft during his employment with AOE. *Schenck*, 802 P.2d at 1132. Based on allegations by Yosha and Rumley while acting in the course and scope of their employment with AOE, Schenck was charged for theft. *Id.* Probable cause for the theft charges was found in a preliminary criminal hearing. *Id.* at 1132–33. The criminal charges were subsequently dismissed by the prosecution due to insufficient evidence. *Id.* at 1133. Schenck obtained a favorable jury verdict on his malicious prosecution claim against AOE (which had been purchased by Minolta Office Systems, Inc.), Yosha, and Rumley. *Id.* at 1132.

On appeal, AOE, Yosha, and Rumley argued that the trial court erred “by refusing to give an instruction that the finding of probable cause by the county court judge create[d] a rebuttable presumption of probable cause.” *Id.* at 1133. A panel of the Court of Appeals disagreed, holding that Schenck presented “ample evidence contrary to the rebuttable presumption” and that the presumption therefore was rebutted. *Id.* The *Schenck* court also held the rebuttable presumption

was not established because Schenck “successfully established that [Yosha and Rumley] willfully misrepresented and withheld material information from the prosecution and from the criminal court.” *Id.* at 1134. Thus, the *Schenck* court held that the trial court did not error in refusing to give the requested jury instruction regarding probable cause. *Id.* Any summary judgment rulings by the trial court, if there were any, were not appealed and thus were not an issue in the appeal.

2. *Wigger v. McKee*

As discussed above in Part II, *Wigger* involved both § 1983 claims and malicious prosecution claims. *Wigger*, 809 P.2d at 1004–05, 1007. The *Wigger* court addressed these claims separately. *Id.* However, even if the claims were treated the same, the decision in *Wigger* was not based a determination that a rebuttable presumption arises from the criminal proceedings and can be used to obtain summary judgment against the former criminal defendant in a subsequent malicious prosecution action. Rather, the *Wigger* decision was based on the Court’s analysis of the facts in the record. Specifically, the *Wigger* court determined that the facts in the record established probable cause as a matter of law. *Id.* at 1007. The facts in the record therefore warranted summary judgment on the issue of probable cause regardless of the alleged failures of the entities and individuals affiliated with the County and regardless of the criminal court’s finding

of probable cause. *Id.* Thus, *Wigger* does not hold that a finding of probable cause in a criminal proceeding creates a rebuttable presumption which can be used against a criminal defendant in a subsequent malicious prosecution action.

C. A Court's View of the Evidence and the Inferences It Can Draw Are Opposite in a Preliminary Criminal Hearing and Summary Judgment In A Malicious Prosecution Action

If a finding of probable cause in a preliminary criminal hearing creates a rebuttable presumption, the rebuttable presumption cannot be used to obtain summary judgment. In a preliminary criminal hearing to determine whether the prosecution has probable cause, "all inferences must be drawn in favor of the prosecution and all evidence is to be viewed in a light most favorable to the prosecution." *Schenck*, 802 P.2d at 1134. This means that all inferences regarding probable cause are drawn against the criminal defendant and all evidence is viewed in a light least favorable to the criminal defendant. *See id.*

If the person who was formerly the criminal defendant later files a malicious prosecution action against the individuals who were responsible for causing the criminal prosecution, either party is permitted to request summary judgment on the element of probable cause. *See* C.R.C.P. 56(a-b). *See also Hewitt*, 154 P.3d at 411 (lack of probable cause is an element of a malicious prosecution claim). If the summary judgment is sought against the former criminal defendant on probable cause, the trial court must view the evidence in a light most favorable to the former

criminal defendant. *See Weigel v. Broad*, 544 F.3d 1143, 1147 (10th Cir. 2008).

The former criminal defendant is also entitled to the benefit of all reasonable inferences and “[w]here different ultimate inferences may properly be drawn, the case is not one for a summary judgment.” *See Seamons v. Snow*, 206 F.3d 1021, 1026 (10th Cir. 2000). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.”).

Summary judgment against a former criminal defendant in a malicious prosecution action on the element of probable cause, based on the rebuttable presumption, is contrary to these summary judgment principles. If summary judgment based on the rebuttable presumption were permitted, the moving party would not need to introduce any evidence regarding probable cause. The moving party would only need to cite the criminal court’s decision to invoke the rebuttable presumption. The former criminal defendant would then have to overcome the criminal court finding to survive summary judgment, even though the finding is the result of a hearing in which the evidence was viewed in a light least favorable to the former criminal defendant and all inferences were drawn against the former criminal defendant. *See Schenck*, 802 P.2d at 1134.

Summary judgment is a drastic remedy because it denies litigants their right to trial. *Ginter v. Palmer & Co.*, 585 P.2d 583, 584 (Colo. 1978). Summary

judgment “is never warranted except on a clear showing that there is no genuine issue as to any material fact.” *Id.* If the rebuttable presumption of probable cause applies and can be used to obtain summary judgment against a former criminal defendant in the malicious prosecution action, the moving party could obtain the drastic remedy of summary judgment without demonstrating that the material facts, when properly viewed in favor of the former criminal defendant under summary judgment principles, show that there is no genuine dispute regarding probable cause.

Here, the finding of probable cause on one felony count against Andre was the result of a preliminary criminal hearing in which the evidence was viewed in a light least favorable to Andre and all inferences were drawn against her. *See Schenck*, 802 P.2d at 1134. The Merediths did not put forth any evidence regarding whether they had probable cause to report Andre for alleged theft and instead relied solely on the criminal court’s finding.³

Andre, as the nonmoving party opposing summary judgment, is entitled to have the evidence viewed in a light most favorable to her and to have all reasonable inferences drawn in her favor. The trial court’s ruling of summary judgment based solely on the rebuttable presumption contradicts these principles. The Merediths obtained the drastic remedy of summary judgment without

³ The Merediths failed to invoke the rebuttable presumption in their summary judgment motion. *See Part IV, infra.*

demonstrating that (1) there is no genuine dispute of material fact and (2) the evidence, when viewed in a light most favorable to Andre and when all inferences are granted in Andre’s favor, clearly shows that they had probable cause for reporting Andre to the police for alleged theft. Thus, this Court should rule that the trial court erred in granting summary judgment based solely on the rebuttable presumption and remand for further proceedings on Andre’s malicious prosecution claims.

IV. SUMMARY JUDGMENT IS NOT PROPER WHEN IT IS BASED ON A REBUTTABLE PRESUMPTION CLAIMED FOR THE FIRST TIME BY THE MOVING PARTY IN THE MOVING PARTY’S SUMMARY JUDGMENT REPLY BRIEF

A. Standard of Review and Preservation of the Issue

Review of an order granting summary judgment is de novo. *Robinson v. Legro*, 2014 CO 40, ¶10. Andre preserved this issue by opposing the Merediths’ summary judgment motion. TCF, pp. 163–188.

B. Summary Judgment cannot be granted on an Argument Raised for the First Time in the Moving Party’s Reply Brief

A request for summary judgment is controlled by C.R.C.P. 56. The rule “contemplates that opposing parties will be provided an opportunity to respond to authority cited in support of or in opposition to a motion for summary judgment.” *Antelope Co. v. Mobile Rocky Mtn., Inc.*, 51 P.3d 995, 1001 (Colo. App. 2001). “An issue not raised by the moving party in the motion or brief cannot serve as the

basis for summary judgment because the nonmoving party is not put on notice of the need to present evidence concerning that issue.” *Id.*

“The party moving for summary judgment has the burden of demonstrating clearly the absence of a genuine issue of fact in order to prevail.” *Jefferson County Sch. Dist. R-1 v. Justus*, 725 P.2d 767, 773 (Colo. 1986). In order to obtain summary judgment, the moving party must raise its specific arguments for summary judgment in its summary judgment motion. *Id.* Otherwise, the moving party cannot meet its summary judgment burden. *Id.* The moving party’s failure to raise an argument in support of summary judgment in its summary judgment motion also deprives the non-moving party of notice of the issue and the opportunity to present evidence in opposition to the argument. *Id.* at 773.

In *Justus*, a minor child was injured when he was struck by a car while riding his bicycle home from school. *Id.* at 768. The minor child, through his conservator, filed a negligence action against the school district. *Id.* at 767, 769. “The trial court granted summary judgment in favor of the school district and ruled that the school district had no duty to protect students from foreseeable harm existing off school premises.” *Id.* at 769. “The court also concluded that evidence contained in the pleadings and respondent’s affidavits was insufficient to support a legitimate inference that the school district had assumed a duty to prevent petitioner from leaving school on a bicycle.” *Id.*

“The court of appeals reversed the district court’s order granting summary judgment.” *Id.* “It pointed out various practices and procedures followed by [the school] and held, on the basis of the regulations contained in the handbook and the placement of teachers in front of the school, that the district had assumed the duty to prevent certain students from leaving school grounds on a bicycle” *Id.* The Colorado Supreme Court granted certiorari on the issue of whether the school district “had assumed the duty of preventing certain students from leaving school grounds on bicycles.” *Id.* at 768.

Before the Supreme Court, the school district argued “that the trial court’s entry of summary judgment was appropriate because the respondent introduced no evidence to show that he or his parents relied on the district to prevent him from leaving school on a bicycle.” *Id.* at 769. The Supreme Court disagreed, holding that because “the school district did not raise nonreliance as grounds for summary judgment before the trial court,” the school district did not meet its summary judgment burden of showing that neither the minor child nor his parents relied on the school district. *Id.* at 773.

As a result of the school district’s failure to raise nonreliance in its summary judgment motion, the school district “did not put the [minor child] on notice of the need to show reliance at that early stage in the proceedings.” *Id.* The Supreme Court therefore concluded that “nonreliance cannot serve as a ground for

reinstating the trial court's entry of summary judgment.”⁴ *Id. See also Wallman v. Kelley*, 976 P.2d 330, 332 (Colo. App. 1998) (reversing an order granting summary judgment on causation in a product liability action where the defendant argued for the first time in his summary judgment reply brief that the plaintiff could not prove that the product she purchased from him caused her injury).

C. The Merediths Claimed the Rebuttable Presumption for the First Time in their Reply Brief

In their motion for summary judgment, the Merediths' sole argument regarding probable cause was that the county criminal court's finding of probable cause collaterally estopped Andre from establishing probable cause in her malicious prosecution action. TCF, pp. 129–130. Specifically, the Merediths' summary judgment motion argued that:

Andre clearly had a fair and full opportunity at the Preliminary Hearing to litigate the probable cause issue. She was represented by counsel who provided argument, submitted documentary evidence and had the opportunity to cross examine the prosecution's witnesses, the Defendants in this matter and the USC accountant. Because Andre had such opportunity to fully and fairly litigate the issue, and in light of the evidence presented by both sides considered by the court in concluding that

⁴ In a footnote, the Supreme Court noted that its opinion did not preclude the school district from timely requesting summary judgment “on the grounds of nonreliance once the cause has been remanded to the district court.” *Justus*, 725 P.2d at 773, n. 6. The Supreme Court noted, however, that the minor child would then “have the opportunity to present evidence of reliance which, if sufficient to raise a genuine issue as to whether [he] or his parents relied on the school district's alleged undertaking, w[ould] preclude summary judgment.” *Id.*

there was probable cause supportive of the theft claim, ***the principles of collateral estoppel now preclude Andre from asserting that there was no probable cause*** for bringing the information and documentation to the Delta Police Department.

TCF, pp. 129–130 (emphasis added). The Merediths’ motion for summary judgment did not claim that a rebuttable presumption applied, use the phrase “rebuttable presumption,” or make any arguments that the burden of production in this case had shifted to Andre to rebut a presumption that defendants’ allegations against Andre were supported by probable cause. *See* TCF, pp. 120–131. Rather, the Merediths’ argued that Andre was collaterally estopped from offering such evidence to show probable cause. TCF, pp. 129–130.

In her response brief, Andre addressed the only probable cause issue raised by the Merediths’ motion: that collateral estoppel precluded her from re-litigating probable cause. TCF, pp. 179–184. Andre argued that the probable cause question in the criminal proceedings against Andre was distinct from the probable cause question in her malicious prosecution case against the Merediths. TCF, pp. 179–184. Thus, under *Schenck*, the Merediths cannot use collateral estoppel against Andre on the issue of probable cause. TCF, pp. 179–184. Andre did not need to introduce any facts regarding probable cause to show that under *Schenck* she was not collaterally estopped from later establishing probable cause.⁵ TCF, pp. 179–

⁵ *See* Part IV, Section D, *infra*.

184. Andre specifically noted in her response that since the Merediths had not demonstrated or otherwise argued that there is an absence of a question of material fact regarding whether they had probable cause to report Andre to the police, there was no other basis for granting the Merediths' request for summary judgment on probable cause. TCF, p. 184.

The Merediths, for the first time in their reply brief, claimed that a rebuttal presumption applied due to the finding of probable cause in the preliminary criminal hearing. TCF, pp. 197–199. The Merediths then argued that Andre did not overcome the rebuttable presumption because she did not present any evidence regarding probable cause. *Id.* TCF, pp. 197–199. Notably, the Merediths also argued for the first time that if the trial court found “that the collateral estoppel doctrine is inapplicable, thus distinguishing the probable cause determination in the criminal case from that required in the malicious prosecution claim at hand, Defendants argue that there still exists no genuine issue of material fact regarding whether there was probable cause to report Plaintiff to the police.” TCF, pp. 198–199. The trial court did not rule on the collateral estoppel issue and instead accepted the Merediths' rebuttable presumption argument, made for the first time in their reply brief. TCF, pp. 203–206. The trial court therefore granted defendants' request for summary judgment. TCF, pp. 205–206.

Summary judgment should not have been granted on the basis that Andre failed to overcome the rebuttable presumption of probable cause. The Merediths' rebuttal presumption argument was improperly raised for the first time in their summary judgment reply brief. The Merediths, as the party requesting summary judgment, had the burden of "demonstrating clearly the absence of a genuine issue of fact in order to prevail." *See Justus*, 725 P.2d at 773.

In order to obtain summary judgment based on the rebuttable presumption, the Merediths needed to raise the rebuttable presumption argument in its summary judgment motion. *See id.* The Merediths' failure to do so deprived Andre notice that the Merediths were claiming the rebuttable presumption. *See id.* Because Andre did not need to present evidence on probable cause in order to defeat the Merediths' collateral estoppel argument,⁶ the effect of the Merediths claiming the rebuttable presumption for the first time on reply was that Andre was denied the opportunity to present evidence on probable cause to overcome the rebuttable presumption. *See id.* at 773. *See also Wallman*, 976 P.2d at 332.

D. Andre Was Prejudiced by Summary Judgment on the Rebuttable Presumption of Probable Cause

The trial court's decision to accept the Merediths' rebuttable presumption argument and grant summary judgment, even though the Merediths raised the issue for the first time in their reply brief, prejudiced Andre. *See Antelope*, 51 P.3d at

⁶ *See* Part IV, Section D, *infra*.

1002. Andre did not have notice that the Merediths were claiming the rebuttal presumption or the opportunity to present evidence to overcome the presumption. Andre instead focused on defeating defendants' collateral-estoppel argument, the sole argument the Merediths made in their summary judgment motion regarding probable cause.

Andre did not need to present evidence regarding probable cause in order to defeat the Merediths' collateral-estoppel argument. "Four elements are required for issue preclusion: 1) The issue sought to be precluded must be identical to an issue actually and necessarily decided at a prior proceeding; 2) there must have been a final judgment on the merits at the first proceeding; 3) there must be identity of parties or privity of parties against whom the doctrine is asserted; and 4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding." *Schenck*, 802 P.2d at 1134. Andre did not need to introduce evidence regarding probable cause to show that one or more of these elements were not met and that the Merediths therefore were not entitled to collateral estoppel.

Andre argued that the Merediths could not show that she had a full and fair opportunity to litigate the case. TCF, p. 181. Although Andre attended the preliminary hearing and was represented by counsel, she only submitted one exhibit and did not call any witnesses. TCF, pp. 137–138, 181. The prosecution, as

a matter of law, received all favorable inferences in the preliminary hearing and its evidence was viewed in its favor. *See* TCF, p. 181. *See also Schenck*, 802 P.2d at 1134. There was no evidence in the record that the criminal court specifically confronted the issue of whether defendants lied to or excluded evidence from the police in reporting their allegations against Andre. *See* TCF, pp. 137–138. *See also Schenck*, 802 P.2d at 1134. Thus, the fact that Andre introduced one exhibit at the preliminary hearing and cross-examined the prosecution’s witnesses does not mean that she had a full and fair opportunity, or the incentive, to litigate the Merediths’ lack of probable cause in reporting her to the police. *See Schenck*, 802 P.2d at 1134. Under *Schenck*, collateral estoppel therefore did not apply and Andre did not need to introduce any evidence regarding probable cause to defeat the Merediths’ collateral estoppel argument. *See id.*

Andre also did not need to introduce any evidence regarding probable cause to support her argument that *Schenck* precluded the Merediths’ collateral estoppel argument because the issues involved in the preliminary criminal hearing and a malicious prosecution action are different. *Schenck* held that “the issue of probable cause in the malicious prosecution proceeding is not identical to the probable cause issue in the preliminary hearing” and thus collateral estoppel does not apply in the malicious prosecution action. TCF, p. 182. *See Schenck*, 802 P.2d at 1134 (collateral estoppel does not apply because “[t]he sole focus at the preliminary

hearing was whether the state had probable cause to believe plaintiff committed a crime” whereas “in the malicious prosecution proceeding, the issue was whether the defendants had probable cause to believe plaintiff committed the crime”).

Andre was also prejudiced by the Merediths claiming the rebuttable presumption for the first time in their reply because it precluded her from showing that the Merediths provided perjured testimony during the preliminary criminal hearing. Under *Schenck*, the rebuttable presumption disappears upon a showing “that perjured testimony was received during the preliminary hearing in the criminal matter, or that such hearing was otherwise significantly irregular.” *Schenck*, 802 P.2d at 1134.

Andre alleged in her complaint that the Merediths made false allegations that she stole from USC, Inc. TCF, pp. 2–10. In their summary judgment motion, the Merediths did not introduce evidence of the truth of their allegations. Andre’s allegations must therefore be accepted as true. *See Abrahamsen v. Mtn. States Tel. and Tel. Co.*, 494 P.2d 1287, 1288–89 (Colo. 1972) (holding that “the material allegations of the nonmoving party’s pleadings must be accepted as true even in the face of denial by the moving party’s pleadings unless the depositions and admissions on file, together with the affidavits, clearly disclose that there is no genuine issue as to any material fact, and that, as a matter of law, summary judgment should be entered.”).

Andre recognizes that her complaint did not refer to the preliminary criminal hearing and whether the Merediths offered perjured testimony at the preliminary criminal hearing. However, had the Merediths raised the rebuttable presumption in their summary judgment motion, Andre could have introduced evidence that the false allegations made by the Merediths and referenced in her complaint were also made at the preliminary criminal proceeding and that, as a result, the rebuttable presumption did not apply. The likelihood of Andre successfully making this showing would have been high because the trial court would have needed to find that the Merediths had otherwise made false allegations against Andre because the Merediths did not present evidence of the truth of their allegations in their summary judgment motion. *See Abrahamsen*, 494 P.2d at 1288–89.

The Merediths filed their summary judgment motion on December 3, 2013. TCF, p. 120. The trial was scheduled to commence on June 3, 2014. TCF, pp. 106–107. Pursuant to C.R.C.P. 16(b)(10), discovery could have continued until April 15, 2014, 49 days before the start of the trial. When the Merediths filed their summary judgment motion, Andre had some evidence that the Merediths lacked probable cause to report her to the police. This evidence included a tape recording of the June 1, 2012, meeting between the Merediths and the district attorney. However, discovery was still ongoing.

Had the Merediths claimed the rebuttable presumption in their summary judgment motion, Andre could have presented the evidence she had to overcome the presumption. Alternatively, if Andre determined that she needed additional discovery on probable cause before responding to the rebuttable presumption she could have requested relief from the trial court pursuant to C.R.C.P. 56(f), including requesting more time to complete discovery on the issue of probable cause. However, because Andre did not need to introduce any evidence regarding probable cause in order to overcome the Merediths' collateral estoppel argument, she did not present her evidence to overcome the presumption or request C.R.C.P. 56(f) relief.

Under C.R.C.P. 56, Andre should have had the opportunity to address the Merediths claim of the rebuttable presumption. Andre did not have this opportunity because the Merediths did not claim the rebuttable presumption until they filed their summary judgment reply brief. Andre was prejudiced as a result because she did not need to introduce evidence regarding probable cause, and did not do so, to overcome the Merediths' collateral estoppel argument. Thus, this Court should reverse the trial court and remand for further proceedings on Andre's malicious prosecution claims.

CONCLUSION

Andre requests that this Court reverse the trial court's entry of summary judgment and remand for further proceedings consistent with this opinion.

SUBMITTED this 30th day of June, 2014.

KILLIAN DAVIS Richter & Mayle, PC

Duly authorized original signature on file at the offices of KILLIAN DAVIS Richter & - Mayle, PC pursuant to C.R.C.P. 121, section 1-26(9).

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