

<p>COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203</p> <p>Trial Court: District Court, Delta County, Colorado Trial Court Judges: Hon. Charles R. Greenacre Case Number: 2013 CV 9</p>	<p style="text-align: right;">DATE FILED: September 9, 2014 2:25 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiff/Appellant:</p> <p>Toni Andre</p> <p>v.</p> <p>Defendants/Appellees:</p> <p>Lena Meredith; Harold Meredith; USC, Inc.</p>	
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<p>AMENDED ANSWER BRIEF</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this Amended Answer Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the Amended Answer Brief complies with C.A.R. 28(g) as it contains 30 pages. This Amended Answer Brief has been amended to comply with C.A.R. 28(k).

I acknowledge that this Amended Answer Brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

*Original signature on file at Wilson Elser, per
Rule 121 § 1-26*

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
I. STATEMENT OF THE CASE	1
A. The Nature of the Case and Court of Proceedings.....	1
B. Statement of the Facts	2
II. SUMMARY OF THE ARGUMENT	4
III. ARGUMENT.....	5
A. Legal Standard for Summary Judgment.....	5
B. A Finding in a Preliminary Criminal Hearing of Probable Cause Establishes a Rebuttable Resumption for Subsequent Malicious Prosecution Claims	5
1. Standard of Review and Preservation of the Issues.....	6
2. Andre Failed to Establish the Elements of Malicious Prosecution.....	6
3. Colorado Appellate Authority Supports a Rebuttable Presumption of Probable Cause Applies to Malicious Prosecution Claims.....	7
C. This Court Has, and Should, Recognize a Rebuttable Presumption of Probable Cause in Subsequent Malicious Prosecution Actions.....	10
1. Legal Standard Regarding Presumptions.....	10

2.	The Presumption of Probable Cause is Proper Based on Colorado Case Law and Applicable Facts	10
3.	Andre Had a Fair and Full Opportunity to Defend Herself at the Preliminary Hearing	11
4.	Andre’s Public Policy and Probability of Probable Cause Arguments Fail for a Lack of Legal Support	13
D.	The Rebuttable Presumption of Probable Cause in a Subsequent Malicious Prosecution Action Can and Has Been Used to Obtain Summary Judgment	14
1.	Standard of Review and Preservation of the Issue	14
2.	Legal Authority Supports the Use of Probable Cause Rebuttable Presumption for Summary Judgment	15
E.	The Rebuttable Presumption of Probable Cause was Addressed by the Merediths in their Motion for Summary Judgment	18
1.	Standard of Review and Preservation of the Issue	18
2.	The Rebuttable Presumption for Probable Cause was Raised in the Merediths’ Motion for Summary Judgment	19
IV.	CONCLUSION.....	22
V.	REQUEST FOR ATTORNEYS FEES	22

TABLE OF AUTHORITIES

CASES	PAGE
<i>Adamson v. May Co</i> , 456 N.E. 2d 1212 (Ohio App. 1982).....	10, 17, 18
<i>Barton v. Blea</i> , 2006 WL 3262831 (D.Colo. 1996).....	12, 13
<i>Bell v. Dillard Dept. Stores, Inc.</i> , 85 F.3d 1451 (10th Cir. 1996).....	13
<i>Catillo v. Koppes-Conway</i> , 148 P.3d 289 (Colo. App. 2006).....	23
<i>Cont'l Air Lines, Inc. v. Keenan</i> , 731 P.2d 708 (Colo. 1987).....	19
<i>Hewitt v. Rice</i> , 119 P.3d 541 (Colo. App. 2004).....	6
<i>People v. Taylor</i> , 655 P.2d 382 (Colo. 1982).....	15, 20
<i>Rose v. Bartle</i> , 871 F.2d 331 (3rd Cir. 1989).....	15
<i>Schenck v. Minolta Office Systems, Inc.</i> , 802 P.2d 1131 (Colo. App. 1990).....	7, 9, 11, 12
<i>Stainer v. San Luis Valley Land & Mining Co.</i> , 166 F. 220 (8th Cir. 1908).....	15, 20
<i>White v. Frank</i> , 855 F.2d 956 (2nd Cir. 1988).....	15, 20

Wigger v. McKee,
809 P.2d 999 (Colo. App. 1990).....8, 9, 14, 15, 16, 20

STATUTES

C.R.S. § 13-17-10222

OTHER

Restatement (Second) of Torts § 663, comment h (1997)..... 16

I. STATEMENT OF THE CASE

A. The Nature of the Case and Course of Proceedings

Plaintiff, Toni Andre (“Andre”), asserted claims against Lena Meredith, Harold Meredith, and USC, Inc. (collectively the “Merediths”) for damages arising out of her arrest and prosecution for theft. Record on Appeal (“ROA”), pp. 2-10. Andre was employed as the office manager at USC, Inc. ROA, p. 3 ¶ 11. As the office manager, Andre was an authorized signor on USC, Inc.’s checking account. ROA, p. 3 ¶ 12. Following Andre’s departure from her employment, the Merediths discovered that Andre had issued unauthorized company checks and unauthorized transactions on the company credit card. ROA, p.6 ¶ 45. The Merediths contacted the Delta Police Department and reported Andre’s unauthorized use of company checks and credit card. ROA, p.6 ¶ 45.

Andre subsequently filed a civil action against the Merediths asserting a claim for malicious prosecution (“Underlying Action”). ROA, p. 8. In the Underlying Action the Merediths filed a motion for summary judgment arguing that Andre failed to establish the elements of malicious prosecution. ROA, pp. 123-130. Specifically, Andre did not establish the underlying criminal case ended in her favor or that the statements made by the Merediths were made without probable cause. ROA, pp. 124. Contrary to Andre’s allegations in her Opening

Brief, the Merediths argued in their motion for summary judgment that a judicial finding of probable cause 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. ROA, p. 126.

The trial court held that Andre could not establish that there was no probable cause to support the criminal proceeding. ROA, p. 203. Further, the trial court found that the criminal proceeding established a rebuttable presumption for purposes of a subsequent malicious prosecution claim and that Andre failed to produce competent evidence to rebut that presumption. ROA, p 204. Therefore, the trial court granted summary judgment to the Merediths. ROA, p. 206.

B. Statement of the Facts

Andre began working as the office manager at USC, Inc. in March, 2006. ROA, p. 3 ¶ 10. After Plaintiff had left USC, the Merediths contacted the Delta Police Department about Plaintiff's prior issuance of unauthorized company checks and unauthorized transactions on the company credit card. ROA, p. 6 ¶ 45. Based upon the information and documentation provided, the Delta Police Department brought charges of felony theft, felonious unauthorized use of a financial transaction device and felony identity theft. ROA, p.6 ¶ 50. Specifically,

Andre was charged with sixteen (16) counts of theft, felonious unauthorized use of a financial transaction device and felony identity theft. ROA, p. 7 ¶ 57. On July 21, 2010, Andre was arrested on those charges. ROA, p. 6 ¶ 51.

On October 5, 2010, a Preliminary Hearing was held before the Honorable Sandra K. Miller (“Preliminary Hearing”). ROA, pp. 134-145. Andre appeared at the Preliminary Hearing with counsel. ROA, p. 137. The court heard testimony from Lena Meredith, Hal Meredith and USC accountant, Cindy Groskopf. ROA, p. 137. All were subjected to cross-examination by counsel for Andre. ROA, p. 137. Documents were submitted as evidence by both the District Attorney and counsel for Andre. ROA, p. 137-38. Both the District Attorney and counsel for Andre presented opening and closing arguments. ROA, p. 137-38. After hearing argument and testimony, the judge specifically found that there was probable cause on Count 1 (Theft in excess of \$20,000) and bound the case over to the District Court for arraignment. ROA, p. 138.

The criminal case was set for an eight (8) day jury trial to commence February 7, 2012. ROA, p. 141. On Andre’s motion, the February 7, 2012 jury trial was continued to July 10, 2012. ROA, p. 141. Over the course of the criminal case, the prosecution of the claims was handled by at least five (5) different district attorneys in two (2) separate judicial districts. ROA, pp. 134-145. On June 18,

2012, the specially appointed prosecutor moved to dismiss the criminal case. ROA, p. 150. The court found that “[b]ased upon statements of those present, the court will not make a finding at this time of dismissal with or without prejudice.” ROA, p. 144. There was no finding as to Andre’s guilt or innocence. ROA, pp. 133, 134-145.

II. SUMMARY OF THE ARGUMENT

Among the necessary elements that a plaintiff must prove in a malicious prosecution action are the elements that the criminal action ended in favor of the plaintiff and that defendant’s statements against the plaintiff are made without probable cause. 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 that the findings of the preliminary hearing establish a rebuttable presumption of probable cause in a subsequent malicious prosecution action against private third parties. The probable cause presumption may be rebutted by evidence that the defendants willfully misled the prosecution or knowingly withheld material information from the prosecution or criminal court.

Where a rebuttable presumption exists in favor of the moving party on summary judgment, the opposing party must produce some evidence to rebut the presumption in order to defeat the motion for summary judgment. Here, this

means that Andre was required to produce some competent evidence showing that the Merediths made the allegations against her without probable cause. Andre failed to produce any evidence to rebut the presumption in favor of probable cause, thus summary judgment was properly granted as a matter of law based on the finding that there was probable cause to support the criminal proceeding.

Although alleged otherwise, the Merediths presented arguments in their motion for summary judgment that Andre must prove that there was not probable cause for the statements made by the Merediths and that the finding of probable cause in the criminal proceeding created a rebuttable presumption. Therefore, the trial court's order granting summary judgment in favor of the Merediths was proper based on Andre's failure to provide evidence rebutting the judicial finding of probable cause.

III. ARGUMENT

A. Legal Standard for Summary Judgment

Appellees agree with Appellant's statement of the legal standard for summary judgment.

B. A Finding in a Preliminary Criminal Hearing of Probable Cause Establishes a Rebuttable Presumption for Subsequent Malicious Prosecution Claims

1. Standard of Review and Preservation of the Issue

Appellees agree with Appellant's statement that the standard of review by the Court of summary judgment orders is de novo. Although Appellees agree that Appellant preserved this issue for appeal by opposing the Merediths' summary judgment motion, Appellees disagree that Appellant met her burden of production regarding this issue as evidence was not produced by Appellant regarding the rebuttable presumption of probable cause in the Underlying Action.

2. Andre Failed to Establish the Elements of Malicious Prosecution

The tort of malicious prosecution requires that Andre establish all of the following: "(1) a criminal case was brought against the plaintiff; (2) the criminal case was brought as a result of an oral or written statement made by the defendant; (3) the criminal case ended in favor of the plaintiff; (4) the defendant's statements against the plaintiff were made without probable cause; (5) the defendant's statements against the plaintiff were motivated by malice towards the plaintiff; and (6) as a result of the criminal case, the plaintiff had damages." *Hewitt v. Rice*, 119 P.3d 541, 544 (Colo.App. 2004).

Pertinent in the Underlying Action, and as argued in the Merediths' motion for summary judgment, was the question of whether the criminal case ended in Andre's favor and whether the Merediths' statements were made without probable

cause. The trial court concluded that as a matter of law, that there was probable cause to support the criminal proceeding. ROA, p. 205. As explained by the trial court, the probable cause finding in the criminal proceeding established a rebuttable presumption that the Merediths had probable cause to believe that Andre had committed a crime and Andre produced no evidence to rebut this presumption. ROA, p. 205. In light of the trial court's finding that there was probable cause, the court did not address whether or not the criminal case ended in Andre's favor as it found all other issues to be moot. ROA, p. 206.

3. Colorado Appellate Authority Supports a Rebuttable Presumption of Probable Cause Applies to Malicious Prosecution Claims

The Colorado Court of Appeals has held that “[a]s 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 v. Minolta Office Systems, Inc.*, 802 P.2d 1131, 1133-34 (Colo. App. 1990). In *Schenck*, the plaintiff was an employee of the defendant. When plaintiff gave the defendant notice of his resignation, defendant became upset and reported an accusation of theft by the plaintiff to the local sheriff's department. *Id.* at 1132. In a preliminary hearing, a county judge found that probable cause existed and a criminal complaint was filed against the plaintiff for

theft. *Id.* Subsequently, the criminal complaint was dismissed because of insufficient evidence. *Id.* at 1133. Plaintiff filed a malicious prosecution action against defendant based on the underlying criminal action. Schenck successfully rebutted the presumption in favor of probable cause by producing evidence showing that the defendants perjured testimony during the preliminary hearing in the criminal matter. *Id.* at 1134.

In contrast, Andre failed to produce any evidence that showed that the Merediths willfully misled the prosecution or knowingly withheld material information from the prosecution or the criminal court. ROA, p. 205. Thus, the trial court relying on *Schenck*, held that Andre could not establish that the Merediths made the allegations against her without probable cause. ROA, p. 205.

Andre attempts to attack the holding in *Schenck* based on the fact that the *Schenck* court cited *Wigger v. McKee* 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. Opening Brief, p. 11 (quoting *Wigger v. McKee*, 809 P.2d 999 (Colo. App. 1990)). Andre argues that in *Wigger* the court addressed two types of claims, a claim under 42 U.S.C. § 1983 and a malicious prosecution claim. Opening Brief, p. 11. Andre states that under the malicious prosecution claim, the *Wigger* court did not hold that there was a rebuttable

presumption as the court held that it had “already determined that probable cause to prosecute existed.” Opening Brief, p. 13 (quoting *Wigger*, 809 P.2d at 1007.).

Andre misconstrues that the rebuttable presumption of probable cause only applies to § 1983 claims because it is discussed in the context of the § 1983 claim in *Wigger*. *Id.* at 1005. However, the rebuttable presumption is a judicial finding of probable cause, which is an element of a lawful arrest, not merely an element of a § 1983 claim. *Id.* The standard controlling a probable cause determination, which is whether evidence is sufficient to induce a person of ordinary prudence and caution reasonably to believe that the defendant committed the crime charged, is the same standard when applied in the context of a § 1983 claim and malicious prosecution claim. *Id.* The *Wigger* court simply addressed the rebuttable presumption under the § 1983 claim as it was discussed before the malicious prosecution claim.

The *Wigger* court determined that the rebuttable presumption of probable cause was not defeated by the evidence presented. *Id.* at 1007. Relying on this conclusion that the rebuttable presumption of probable cause was not overcome, the court holds the same rebuttable presumption applied to the probable cause determination of the malicious prosecution claim and that summary judgment was proper. *Id.* Therefore, both *Schenck* and *Wigger* provide Colorado appellate

authority 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 of probable cause.¹

C. This Court Has, and Should, Recognize a Rebuttable Presumption of Probable Cause in Subsequent Malicious Prosecutions Actions

1. Legal Standard Regarding Presumptions

Appellees agree with Appellant's statement of the legal standard regarding presumptions.

2. The Presumption of Probable Cause is Proper Based on Colorado Case Law and Applicable Facts

Andre argues that the purpose of the rebuttable presumptions is not furthered by allowing a rebuttable presumption in subsequent malicious prosecution actions against private third parties based on the finding of probable cause in a criminal proceeding. Opening Brief, p. 14. As previously discussed, *Schenck* and *Wigger* establish that Colorado courts already recognize a rebuttable presumption in subsequent malicious prosecution actions against private third parties based on the finding of probable cause in a criminal proceeding. Furthermore, Andre's

¹ Other jurisdictions have also held that a rebuttable presumption of probable cause occurs when an order to bind the accused over after a preliminary hearing. *See Adamson v. May Co.*, 456 N.E.2d 1212, 1215 (Ohio App. 1982).

arguments that a criminal defendant does not have incentive to fully defend themselves at a preliminary criminal hearing, that public policy favors not vigorously litigating probable cause in preliminary hearings, and that the rebuttable presumption is not based on high probability of probable cause are unpersuasive, irrelevant, and unsupported.

3. Andre Had a Fair and Full Opportunity to Defend Herself at the Preliminary Hearing

Andre argues that a criminal defendant has little incentive to litigate the probable cause determination at a preliminary hearing because at such hearing all inferences must be drawn in favor of the prosecution and that the defendant has the opportunity to fully and fairly defend herself at trial. Opening Brief, p. 16. First, this argument is illogical as the determination of probable cause at a preliminary hearing will bind a plaintiff for trial. *Schenck*, 802 P.2d at 1132-33. It would be logical that a criminal plaintiff would want to present evidence that probable cause did not exist to avoid a criminal trial which would be more expensive, time consuming, and could result in a criminal punishment. Furthermore, this argument is irrelevant as Andre had a fair and full opportunity at the Preliminary Hearing to litigate the probable cause issue. Andre was represented by counsel who provided

argument, submitted documentary evidence, and had the opportunity to cross-examine the prosecution's witnesses. ROA, pp. 134-145.

Second, Andre's suggestion that if a criminal defendant is represented by a criminal defense attorney or public defender that the criminal defendant would be unaware of the consequences of not rebutting probable cause at a preliminary hearing is a malpractice issue, not one that should determine whether or not a rebuttable presumption should apply. Additionally, no evidence has been presented that was the case in this matter, thus this argument is irrelevant.

Finally, Andre contends that it is unfair to create a rebuttable presumption in a malicious prosecution action based on a probable cause determination in a preliminary criminal hearing because the issue of probable cause is different in the two cases. Opening Brief, p. 18. Relying on *Schenck*, Andre states that in a preliminary criminal hearing the question is whether the district attorney has probable cause to pursue the asserted criminal count, while in a malicious prosecution action, the question is whether the defendants had probable cause to make the allegations which were used to bring criminal charges. Opening Brief, pp. 18-19 (quoting *Schenck*, 802 P.3d at 1134).

In *Barton v. Blea*, the *Barton* court applied Colorado state law and reasoned that a plaintiff in a malicious prosecution case may not be bound by a state court's

determination of probable cause if the plaintiff did not have a fair and full opportunity to litigate the issue in the state court proceeding. *Barton v. Blea*, 2006 WL 3262831 at *4 (D.Colo. 1996) (citing *Bell v. Dillard Dept. Stores, Inc.*, 85 F.3d 1451, 1453-54 (10th Cir. 1996)). Similarly, here it is clear that the court in the criminal case considered not just whether there was probable cause to bind over Andre to the district court, but whether there was probable cause to believe that Andre had stolen from the Merediths. ROA, p. 138 (stating “after hearing argument and testimony, court finds there is probable cause on count 1,” the theft in excess of \$20,000 claim.). Andre clearly had a fair and full opportunity at the Preliminary Hearing to litigate the probable cause issue. As such, it is fair and appropriate that the determination of probable cause at Preliminary Hearing establish a rebuttable presumption for purposes of her subsequent malicious prosecution case.

4. Andre’s Public Policy and Probability of Probable Cause Arguments Fail for a Lack Legal Support

Andre suggests that it is in the interest of public policy that probable cause determinations are not vigorously litigated. However, Andre does not provide any legal support for this argument. Instead, Andre relies on the fact that she introduced only one exhibit on her behalf and called no witnesses as support for

the fact that preliminary criminal hearings are not vigorously. Andre's public policy argument is circular and simply fails for lack of any kind of legal support.

Although not entirely clear in Andre's Opening Brief, Andre seems to suggest that the accuracy of a probable cause determination in a criminal hearing is less than in a malicious prosecution matter. Opening Brief, p. 22. Andre does not provide any legal support for this statement. Andre suggests that probable cause can be based on false statements, which in the criminal court's estimate was not the case. Andre ignores that the standard controlling a probable cause determination is whether the evidence is sufficient to induce a person of ordinary prudence and caution reasonably to believe that the defendant committed the crime charged. *Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990). Andre's argument that the probable cause determination in a preliminary hearing is less accurate than in a malicious prosecution matter also fails for lack of any type of legal support.

D. The Rebuttable Presumption of Probable Cause in a Subsequent Malicious Prosecution Action Can and Has Been Used to Obtain Summary Judgment

1. Standard of Review and Preservation of the Issue

Appellees agree with Appellant's statement that the standard of review by the Court of summary judgment orders is de novo. Although Appellees agree that Appellant preserved this issue for appeal by opposing the Merediths' summary

judgment motion, Appellees disagree that Appellant met her burden of production regarding this issue as evidence was not produced by Appellant regarding the rebuttable presumption of probable cause in the Underlying Action.

2. Legal Authority Supports the Use of the Probable Cause Rebuttable Presumption in Summary Judgment

Andre repeats her argument that there is not Colorado appellate case law that supports whether the rebuttable presumption of probable cause can be used in a subsequent malicious prosecution action, therefore there is no support for obtaining summary judgment based on the rebuttable presumption. However, once again Andre misconstrues *Wigger v. McKee* in order to support this conclusion. Opening Brief, p. 25. In *Wigger*, the court states:

The standard controlling a probable cause determination is whether the evidence is sufficient to induce a person of ordinary prudence and caution reasonably to believe that the defendant committed the crime charged. *People v. Taylor*, 655 P.2d 382 (Colo. 1982). 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. *White v. Frank*, 855 F.2d 956 (2d Cir. 1988); see *Stainer v. San Luis Valley Land & Mining Co.*, 166 F. 220 ((8th Cir. 1908).

Further, to defeat a judicial finding of probable cause, any actions or omissions by the defendant must have tainted the proceedings. *Hand v. Gary*, *supra*; see *Rose v. Bartle*, 871 F.2d 331 (3rd Cir. 1989) (probable cause finding must have been “procured” by defendant’s

acts); Restatement (Second) of Torts § 663, comment h (1977) (court should take account of any withholding of material evidence).

Wigger, 809 P.2d at 1005.

The *Wigger* court then analyzed the facts in order to determine if any actions or omissions by the defendant tainted the judicial finding of probable cause in order to overcome the rebuttable presumption of probable cause. *Id.* The court found that facts analyzed did not support that the probable cause determination was tainted. *Id.* at 1007. Relying on this analysis of probable cause, the court then found that “[b]ecause we have already determined that probable cause to prosecute existed irrespective of defendant’s action or nonaction, summary judgment on the malicious prosecution claim is proper.” *Id.* The court is referencing the rebuttable presumption of probable cause previously set forth above in the quoted material. Therefore, Colorado case law does support summary judgment based on the rebuttable presumption of probable cause.²

² In the alternative, if the court interprets the analysis of *Wigger* to apply the issue of probable cause, not the rebuttable presumption of probable cause, it should be noted that Andre did not present sufficient evidence that there was no probable cause for the criminal action as required by the elements of malicious prosecution. As the trial court pointed out in its order, “[Andre] must produce some competent evidence showing that the Merediths made the allegations against her without probable cause in order to defeat summary judgment . . . [t]he mere fact that the criminal charges were eventually dismissed is not sufficient . . . because ‘[t]he

Andre also disputes that summary judgment based on the rebuttable presumption of probable cause is proper because the evidence and inferences made in the a criminal hearing oppose those made in a malicious prosecution action. Opening Brief, p. 26. However, Andre provides no legal support for this claim. Instead, Andre strings together references to the applicable inferences and concludes that if summary judgment based on the rebuttable presumption is permitted that such ruling contradicts the principles of summary judgment. Opening Brief, p. 28.

Andre's concerns are addressed by the fact that a rebuttable presumption can by overcome by presenting evidence which counterbalances the evidence used to sustain the burden. *Adamson v. May Co.*, 465 N.E.2d 1212, 1217 (Ohio App. 1982). As explained by the court in *Adamson*:

At the same time, the presumption resulting from a bind over order or an indictment should be rebuttable. A malicious prosecution action fails without proof that the criminal case terminated favorably for the accused. It should be obvious that the bind over order and the indictment should not have conclusive weight. A contrary rule would change the elements of this action and exclude recovery in any case where there has been a bind over order or an indictment, regardless of its fanciful or unfounded source. The ability to rebut probable cause

defendant in a suit based on malicious prosecution may have probable cause for the filing of the charges event though subsequent events may prove such charges to be erroneous.” ROA, p. 205.

presumed from an indictment is particularly significant, since the grand jury's evidence is usually secret and beyond the plaintiff's reach. If the probable cause presumption were not rebuttable, a truly malicious accuser could lie at the preliminary hearing or the grand jury sessions and thereby obtain a bind over order or an indictment which screened him from civil liability for his malicious prosecution.

Adamson, 465 N.E.2d at 1216.

In *Adamson*, the plaintiff was accused of theft from his employer. When the plaintiff provided a deposition of a co-worker that admitted the theft and denied the plaintiff's involvement, the court found that the evidence was strong enough to rebut the presumed fact of probable cause. *Id.* at 1217. As demonstrated in *Adamson*, a rebuttable presumption can be rebutted, however if the presumed fact remains unrebutted, the court should direct that the presumed facts has been established as a matter of law. *Id.* at 1216. Therefore, the trial court's ruling was not in error as Andre failed to provide any evidence rebutting the presumption of probable cause.

E. The Rebuttable Presumption of Probable Cause was Addressed by the Merediths in their Motion for Summary Judgment

1. Standard of Review and Preservation of the Issue

Appellees agree with Appellant's statement that the standard of review by the Court of summary judgment orders is de novo. Although Appellees agree that Appellant preserved this issue for appeal by opposing the Merediths' summary

judgment motion, Appellees disagree that Appellant met her burden of production regarding this issue as evidence was not produced by Appellant regarding the rebuttable presumption of probable cause in the Underlying Action.

2 The Rebuttable Presumption for Probable Cause was Raised in the Merediths' Motion for Summary Judgment

Whenever summary judgment is sought, the moving party bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and of the affidavits, if any, which he believes demonstrate the absence of a genuine issue of material fact. In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case.

Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.

Cont'l Air Lines, Inc. v. Keenan, 731 P.2d 708, 712-13 (Colo. 1987) (internal citations omitted).

Andre claims that 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.” Opening Brief, p. 33. However, the Record on Appeal clearly shows that the Merediths did make such arguments in their motion for summary judgment. The following statements were included in the Merediths’ motion for summary judgment:

1. Plaintiff still maintains the **burden** of providing evidence that “a person of ordinary prudence and caution” would not have reasonably believed that the defendant committed the crime charged. *Wigger v. McKee*, 809 P.2d 999, 1005 (Colo.App.1990); citing, *People v. Taylor*, 655 P.2d 382 (Colo.1982). ROA, p. 126.
2. Similarly, the undisputed facts in this case demonstrate that even if the criminal case had ended in Andre’s favor, probable cause for the allegations still existed. It is undisputed that Defendants provided both statements and documentation to the Delta Police Department. From there, formal charges were brought and ultimately heard by the court as it considered evidence presented by both the prosecution and Andre. It was upon evaluation of that evidence, in its entirety, that the court found that there was probable cause on the theft charge. **A judicial finding of probable cause 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.”** *White v. Frank*, 855 F.2d 956 (2d Cir.1988); *see Stainer v. San Luis Valley Land & Mining Co.*, 166 F. 220 (8th Cir.1908). ROA, p. 126.

Although the Merediths’ motion for summary judgment argued that the principles of collateral estoppel applied, this argument was premised on the fact that a the judicial finding of probable cause in the criminal action created a

rebuttable presumption of probable cause, as evidenced by the above quotation from the motion for summary judgment. Additionally, the Merediths address in the motion for summary judgment the absence of evidence for Plaintiff to argue that there was not probable cause. Specifically, the Merediths reference that they provided statements to the Delta Police Department, formal charges were brought and heard by the court, and based upon that evidence there was a finding of probable cause on the theft count. ROA, p. 126. The Merediths met their initial burden of production by showing the court that there was an absence of evidence in the record to support Andre's case.

Andre also argues that she was prejudiced by the summary judgment on the rebuttable presumption. Although the record clearly shows that the rebuttable presumption was addressed in the motion for summary judgment, Andre also was aware that one of the necessary elements of malicious prosecution required that she establish that there was no probable cause in the criminal action. Further, a section of the motion for summary judgment was entitled "Defendants' Statements Were Not Made Without Probable Cause." ROA, p. 125. Andre strategically focused her responsive arguments on the Merediths' collateral-estoppel argument. Opening Brief, p. 36. Andre suggests that she did not need to present evidence of probable cause to defeat the Merediths' collateral-estoppel argument, however

Andre was fully aware that she had to establish the Merediths' had no probable cause as an element of malicious prosecution. Andre's poor strategy does not justify sufficient prejudice to overturn an order granting summary judgment. Therefore, Andre's argument that the rebuttable presumption of probable cause was not addressed in the motion for summary judgment, and that Andre was prejudiced, also fail.

IV. CONCLUSION

In conclusion, Andre's appeal should be denied as the trial court's order granting the Merediths' motion for summary judgment based on the rebuttable presumption of probable cause is proper, as well as supported by Colorado case law. Additionally, Andre was not prejudiced by the trial court's decision as the Merediths' addressed the rebuttable presumption in their motion for summary judgment.

V. REQUEST FOR ATTORNEYS' FEES

Defendants request an award of their attorneys' fees incurred in this appeal pursuant to C.R.S. § 13-17-102, because this appeal is substantially groundless. As discussed above, there is nothing in the record to support Plaintiff's arguments. An appeal "lacks substantial justification" and is "substantially frivolous" when the appellant's brief fails to set forth, in a manner consistent with C.A.R. 28, a coherent

assertion of error supported by legal authority. As a result, it is appropriate to assess attorney fees against the attorney prosecuting the appeal in this case. *Castillo v. Koppes-Conway*, 148 P.3d 289 (Colo. App. 2006). As such, Defendants are entitled to an award of its attorneys' fees incurred in this appeal.

Dated this 9th day of September, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the electronic submission of the foregoing **AMENDED ANSWER BRIEF** on September 9, 2014, will cause an electronic copy of the documents to be served on all counsel via the email address that counsel have registered with the Courts ICCES system.

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