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ADVANCE SHEET HEADNOTE  
June 16, 2025

2025 CO 39

**No. 24SC204, *Cantafio v. Schnelle* – Malicious Prosecution – Probable Cause – Summary Judgment – Directed Verdict.**

The supreme court granted certiorari to answer whether a court's denial of a summary judgment or directed verdict motion in a prior civil case raises a rebuttable presumption that there was probable cause to bring the original claim in a subsequent malicious prosecution action.

The court concludes that, while the denial of either motion in a prior civil case is a *factor* that a district court may consider in ruling on a motion to dismiss in a subsequent malicious prosecution case, the prior denial of a summary judgment or directed verdict motion does not create a rebuttable presumption of probable cause. Here, the trial court's orders denying summary judgment and directed verdict motions in a prior professional negligence case did not create a rebuttable presumption that the defendants in a subsequent malicious prosecution case had probable cause to bring the professional negligence claim. Accordingly, the supreme court affirms the judgment of the court of appeals.

**The Supreme Court of the State of Colorado**  
2 East 14th Avenue • Denver, Colorado 80203

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**2025 CO 39**

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**Supreme Court Case No. 24SC204**  
*Certiorari to the Colorado Court of Appeals*  
Court of Appeals Case No. 23CA1333

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**Petitioners:**

Ralph Cantafio, David Feeder, Lilly Lentz, Mike Lazar, Cantafio & Song PLLC,  
Mark Fischer, and Patricia Ann Scott,

v.

**Respondent:**

Kaylee Schnelle.

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**Judgment Affirmed**

*en banc*

June 16, 2025

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**JUSTICE BERKENKOTTER** delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ, JUSTICE BOATRIGHT, JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE HART, and JUSTICE SAMOUR** joined.

JUSTICE BERKENKOTTER delivered the Opinion of the Court.

¶1 This case arises from a dispute over the sale of real property. In a prior case, Patricia Ann Scott, the seller of a tract of land, sued real estate agent Kaylee Schnelle for professional negligence over her alleged mishandling of the sale. Schnelle moved for summary judgment before trial, arguing that Scott could not prove the necessary elements of breach of the professional duty of care, damages, or causation. The district court denied the motion, finding that there were genuine disputes regarding material facts. The case then proceeded to a jury trial. At the close of Scott’s case, Schnelle moved for a directed verdict, which the court denied. The jury returned a verdict in Schnelle’s favor on the professional negligence claim.

¶2 Schnelle then brought the present case asserting, among other things, a claim for malicious prosecution against Scott, the attorneys who represented Scott in the prior case, their law firm, and members of the law firm (“the defendants”). She alleges that the defendants lacked probable cause to believe that she was professionally negligent and that she “conspired to cheat and take advantage of an elderly widowed client with no family.” Schnelle contends that by pursuing baseless litigation, the defendants tarnished her reputation in the community. In response, the defendants filed a C.R.C.P. 12(b)(5) motion to dismiss, arguing that the denial of Schnelle’s summary judgment and directed verdict motions in the

previous case established that there was probable cause to bring the original action against her and should therefore bar her malicious prosecution claim.

¶3 The district court disagreed, concluding that the previous denial was a factor it could consider in analyzing probable cause but that it did not conclusively establish probable cause. The court ultimately determined that Schnelle had alleged sufficient factual evidence which, if taken as true, would support her assertion that the defendants lacked probable cause to bring the original professional negligence claim against her, so it denied the motion to dismiss. After the court of appeals granted the defendants' petition for interlocutory appeal pursuant to C.A.R. 4.2, a division of the court of appeals affirmed the district court's order denying the motion to dismiss. *Schnelle v. Cantafio*, 2024 COA 17, ¶ 1, 548 P.3d 1171, 1174.

¶4 We granted certiorari to answer whether a court's denial of a summary judgment or directed verdict motion in a prior civil case raises a rebuttable presumption that there was probable cause to bring the original claim.

¶5 We conclude that, while the denial of either motion in a prior civil case is a *factor* that a district court may consider in ruling on a motion to dismiss in a subsequent malicious prosecution case, the prior denial of a summary judgment or directed verdict motion does not create a rebuttable presumption of probable cause.

¶6 Because the court's orders denying Schnelle's summary judgment and directed verdict motions in the professional negligence case do not create a rebuttable presumption that the defendants had probable cause to bring the original claim against her, we affirm the judgment of the court of appeals.

### **I. Facts and Procedural History**

¶7 In denying the defendants' motion to dismiss, the district court noted that there was no decision from this court that was directly on point, but that the court of appeals decision in *Health Grades, Inc. v. Boyer*, 2012 COA 196M, 369 P.3d 613 (Colo. App. 2010), *rev'd on other grounds*, 2015 CO 40, 359 P.3d 25, was "persuasive." There, a division of the court of appeals "decline[d] to adopt an all-encompassing rule that the denial of a motion for summary judgment, or the denial of a motion for directed verdict, necessarily bars a claim for abuse of process based on a sham litigation theory." *Health Grades*, ¶ 31, 369 P.3d at 620. Instead, the division held that "a more careful analysis, as opposed to application of [a] bright-line rule," was necessary. *Id.* at ¶ 34, 369 P.3d at 620.

¶8 Similarly, here, the district court declined to adopt a bright-line rule, instead concluding that a previous denial of a summary judgment or directed verdict motion "is a factor in the probable cause analysis." The district court went on to find that Schnelle had alleged sufficient factual evidence which, if taken as true, would support her assertion that the defendants lacked probable cause to bring

the professional negligence claim against her. It therefore denied the defendants' motion to dismiss as to the malicious prosecution claim.

¶9 The defendants then petitioned the court of appeals pursuant to C.A.R. 4.2 on the grounds that the district court's ruling on the motion to dismiss addressed an unresolved and controlling question of law and that immediate review could establish a final disposition of the litigation. A division of the court of appeals granted the petition. The defendants argued to the division that a trial court's denial of a summary judgment or directed verdict motion should be considered an absolute bar to a subsequent malicious prosecution cause of action as a matter of law or, in the alternative, that it should establish a rebuttable presumption that there was probable cause to bring the prior case. In a unanimous, published opinion, the division affirmed the district court's denial of the defendants' motion to dismiss the malicious prosecution claim. *Schnelle*, ¶ 1, 548 P.3d at 1174. Among other things, the division reasoned that the individual circumstances relating to how a particular summary judgment or directed verdict motion was resolved would make any categorical rule applying a presumption hard to maintain. *Id.* at ¶ 32, 548 P.3d at 1179. The denial of either or both such motions, the division concluded, should instead be a factor that may be considered in determining the existence of probable cause. *Id.* at ¶ 33, 548 P.3d at 1179.

¶10 The defendants then petitioned this court for certiorari review, which we granted.<sup>1</sup>

## II. Analysis

¶11 We begin by outlining the relevant standard of review before briefly describing the tort of malicious prosecution and the standards that guide courts' consideration of summary judgment and directed verdict motions.

### A. Standard of Review and Applicable Law

¶12 We review de novo an order denying a motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5). *Melat, Pressman & Higbie, L.L.P. v. Hannon L. Firm, L.L.C.*, 2012 CO 61, ¶ 16, 287 P.3d 842, 846.

¶13 The tort of malicious prosecution provides a remedy when a person “knowingly initiates baseless litigation.” *Mintz v. Accident & Inj. Med. Specialists, PC*, 284 P.3d 62, 66 (Colo. App. 2010). To prevail on a civil claim for malicious prosecution, a plaintiff must establish: (1) the defendant’s contribution to bringing a prior case against the plaintiff; (2) the ending of the previous action in favor of

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<sup>1</sup> Specifically, we granted certiorari on the following issue:

1. Whether the court of appeals erred in holding that denial of summary judgment or directed verdict in a prior civil case does not raise a rebuttable presumption of probable cause in a subsequent malicious prosecution action.



the plaintiff; (3) lack of probable cause; (4) malice; and (5) damages. *Hewitt v. Rice*, 154 P.3d 408, 411 (Colo. 2007).

¶14 In a civil malicious prosecution action, probable cause means that the plaintiff in the prior case “in good faith had a reasonable belief that [the defendant in the prior case] was liable for the claim that was made.” *Walford v. Blinder, Robinson & Co.*, 793 P.2d 620, 624 (Colo. App. 1990). “The existence of probable cause is alone sufficient to relieve a defendant of a charge of malicious prosecution.” *Montgomery Ward & Co. v. Pherson*, 272 P.2d 643, 645 (Colo. 1954).

¶15 Motions for summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” C.R.C.P. 56(c). “In determining the propriety of summary judgment, the non-moving party is entitled to all favorable inferences that may reasonably be drawn from the undisputed facts.” *Bayou Land Co. v. Talley*, 924 P.2d 136, 151 (Colo. 1996).

¶16 “A party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence.” C.R.C.P. 50. A motion for a directed verdict should be granted “only when the evidence, viewed in the light most favorable to the non-moving party, ‘compels the conclusion that reasonable

persons could not disagree and that no evidence, or legitimate inference therefrom, has been presented upon which a jury's verdict against the moving party could be sustained.'" *Mid-Century Ins. Co. v. HIVE Constr., Inc.*, 2025 CO 17, ¶ 20, 567 P.3d 153, 157–58 (quoting *Burgess v. Mid-Century Ins. Co.*, 841 P.2d 325, 328 (Colo. App. 1992)).

### **B. Denial of a Summary Judgment or Directed Verdict Motion Is a Factor in the Probable Cause Analysis**

¶17 With the above principles in mind, we address the parties' arguments.

¶18 The defendants contend that a trial court's denial of a summary judgment or directed verdict motion in a prior case should constitute *presumptive proof* that the plaintiff in that case had probable cause to bring the action. Thus, if a defendant in a subsequent malicious prosecution action filed a motion to dismiss and provided evidence of such a denial, the burden would shift and the malicious prosecution plaintiff (i.e., the defendant in the original action) would have to offer evidence rebutting that presumption to defeat the motion to dismiss the malicious prosecution claim.

¶19 The rebuttable presumption approach has support in states like Maryland, where an intermediate appellate court reasoned:

Given that under Maryland common law, suits for malicious use of process are disfavored, it is more sensible to treat the denial of a motion for judgment as a presumption in favor of probable cause, rather than treating it as just a factor in the probable cause evaluation. Malicious use of process defendants cannot bear the burden of

proving that the prior action had probable cause. Rather, plaintiffs must prove that “the prosecution complained of was *without* ‘probable cause,’ and unless that burden be met there can be no recovery.”

*Havilah Real Prop. Servs., LLC v. Early*, 88 A.3d 875, 886 (Md. Ct. Spec. App. 2014) (quoting *N. Point Constr. Co. v. Sagner*, 44 A.2d 441, 444 (Md. 1945)). A Kansas intermediate appellate court later found *Havilah* persuasive in its own holding that “the denial of the dispositive motions in the underlying lawsuit established a presumptive bar to a subsequent lawsuit for malicious prosecution.” *Porubsky v. Long*, 487 P.3d 768 (Kan. Ct. App. 2021) (unpublished table decision).

¶20 Schnelle counters that a court’s denial of a summary judgment motion is an inadequate proxy for later evaluating whether a party lacked probable cause. She argues that there are multiple reasons that a court might deny such a motion. She further contends that a court ruling on a summary judgment motion cannot assess the credibility of competing facts and that judges often have no way of knowing if false or misleading facts have been included in the motion.

¶21 We agree that there are many reasons why a court might deny a motion for summary judgment, not the least of which is that “summary judgment is a drastic remedy reserved for those situations in which it is clear that the applicable legal standard has been satisfied.” *Dep’t of Nat. Res. v. 5 Star Feedlot, Inc.*, 2021 CO 27, ¶ 19, 486 P.3d 250, 255. Additionally, we question the fairness of applying a rebuttable presumption since it can be difficult, in some instances, to know just

how much to read into a court's denial of a summary judgment motion. One judge might deny voluminous cross-motions for summary judgment with a detailed, thoughtful order while another judge might deny similar motions with a three-line ruling stating that there are disputed issues of material fact. Both orders may, in fact, be the result of long hours of review and analysis. It is possible that the second judge simply didn't have time to "show their work." Or it may be that the first judge's order was the result of a great deal more time, thought, and effort. In any event, it would be imprudent to adopt a categorical rule that would foreclose more careful analysis of such vastly different summary judgment rulings.

¶22 Drawing presumptive inferences from a ruling on a motion for a directed verdict is even more troubling because such verdicts are "disfavored." *People in Int. of L.S.*, 2023 CO 3M, ¶ 13, 524 P.3d 847, 851. A motion for a directed verdict should be granted "[o]nly in the clearest of cases, where reasonable minds can draw but one inference from the evidence." *Garcia v. Colo. Cab Co.*, 2023 CO 56, ¶ 19, 538 P.3d 328, 332. A trial court may appropriately deny a motion for a directed verdict and allow the jury to fulfill its role as the finder of fact because the court can, if necessary, grant a motion for judgment notwithstanding the verdict. *See Health Grades*, ¶ 33, 369 P.3d at 620. We additionally observe that, just as with summary judgment rulings, some trial courts provide detailed explanations of their directed verdict rulings and some do not.

¶23 A rebuttable presumption would, moreover, shift the burden of persuasion, potentially requiring a party opposing a motion to dismiss to prove why something did not occur, why evidence does not exist, or to divine what a trial court judge was thinking. Because of the difficulties associated with proving a negative, a rebuttable presumption of probable cause could become, in some instances, an insurmountable presumption of probable cause.

¶24 We also have significant concerns about adopting a presumption based on a decision that is not generally subject to appellate review. *See State Farm Mut. Auto. Ins. Co. v. Goddard*, 2021 COA 15, ¶ 54, 484 P.3d 765, 776 (“We do not review a denial of a motion for summary judgment because it is not a final order.”); *see also Potter v. Thieman*, 770 P.2d 1348, 1350 (Colo. App. 1989) (“[S]ince plaintiffs were not aggrieved by the trial court’s judgment, they have no standing to appeal from it.”).

¶25 For all these reasons, we adopt the rationale of both the district court and the division below and conclude that, while the denial of summary judgment or directed verdict motions in a prior civil case is a *factor* that a district court may consider in its probable cause analysis, the prior denials do not presumptively establish probable cause. This approach allows for a more considered analysis of such rulings.

¶26 This conclusion mirrors that of other states like Arizona and Vermont. In Arizona, for example, the court held that the denial of summary judgment “is a *factor* that the court should consider in determining whether there is or is not an objectively reasonable basis for a claim or defense; the denial is not, standing alone, *dispositive* of the issue as a matter of law.” *Wolfinger v. Cheche*, 80 P.3d 783, 791–92 (Ariz. Ct. App. 2003). The Arizona court of appeals observed that this approach is more appropriate because “the prospect of false or misleading evidence is, unfortunately, real. Under such circumstances, judgment as a matter of law based on surviving a summary judgment motion may not only be inappropriate but directly contrary to the purpose of a [wrongful institution of civil proceedings] claim.” *Id.* at 791.

¶27 Likewise in Vermont, the court determined that, while “the denial of a motion for summary judgment *may* provide persuasive evidence that the case had sufficient merit to establish the element of probable cause and thereby defeat a subsequent suit for malicious prosecution,” the summary judgment order at issue fell short of the type of “qualitative merits determination necessary to establish probable cause as a matter of law and bar any subsequent claim for malicious prosecution.” *Bacon v. Reimer & Braunstein, LLP*, 929 A.2d 723, 726–27 (Vt. 2007). This was particularly true, the Vermont court said, in cases like the one before it where there were complex legal issues being determined, and the trial court’s

attention to relatively minor claims may be “perfunctory and confined to the marginal evidence available at that stage of the proceedings.” *Id.* at 727.

¶28 Our reasoning here is similar to that of the courts in Arizona and Vermont. While the denial of a summary judgment or directed verdict motion may be highly persuasive, we see no prudent reason to establish an inflexible, bright-line rule or to shift the burden of persuasion based on a decision that is not typically subject to appellate review. Instead, we hold that the denial of such a motion is a factor that a court may consider in determining if there was probable cause to bring the original claim.

¶29 There is also no bright-line rule for courts to follow in deciding how much weight to give orders denying summary judgment or directed verdict motions. There is, however, some guidance to be gleaned from the division’s opinion in *Health Grades* and from decisions in other jurisdictions. Circumstances deemed relevant to this determination by these courts include, but are not limited to:

- The type of order (i.e., whether it is a denial of a summary judgment or a directed verdict motion). *See Health Grades*, ¶¶ 32–33, 369 P.3d at 620.
- If the order included many details. *See Bacon*, 929 A.2d at 727.
- Whether the order addressed all the elements of all the claims. *See id.*
- At what point in the litigation the order was issued. *See Health Grades*, ¶¶ 32–33, 369 P.3d at 620.
- Whether the trial court commented on the strength of the evidence. *See Bacon*, 929 A.2d at 727.

- Whether there are claims that false or misleading evidence was involved in defeating the motion. *See Wolfinger*, 80 P.3d at 791.
- Whether any relevant testimony was later determined to be materially false. *See Roberts v. Sentry Life Ins.*, 90 Cal. Rptr. 2d 408, 414 (Cal. Ct. App. 1999).
- Whether perjury or fraud was alleged to have occurred or actually did occur. *See Bacon*, 929 A.2d at 726.

¶30 An additional circumstance specific to an order denying a motion for summary judgment may include whether the parties have completed discovery.

### **III. Conclusion**

¶31 Because the court's orders denying Schnelle's summary judgment and directed verdict motions in the professional negligence case do not create a rebuttable presumption that the defendants had probable cause to bring the original claim against her, we affirm the judgment of the court of appeals.