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| COLORADO COURT OF APPEALS<br>2 East 14th Avenue<br>Denver, CO 80203<br><br>Trial Court: District County District Court<br>Trial Court Judge: Hon. Charles R. Greenacre<br>Case No.: 2013 CV 9 | DATE FILED: September 22, 2014 10:00 PM |
| Plaintiff/Appellant:<br><br>Toni Andre<br><br>v.<br><br>Defendants/Appellees:<br><br>Lena Meredith; Harold Meredith; USC, Inc. | ☐ **COURT USE ONLY** ☐<br><br>Case No. 2014 CA 516 |
| J. Keith Killian, Esq. No. 9042<br>Andrew S. Petroski, Esq. No. 42871<br>Matthew Parmenter, Esq. No. 42937<br>KILLIAN DAVIS Richter & Mayle, PC<br>202 North Seventh Street<br>Post Office Box 4859<br>Grand Junction, Colorado 81502<br>Telephone: (970) 241-0707<br>Attys. For Plaintiff/Appellant: Toni Andre | |

**PLAINTIFF-APPELLANT'S REPLY BRIEF**

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that to the best of his knowledge this Plaintiff-Appellant's Reply 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 Reply Brief contains 5,697 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).*

*/s/ J. Keith Killian*

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## I. 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. *Wigger* Analyzed § 1983 Claims and Malicious Prosecution Claims Separately and Only Held that A Rebuttal Presumption Existed as to § 1983 Claims

The trial court ruled that a probable cause finding in a preliminary criminal hearing creates "a rebuttable presumption for purposes of a subsequent malicious prosecution claim unless it is shown that perjured testimony was received during the preliminary hearing or that the hearing was 'otherwise significantly irregular,'" relying solely on *Schenck v. Minolta Office Sys., Inc.*, 802 P.2d 1131 (Colo. App. 1990). *See* Trial Court File ("TCF"), p. 219.

*Schenck* relied on *Wigger v. McKee*, 809 P.2d 999 (Colo. App. 1990), for the proposition 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. In her Opening Brief, Andre argued that this was not the holding of *Wigger* because the *Wigger* court discussed § 1983 claims and malicious prosecution claims separately and held that a rebuttable presumption existed only as to the § 1983 claims. *See Wigger*, 809 P.2d at 1004–07.

With regard to the malicious prosecution claims, *Wigger* did not hold that there is a rebuttable presumption or that a rebuttable presumption applied. *See id.* at 1007. Instead, the *Wigger* court, in granting summary judgment on the malicious prosecution claims, relied on its determination "that probable cause to prosecute existed irrespective of defendant's action or nonaction." *Id.* This determination was not the result of a rebuttable presumption arising from the preliminary criminal court's probable cause finding, but rather the *Wigger* court's determination that the facts in the record established probable cause as a matter of law. *Id.* at 1006.

Other than *Wigger*, the *Schenck* court did not cite any Colorado authority in support of its holding that a finding of probable cause in a preliminary criminal hearing creates a rebuttable presumption of probable cause in a subsequent malicious prosecution action. Neither *Schenck* nor *Wigger* explain why a rebuttable presumption should arise from a finding of probable cause in a preliminary criminal hearing. Neither *Schenck* nor *Wigger* analyze whether a rebuttable presumption arising from a finding of probable cause in a preliminary criminal hearing is consistent with Colorado's evidentiary rules or public policy.

The Merediths argue that it is irrelevant that *Wigger* only discussed the rebuttable presumption in the context of § 1983 claims and not malicious prosecution claims. The Merediths claim that: "The standard controlling a

probable cause determination, which is whether evidence is sufficient to induce a person or 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." Thus, the Merediths conclude that *Wigger* "simply addressed the rebuttable presumption under the § 1983 claim as it was discussed before the malicious prosecution claim."

The Merediths' argument should be rejected. The relevant question is not whether the standard of probable cause is the same in a § 1983 action and a malicious prosecution action, but rather whether a rebuttable presumption of probable cause based on a preliminary criminal hearing's finding of probable cause applies in a malicious prosecution action against private third parties. *Wigger* held that the rebuttable presumption applied to § 1983 claims. However, *Wigger* did not address whether the rebuttable presumption also applies in malicious prosecution actions. Thus, *Schenck* incorrectly concluded that *Wigger* held that a rebuttable presumption arises from a finding of probable cause in a preliminary criminal hearing.

*Wigger* addressed the § 1983 claims and malicious prosecution claims separately. While this decision was not explained, it is logical because § 1983 claims and malicious prosecution claims have different elements and require different analysis. Additionally, lack of probable cause is not necessarily fatal to a

§ 1983 action because, unlike a malicious prosecution claim, a § 1983 action can be based on wrongdoing other than acting without probable cause.

Whether a rebuttable presumption of probable cause, based on a preliminary criminal hearing's finding of probable cause, should apply in a § 1983 action is not an issue to be decided in this appeal. The Court only needs to decide whether the rebuttable presumption should apply in a malicious prosecution action against private third parties. As discussed in Andre's Opening Brief and below, there are several reasons why the Court should hold that the rebuttable presumption does not apply.

The Merediths also argue that *Wigger* "determined that the rebuttable presumption of probable cause was not defeated by the evidence presented." This is incorrect. *Wigger* did not grant summary judgment based on an unrebutted presumption. Instead, the *Wigger* court specifically held that probable cause existed as a matter of law based on the facts in the record. The *Wigger* court held that: "Because we have already determined that probable cause to prosecute existed irrespective of defendant's action or nonaction, summary judgment on the malicious prosecution claim was proper." *See Wigger*, 809 P.2d at 1007.

The underlying criminal allegations in *Wigger* concerned incidents of sexual assault. *See id.* at 1002. The *Wigger* court agreed with the trial court that "there was a significant amount of consistent evidence in the record indicating that the

sexual assaults had occurred." *Id.* at 1006. This evidence included multiple interviews of the alleged victims which indicated that improper behavior had occurred. *Id.* The evidence also included deposition testimony from several individuals, including the criminal defendant's two criminal defense attorneys who testified that, in their opinion, "the prosecution had sufficient evidence to establish probable cause." *Id.* Thus, *Wigger* did not grant summary judgment based on an unrebutted presumption of probable cause but rather because of its own determination that probable cause existed as a matter of law based on the evidence in the record. *See id.* at 1007.

*Schenck* appears to be the only Colorado appellate authority which holds that a finding of probable cause in a preliminary criminal hearing gives rise to a rebuttable presumption of probable cause in a subsequent malicious prosecution action against private third parties. *Schenck* did not explain the basis for ruling that a rebuttable presumption exists or analyze whether a rebuttable presumption should exist under Colorado's presumption rules and public policy. Instead, *Schenck* relied on *Wigger* for the proposition that Colorado recognizes the rebuttable presumption. As discussed above, this was not the holding of *Wigger*. The Court therefore should not give deference to *Schenck* or *Wigger* in determining whether, in Colorado, a finding of probable cause in a preliminary

criminal hearing creates a rebuttable presumption of probable cause in a subsequent malicious prosecution action against private third parties.

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

In her Opening Brief, Andre argued that the purpose of judicial recognition and use of rebuttable presumptions is not furthered by a rebuttable presumption of probable cause in a malicious prosecution action against private third parties based on a finding of probable cause in a preliminary criminal hearing. In support of this argument, Andre noted that criminal defendants do not have the ability or incentive to fully defend themselves at a preliminary criminal hearing. This has been recognized by the Colorado Supreme Court and Court of Appeals. *Sanchez v. People*, 2014 CO 29, ¶¶ 14, 17; *People v. Noline*, 917 P.2d 1256, 1266 (Colo. 1996); *Schenck*, 802 P.2d at 1134.

The Merediths nevertheless argue that Andre had a fair and full opportunity to defend herself at the preliminary criminal hearing. The Merediths claim that Andre had incentive 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 criminal punishment." The Merediths also argue that Andre had a full and fair

opportunity to litigate probable cause at the preliminary criminal hearing because she was represented by criminal defense counsel who made arguments and offered evidence on her behalf.

The Merediths' argument conflicts with the clear Colorado authority which holds that a criminal defendant does not have the opportunity or incentive to fully defend herself at a preliminary criminal hearing. *See Sanchez*, 2014 CO 29 at ¶¶ 14, 17; *Noline*, 917 P.2d at 1266; *Schenck*, 802 P.2d at 1134. The Merediths are correct that Andre was represented by counsel at the preliminary criminal hearing. TCF, pp. 137–38. However, Andre did not call witnesses at the preliminary hearing or testify, and only one defense exhibit was admitted into evidence. *See id.* The evidence, including evidence presented by Andre, was weighed in a light most favorable to the prosecution and all inferences were drawn in the prosecution's favor. *See Schenck*, 802 P.2d at 1134. The prosecution was not obligated to prove its case beyond a reasonable doubt. *See Sanchez*, 2014 CO 29 at ¶¶ 14, 17. Regardless of the defense presented by Andre's criminal defense attorney at the preliminary criminal hearing, Andre could not receive dismissal with prejudice in her favor or be convicted of the criminal charges against her. *See Noline*, 917 P.2d at 1266. Thus, Andre did not have the ability or incentive to fully defend herself against a finding of probable cause at the preliminary criminal hearing.

### 2. Whether a criminal defendant knows about her rights to bring a malicious prosecution claim is relevant to whether it is fair to recognize the rebuttable presumption

Andre also argued in her Opening Brief that the Court should not recognize the rebuttable presumption because the criminal defendant may not be aware that she has civil claim for malicious prosecution against the private third parties whose allegations resulted in the criminal proceedings or that the preliminary court's finding of probable cause may be used against her in a subsequent malicious prosecution action. Even if the criminal defendant is aware of the law, her strategy in her criminal case or limited resources for her criminal defense may preclude her from litigating probable cause at the preliminary criminal hearing. Additionally, the criminal defendant will likely not retain counsel to prosecute a civil case until after the criminal proceedings end because a claim for malicious prosecution cannot be brought until after the criminal proceedings have terminated in favor of the criminal defendant. *See Hewitt v. Rice*, 154 P.3d 408, 411 (Colo. 2007). It is then too late for the criminal defendant to receive timely advice about the implications of the criminal court finding probable cause.

The Merediths claim that Andre's argument is irrelevant because she did not submit evidence that she was unaware of the law while her criminal case was proceeding or that she was not advised of the implications of a finding of probable cause by the preliminary criminal court on her subsequent malicious prosecution

action. The Merediths' claim is misplaced. Andre has requested that the Court determine 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. Andre's request does not depend on the particular facts of her case because she is asking the Court to determine whether the presumption should exist generally in a subsequent malicious prosecution action against a private third party.

In determining whether to recognize a presumption, one factor to be considered is the fairness of recognizing the presumption. *See Moreno v. People*, 775 P.2d 1184, 1188 (Colo. 1989). It is unfair to require an individual to make critical decisions that may impact her criminal defense and subsequent malicious prosecution action when she does not know if she has a malicious prosecution claim until after the criminal case ends. *See Hewitt*, 154 P.3d at 411. It is also unfair to require a criminal defendant to use critical and potentially limited resources available for her criminal defense to attempt to defend against a finding of probable cause in a preliminary hearing. It is especially unfair because, as discussed above, the preliminary criminal hearing substantially favors the prosecution.

Recognizing the rebuttable presumption creates a "catch-22" for a criminal defendant with limited resources for her criminal defense. If she does not defeat

the probable cause finding at the preliminary criminal hearing, the rebuttable presumption will arise if she later brings a malicious prosecution action and can be used against her by defendants. On the other hand, if she attempts to preclude the rebuttable presumption from arising in a subsequent malicious prosecution action by attempting to defeat the probable cause finding at the preliminary criminal hearing, she will have to utilize critical and potentially limited resources for her criminal defense. She may also give the prosecution critical insight into her defense which the prosecution can use against her at trial. If the criminal defendant then loses at the preliminary criminal hearing, her ability to defend herself at trial against the criminal charges may be jeopardized. If the criminal charges are then substantiated as a result, there is no malicious prosecution claim because the proceedings did not terminate in her favor. *See Hewitt*, 154 P.3d at 411.

Lastly, it is generally recognized that conviction of a felony is a serious matter which carries a significant stigma of "[d]isgrace and reproach." *People v. Rodrigue*z, 112 P.3d 693, 708 (Colo. 2005). Additionally, the law distinguishes between civil and criminal matters and generally regards criminal violations of the law as "more serious" than a civil offense. *See People v. Lewis*, 745 P.2d 668, 671 (Colo. 1987) (distinguishing between criminal and noncriminal speeding in a motor vehicle); *City of Greenwood Village on Behalf of State v. Fleming*, 643 P.2d

511, 517 (Colo. 1982) (setting forth factors for determining whether conduct has been decriminalized). Thus, a criminal defendant should be allowed to make decisions regarding the preliminary criminal hearing without having to factor in the effect of the hearing's outcome on a potential malicious prosecution claim which cannot arise until after the criminal proceedings are over.

### 3. The question of probable cause in a preliminary criminal hearing is different than in a malicious prosecution action

The Merediths argue that it is fair to recognize a rebuttable presumption based on the preliminary criminal court's finding of probable cause because "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." The Merediths cite a federal district court case, *Barton v. Blea*, 2006 WL 3262831 (D. Colo. 1996), which they assert supports their position.

The Merediths' argument should be rejected. The relevant question is not whether there is probable cause to believe that the underlying allegations occurred, but whether the party making the allegations can demonstrate that probable cause supports its allegations. 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 defendant(s) 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. The prosecutor's ability to demonstrate probable cause for the criminal charges during the preliminary criminal hearing, when the evidence is weighed in the prosecution's favor and all inferences are drawn in a light most favorable to the prosecutor, should not impact the criminal defendant's subsequent malicious prosecution case against a private third party.

*Barton* does not contradict Andre's argument. *Barton* is an unpublished federal district court opinion and is not binding on this court. More importantly, *Barton* is factually and legally distinct from this case. The issues in *Barton* were (1) whether the civil plaintiff could "make offensive use of a state court finding" of no probable cause for an arrest in the later filed civil rights case against the police officers who arrested her and (2) whether the civil defendant police officers were bound in the civil case "by a state court decision that an arrest they made lack[ed] probable cause." *Id.* at *13–*14. The issues addressed by the *Barton* court are not issues in this appeal.

To the extent *Barton* is relevant to this appeal, it supports Andre's position that the issue of probable cause is different in the preliminary criminal hearing than it is in a subsequent civil action. *Id.* at *14 (plaintiff's opponent at the preliminary criminal hearing was the state, not the police officers who arrested her who she subsequently brought the civil action against). *Barton* also recognizes the general

principle stated in *Schenck's* discussion of defensive use of collateral estoppel: "The sole focus at the preliminary hearing was whether the state had probable cause to believe plaintiff committed a crime. However, in the malicious prosecution proceeding, the issue was whether the defendants had probable cause to believe plaintiff committed the crime." *Id.* at *10 (quoting *Schenck*, 802 P.2d at 1134–35).

Lastly, the Merediths cite *Adamson v. May Co.*, 456 N.E.2d 1212 (Ohio App. 1982) as a case in which the rebuttable presumption of probable cause arises from a preliminary criminal court finding of probable cause or grand jury indictment. The Court is not bound to follow *Adamson*. The Court should not be persuaded by *Adamson* because it fails to recognize that the issue of probable cause is different in the criminal proceedings than it is in the subsequent malicious prosecution action. *See Adamson*, 456 N.E.2d at 1216 (holding that preliminary criminal court hearings and grand jury tribunals "are reasonably well devised to find whether probable cause exists for the prosecution"). As *Schenck* correctly noted in its discussion of collateral estoppel, there is a substantial difference because the criminal proceedings focus on whether the prosecution has probable cause for the criminal charges whereas the malicious prosecution action focuses on whether the defendants had probable cause to allege wrongdoing. *Schenck*, 802 P.2d at 1134–35. As noted by Andre in her Opening Brief, the prosecution can

have probable cause even though false information was provided, whereas 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. Thus, a rebuttable presumption of probable cause should not be recognized from a determination of probable cause on a different issue in a preliminary criminal hearing.

#### 4. Andre provided legal support for her arguments that public policy and accuracy considerations weigh against recognizing the presumption

In her Opening Brief, Andre argued that public policy considerations do not support recognizing a rebuttable presumption of probable cause in a subsequent malicious prosecution action based on a preliminary criminal court's finding of probable cause. *See Moreno*, 775 P.2d at 1188 (public policy is a factor to be considered in determining whether to recognize a presumption). Andre also argued that the rebuttable presumption is not based on a high probability of accuracy. *See id.* (probability of the accuracy of the criminal court's determination of probable cause is a factor to consider in determining whether to recognize a presumption).

The Merediths claim that Andre did not provide legal support for her arguments and that the arguments thus necessarily fail. This claim is both incorrect and inaccurate as a matter of law. With regard to her public policy

argument, Andre cited a statute, an evidentiary rule, and numerous cases as supporting authority for her argument. With regard to her accuracy argument, Andre noted that *Schenck*, although improperly recognizing the presumption based on *Wigger*, noted 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. As argued by Andre, this holding at least implicitly recognizes that 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. Thus, the nature of the claim itself does not favor recognizing the presumption because if the preliminary criminal court's finding of probable cause is based on the third parties' false statements, the probability of the probable cause determination being accurate is substantially reduced.

Andre also notes that an appellant does not need on-point authority in order to advance an argument. A litigant is allowed to advance (1) novel theories that are supported by plausible arguments and (2) arguments "that although lacking in precedential authority . . . nonetheless [are] supported by logic." *Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925, 934–35 (Colo. 1993) (citing *Sullivan v. Lutz*, 827 P.2d 626 (Colo. App. 1992); *Jorgenson Realty, Inc. v. Box*, 701 P.2d 1256 (Colo. App. 1985)). Andre made logical, relevant arguments regarding the

public policy and accuracy factors and cited supporting authority for her arguments.

## II. 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. *Wigger* Did Not Decide whether the Rebuttable Presumption Can Be Used In a Malicious Prosecution Action

In her Opening Brief, Andre argued that 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. The Merediths dispute this argument, claiming that *Wigger* held that there is a rebuttable presumption and that it can be used to grant summary judgment.

The Merediths' argument should be rejected. First, as discussed above in Part I, the *Wigger* court's discussion of the rebuttable presumption occurred in its analysis of § 1983 claims, not malicious prosecution claims. *See Wigger*, 809 P.2d at 1004–07. However, even if the Court determines that the rebuttable presumption exists, *Wigger* is silent as to whether it can be used to grant summary judgment in a malicious prosecution action against private third parties. As discussed above, the *Wigger* court agreed with the trial court's specific finding that

probable cause existed. *Id.* at 1005. This finding was based on the facts in the record, not the rebuttable presumption of probable cause. *Id.* Because the *Wigger* court specifically found that probable cause existed based on the facts in the record, and that no reasonably jury could find otherwise, summary judgment was granted. *See id.* at 1005, 1007. Thus, the *Wigger* court did not need to address whether summary judgment based solely on the rebuttable presumption is proper.

The Merediths argue in the alternative that summary judgment was still proper, even if the court finds that the rebuttable presumption cannot be used to grant summary judgment, because "Andre did not present sufficient evidence that there was no probable cause for the criminal action as required by the elements of malicious prosecution." The Court should reject this argument because it is not consistent with the parties' burdens on summary judgment. The Merediths, as the parties seeking summary judgment, had the burden of stating the bases for their request for summary judgment and demonstrating the absence of a question of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Merediths would therefore have to show that there is an absence of a question of material fact as to whether they had probable cause to allege that Andre stole from them. The burden to demonstrate a material question of fact would not shift to Andre unless the Merediths first made this showing.

If a rebuttable presumption exists but cannot be used to obtain summary judgment, the Merediths did not meet their summary judgment burden. The Merediths did not provide any admissible evidence with their summary judgment motion regarding the statements or information they gave to the police or the prosecution, their testimony at the preliminary criminal hearing, or any other evidence which they relied on in alleging Andre stole from them. *See* TCF, pp. 121–23. The Merediths therefore did not show that they had probable cause for reporting Andre for theft, much less that there was an absence of a question of material fact regarding the issue.

### B. The Court Should Decline to Follow Ohio Law Allowing the Presumption to Be Used to Obtain Summary Judgment

The Merediths rely on *Adamson* for their position that a finding of probable cause in a preliminary criminal hearing creates a rebuttable presumption which can be used to obtain summary judgment. As discussed above in Part I, the Court is not bound to follow the Ohio Court of Appeals decision in *Adamson* and should decline to do so because it does not recognize that the criminal case and subsequent malicious prosecution case present different issues regarding probable cause.

The Court should also decline to follow *Adamson* because it does not properly consider the effects of allowing the rebuttable presumption to be used to grant summary judgment. 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.*

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 Merediths did not put forth any evidence regarding probable cause and instead relied solely on the rebuttable presumption (claimed for the first time in their reply brief). Thus, in granting summary judgment the district court relied solely on a finding that was made when the evidence was weighed against Andre and all inference were drawn against her. This is inconsistent with Colorado's principles regarding summary judgment.

The Court should therefore rule that the rebuttable presumption of probable cause, if it exists at all in Colorado, cannot be used to obtain summary judgment. This will not eviscerate the rebuttable presumption of probable cause, which would still apply at trial and could be the basis for a directed verdict. Not allowing the rebuttable presumption to be used as a basis for summary judgment would be consistent with Colorado's summary judgment principles and consistent with the fact that the probable cause determination in the criminal case is different than the probable cause element in a subsequent malicious prosecution action against private third parties.

## III. THE MEREDITHS DID NOT CLAIM THE REBUTTABLE PRESUMPTION IN THEIR MOTION FOR SUMMARY JUDGMENT AS A BASIS FOR SUMMARY JUDGMENT

Andre's final argument in her Opening Brief was that the Merediths did not properly claim the rebuttable presumption in their motion for summary judgment as a basis for the trial court granting summary judgment. The Merediths argue that they properly claimed the rebuttable presumption by stating that:

> 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).

TCF, p. 126; and

> 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).

TCF, p. 126. Notably, the Merediths did not cite *Schenck* for the proposition that a rebuttable presumption applies in a malicious prosecution action even though they cited *Schenck* elsewhere in their summary judgment motion. *See* TCF, p. 127.

The Merediths' motion for summary judgment did not claim or rely on their assertion of a rebuttable presumption, regardless of the above-referenced citations. The Merediths did not *Schenck* for the proposition that a rebuttable presumption

applies in a malicious prosecution action. As discussed above, *Wigger* does not clearly establish that a rebuttable presumption exists in a malicious prosecution action because the rebuttable presumption was only discussed specifically with regard to § 1983 claims. *White* and *Stainer* are federal district court decisions which do not apply Colorado law regarding presumptions.

Significantly, the above-referenced citations were included in the Merediths' collateral-estoppel argument. *See* TCF, pp. 125–30. The collateral-estoppel argument is not consistent with the rebuttable presumption. Under the collateral-estoppel argument, the Merediths claimed that Andre was precluded "from asserting that there was no probable cause for bringing the information and documentation to the Delta Police Department." TCF, pp. 129–30. This is wholly inconsistent with the rebuttable presumption, because under the Merediths' collateral-estoppel argument Andre was not permitted to make any arguments regarding probable cause. If the rebuttable presumption exists and can be used to obtain summary judgment, as advocated by the Merediths for the first time in their reply brief, then collateral estoppel would not apply under any circumstances because it would make it impossible to rebut the presumption. The Merediths failed to clearly plead the rebuttable presumption and collateral estoppel as alternative grounds for summary judgment and instead included the above-

referenced citations within its collateral estoppel argument. Thus, Andre reasonably addressed the collateral-estoppel argument advanced by the Merediths.

The party moving for summary judgment must raise its specific arguments for summary judgment in its summary judgment motion. *Jefferson County Sch. Dist. R-1 v. Justus*, 725 P.2d 767, 773 (Colo. 1986). 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.* 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.

The Merediths claim that Andre was not prejudiced because "she 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." This argument should be rejected by the Court. Andre did not have the burden of proving her case to survive summary judgment. The Merediths had the burden of proving the absence of a question of material fact with regard to one or more elements of Andre's malicious prosecution claim. *Commercial Indus. Constr., Inc. v. Anderson*, 683 P.2d 378, 381 (Colo. App. 1984). The Merediths needed to present

"specific facts" demonstrating their entitlement to summary judgment. *See id.* As noted above, the Merediths' summary judgment motion did not include their statements to the police, the prosecution, or any evidence demonstrating the reasonableness of what they reported to the authorities. Because the Merediths failed to claim the rebuttable presumption or to demonstrate an absence of a material question of fact regarding probable cause, Andre did not have the burden of showing a material fact existed. Nor did Andre even have adequate notice that the Merediths were seeking summary judgment on probable cause on grounds other than collateral estoppel.

## IV. THE COURT SHOULD DENY THE MEREDITHS' REQUEST FOR ATTORNEY FEES

The Merediths seek their attorney fees on appeal pursuant to section 13-17-102, C.R.S. The Merediths claim that Andre's appeal lacks substantial justification and is substantially frivolous. More specifically, the Merediths claim that Andre's appeal does not set forth "a coherent assertion of error supported by legal authority" consistent with the requirements of C.A.R. 28. No further explanation is provided by the Merediths.

"A party seeking an award of attorney fees bears the burden of proving, by a preponderance of the evidence, his entitlement to an award." *Little v. Fellman*, 837 P.2d 197, 204 (Colo. App. 1991), *overruled on other grounds by In re Marriage of Aldrich*, 945 P.2d 1370 (Colo. 1997). An award of attorney fees is proper only if

there is no rational basis in the law or evidence in support of a claim or argument. *Id.* A litigant is allowed to advance novel theories supported by plausible arguments. *Howard*, 862 P.2d at 934–35. An argument that lacks precedential authority can still be made if it is logical. *Id.*

The Court should deny the request for attorney fees. Andre's appeal made three coherent arguments for reversal of the trial court's grant of summary judgment, each accompanied with an explanation of or citation to relevant authority. Andre has explained her position as to why the Court should hold that *Schenck* and *Wigger* do not establish a rebuttable presumption of probable cause in a malicious prosecution action and why the rebuttable presumption is inconsistent with Colorado law regarding presumptions and public policy. Andre has explained why, even if the presumption is recognized, it should not be used to grant summary judgment because it is inconsistent with Colorado's principles regarding the drastic remedy of summary judgment.

Lastly, Andre has made a good-faith argument that the Merediths only argued collateral-estoppel in their summary judgment motion and that such argument was inconsistent with and did not raise the issue of the rebuttable presumption. Since the rebuttable presumption was not specifically claimed by the Merediths until their reply brief, Andre was denied the opportunity to address the rebuttable presumption and summary judgment should not have been granted

based solely on the rebuttable presumption. Overall, the Merediths have wholly failed to meet their burden of showing that Andre had no rational basis in the law or evidence for her appeal.

## CONCLUSION

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

SUBMITTED this 22nd day of September, 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).*

*/s/ J. Keith Killian*

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **PLAINTIFF-APPELLANT'S REPLY BRIEF** has been placed with the United States Mail, properly addressed and first-class postage prepaid, or transmitted by other means as indicated below, this 22nd day of September, 2014, as follows:

COLORADO COURT OF APPEALS *ICCES
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*/s/ Andrew S. Petroski*
Andrew S. Petroski, Esq.