

**FILED: March 16, 2022**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

AJAY MOHABEER,  
Plaintiff-Respondent,

v.

FARMERS INSURANCE EXCHANGE, a corporation; MID-CENTURY  
INSURANCE COMPANY, a corporation; TRUCK INSURANCE EXCHANGE, a  
corporation; COAST NATIONAL INSURANCE COMPANY, a corporation; 21ST  
CENTURY CENTENNIAL INSURANCE COMPANY, a corporation; FARMERS  
INSURANCE COMPANY OF WASHINGTON, a corporation; FARMERS  
INSURANCE COMPANY OF OREGON, a corporation; 21ST CENTURY PACIFIC  
INSURANCE COMPANY, a corporation; 21ST CENTURY INSURANCE COMPANY,  
a corporation; COLE, WATHEN, LEID & HALL, P.C., a corporation; and RYAN J.  
HALL,  
Defendants-Appellants.

Multnomah County Circuit Court  
18CV58678

A172057

Christopher J. Marshall, Judge.

Argued and submitted on February 11, 2021.

Timothy W. Snider argued the cause for appellants Farmers Insurance Exchange, Mid-Century Insurance Company, Truck Insurance Exchange, Coast National Insurance Company, 21st Century Centennial Insurance Company, Farmers Insurance Company of Washington, Farmers Insurance Company of Oregon, 21 Century Pacific Insurance Company, and 21st Century Insurance Company. Also on the briefs were Stephen H. Galloway and Stoel Rives LLP.

George Steven Pitcher argued the cause for appellants Cole Wathen Leid & Hall, P.C., and Ryan J. Hall. Also on the briefs were Rachel A. Robinson, David C. Campbell, and Lewis Brisbois Bisgaard & Smith LLP.

William T. Webb, California, argued the cause for respondent. Also on the brief were J. William Savage, J. William Savage, P. C., and Webb Legal Group.

Before Ortega, Presiding Judge, and Shorr, Judge, and Powers, Judge.

POWERS, J.

Reversed and remanded.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Appellants

- ☐ No costs allowed.  
☒ Costs allowed, payable by Respondent.  
☐ Costs allowed, to abide the outcome on remand, payable by
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1 POWERS, J.

2 Plaintiff brought this action against nine insurance company defendants  
3 (collectively Farmers) and Farmers' attorneys, Cole, Wathen, Leid & Hall, P.C., and  
4 Ryan J. Hall, for wrongful use of civil proceedings, alleging that defendants filed  
5 insurance fraud claims against plaintiff in federal court, which were ultimately settled,  
6 but which were brought with malicious intent and without probable cause. Defendants  
7 filed a special motion to strike the claims under ORS 31.150, Oregon's Anti-Strategic  
8 Lawsuits Against Public Participation (anti-SLAPP) statute, contending that plaintiff's  
9 claims seek damages for conduct that is protected under ORS 31.150(2), and that plaintiff  
10 could not present substantial evidence that he would prevail on his claim. Defendants  
11 appeal from the trial court's limited judgment denying the motion, assigning error to the  
12 trial court's ruling that plaintiff had met his burden to establish a probability that he  
13 would prevail on his claim. We conclude that the trial court erred in denying the special  
14 motion to strike and therefore reverse the limited judgment and remand for entry of a  
15 judgment dismissing plaintiff's claim.

16 We provide some background concerning the special motion to strike.

17 ORS 31.150(1) provides:

18 "A defendant may make a special motion to strike against a claim in  
19 a civil action described in subsection (2) of this section. The court shall  
20 grant the motion unless the plaintiff establishes in the manner provided by  
21 subsection (3) of this section that there is a probability that the plaintiff will  
22 prevail on the claim. The special motion to strike shall be treated as a  
23 motion to dismiss under ORCP 21 A but shall not be subject to ORCP 21 F.  
24 Upon granting the special motion to strike, the court shall enter a judgment

1 of dismissal without prejudice. If the court denies a special motion to  
2 strike, the court shall enter a limited judgment denying the motion."

3 Four categories of claims are subject to a special motion to strike:

4 "A special motion to strike may be made under this section against  
5 any claim in a civil action that arises out of:

6 "(a) Any oral statement made, or written statement or other  
7 document submitted, in a legislative, executive or judicial proceeding or  
8 other proceeding authorized by law;

9 "(b) Any oral statement made, or written statement or other  
10 document submitted, in connection with an issue under consideration or  
11 review by a legislative, executive or judicial body or other proceeding  
12 authorized by law;

13 "(c) Any oral statement made, or written statement or other  
14 document presented, in a place open to the public or a public forum in  
15 connection with an issue of public interest; or

16 "(d) Any other conduct in furtherance of the exercise of the  
17 constitutional right of petition or the constitutional right of free speech in  
18 connection with a public issue or an issue of public interest."

19 ORS 31.150(2).

20 A defendant making a special motion to strike has the initial burden to  
21 make a *prima facie* showing that the plaintiff's claim is of the type described in ORS  
22 31.150(2). ORS 31.150(3). If the defendant meets that burden, "the burden shifts to the  
23 plaintiff in the action to establish that there is a probability that the plaintiff will prevail  
24 on the claim by presenting substantial evidence to support a *prima facie* case." *Id.* The  
25 court's role at that juncture is not to weigh the evidence but to determine whether the  
26 plaintiff has presented substantial evidence in support of a *prima facie* case on the claim.  
27 *Young v. Davis*, 259 Or App 497, 314 P3d 350 (2013). If the plaintiff presents evidence

1 to support a *prima facie* case, the court must deny the special motion to strike.

2 Pursuant to ORS 31.150(4), "[i]n making a determination under subsection  
3 (1) of this section, the court shall consider pleadings and supporting and opposing  
4 affidavits stating the facts upon which the liability or defense is based." In considering  
5 the facts described in affidavits or declarations submitted by the parties, the court views  
6 the record in the light most favorable to the plaintiff. *Mullen v. Meredith Corp.*, 271 Or  
7 App 698, 702, 353 P3d 598 (2015). We review a trial court's ruling on a special motion  
8 to strike for legal error, viewing the evidence and drawing all reasonable inferences in the  
9 light most favorable to the plaintiff. *Plotkin v. SAIF*, 280 Or App 812, 815, 385 P3d 1167  
10 (2016), *rev den*, 360 Or 851 (2017).

11 Plaintiff is a licensed medical doctor who practiced medicine in association  
12 with First Choice Chiropractic clinics. In 2013, defendants filed several claims in federal  
13 court naming as defendants First Choice Chiropractic clinics, plaintiff, and several other  
14 individuals, based on allegations that the clinics and individual defendants had committed  
15 insurance fraud by making "false reports of alleged symptoms and exaggerated findings  
16 designed to make it appear that the patient either had or continued to have  
17 injuries/symptoms which did not actually exist."<sup>1</sup> Plaintiff and the other named

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<sup>1</sup> Farmers alleged claims against First Choice, plaintiff, and other individual defendants for common law fraud; violations of the federal Racketeer Influenced and Corrupt Organization Act (RICO); violations of Oregon's Racketeer Influenced and Corrupt Organization Act (ORICO); violations of Oregon's Unlawful Trade Practices Act (UTPA); unjust enrichment; and declaratory relief.

1 defendants sought summary judgment in the underlying action, and the federal district  
2 court granted the motion on some claims but denied it in part as to several of the claims,  
3 finding that there was evidence of conduct by plaintiff and the other named defendants  
4 that gave rise to genuine issues of fact on those claims.<sup>2</sup> Farmers and plaintiff  
5 subsequently settled Farmers' remaining claims against plaintiff in the underlying action  
6 and stipulated that plaintiff would be considered the prevailing party.

7               Plaintiff then brought this action for wrongful use of civil proceedings,  
8 alleging that Farmers named plaintiff as a defendant in the underlying action without a  
9 basis in fact so that Farmers could allege racketeering claims, for which Farmers would  
10 be entitled to treble damages and attorney fees. Plaintiff alleged that he was named as a  
11 defendant without probable cause and with malicious intent. Defendants filed their  
12 special motions to strike under ORS 31.150 and, after a hearing, the trial court  
13 determined that plaintiff had presented substantial evidence to support a *prima facie* case  
14 on his claim. The court thus denied the motions by limited judgment.

15               On appeal, it is undisputed that plaintiff's claim falls within ORS  
16 31.150(2)(b). The allegations of plaintiff's claim are based solely on written statements  
17 and documents provided to the federal court in the context of the underlying action. The  
18 only dispute on appeal concerns whether plaintiff has met his burden to present *prima*

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<sup>2</sup> The federal district court denied plaintiff's motion with respect to Farmer's claims of common law fraud, RICO, ORICO, and unjust enrichment, concluding that Farmers had demonstrated genuine issues of material fact on those claims that precluded summary judgment.

1 *facie* evidence as to each element of his claim of wrongful use of civil proceedings.

2           One element of the claim of wrongful use of civil proceedings is an absence  
3 of probable cause to prosecute the underlying action. *Roop v. Parker Northwest Paving*  
4 *Co.*, 194 Or App 219, 237-38, 94 P3d 885 (2004), *rev den*, 338 Or 374 (2005).<sup>3</sup>  
5 "Probable cause" means that the person initiating the underlying action "reasonably  
6 believes" that there is a good chance of prevailing, *viz.*, the person "has that subjective  
7 belief and that belief is objectively reasonable." *Id.* at 238. Defendants assert that  
8 plaintiff has not sustained his burden to present *prima facie* evidence that Farmers lacked  
9 probable cause to bring the underlying action.

10           Plaintiff contends that a probable cause determination is premature, because  
11 the existence of *prima facie* evidence of a lack of probable cause is a question for the  
12 factfinder that necessitates additional discovery. Oregon's anti-SLAPP statute provides  
13 "an expedited procedure for dismissal of certain nonmeritorious civil cases without  
14 prejudice at the pleading stage." *Neumann v. Liles*, 358 Or 706, 723, 369 P3d 1117  
15 (2016). Plaintiff is correct that, when facts are in dispute, proof of the absence of  
16 probable cause in establishing a claim for wrongful use of civil proceeding is a mixed  
17 question of law and fact. *Roop*, 194 Or App at 239. In the context of the special motion

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<sup>3</sup> The elements of a claim for wrongful initiation of a civil proceeding are (1) commencement and prosecution by the defendant of a judicial proceeding against the plaintiff; (2) termination of the underlying proceeding in the plaintiff's favor; (3) absence of probable cause to prosecute the underlying proceeding; (4) malice in initiating the underlying proceeding; and (5) damages. *Roop*, 194 Or App at 237-38.

1 to strike, however, the existence of *prima facie* proof of the elements of the claim being  
2 challenged by the motion is something that the court determines as a matter of law, based  
3 on the "pleadings and supporting and opposing affidavits stating the facts upon which the  
4 liability or defense is based." ORS 31.150(4); *Young*, 259 Or App at 509-10. It is,  
5 therefore, not premature for the court to decide whether *prima facie* evidence of the  
6 elements of the claim has been presented before full discovery or for a party to raise the  
7 issue on appeal of the denial of a special motion to strike.

8           As they argued below, defendants contend that the summary judgment  
9 ruling of the federal district court in the underlying action either conclusively establishes  
10 that Farmers had probable cause to bring the underlying action or gives rise to a  
11 rebuttable presumption of probable cause. In denying plaintiff's and the other named  
12 defendants' motions for summary judgment against the claims in the underlying action,  
13 the federal district court concluded that Farmers had demonstrated genuine issues of  
14 material fact as to whether plaintiff (1) made material misrepresentations, either  
15 knowingly or recklessly, by signing off on falsified chart notes; (2) engaged in a pattern  
16 of racketeering by committing indictable acts through wire and mail fraud; (3) engaged in  
17 a conspiracy to commit racketeering; and (4) was unjustly enriched by fraudulent claims  
18 made to Farmers by falsified chart notes. We agree with defendants' argument that that is  
19 evidence that the claims brought by defendants in the underlying action were objectively  
20 reasonable and based on probable cause. *See Kennedy v. Wackenhut Corp.*, 41 Or App  
21 275, 599 P2d 1126, *modified on recons*, 42 Or App 435, 601 P2d 474 (1979) (granting of



1 the preliminary injunction by federal court in action to enforce a covenant not to compete  
2 constituted *prima facie* evidence of probable cause to bring the action).

3           However, we need not, as defendants request, adopt a categorical rule that  
4 the denial of a motion for summary judgment in the underlying litigation conclusively  
5 establishes or creates a rebuttable presumption of probable cause. And an extensive  
6 discussion of the factual record in this case would not serve the parties, the public, the  
7 bench, or the bar. Suffice it to say that, independent of the federal district court's  
8 summary judgment ruling in the underlying action, there is ample evidence in the record  
9 that defendants had probable cause to name plaintiff as a defendant in the underlying  
10 action, including affidavits of former clinic employees, who described plaintiff's  
11 participation in a scheme to overtreat patients and overbill insurance. Plaintiff disputes  
12 that evidence but has not rebutted it with evidence to support his position. *See Snook v.*  
13 *Swan*, 292 Or App 242, 247, 423 P3d 747 (2018) (explaining that, in opposing a special  
14 motion to strike under ORS 31.150, a party is required to provide "some evidence to  
15 support her counterclaim and could not rely solely on pleadings or written argument");  
16 *Young*, 259 Or App at 510 (court may consider a defendant's opposing evidence "to  
17 determine if it defeats the plaintiff's showing as a matter of law"). We conclude,  
18 therefore, that plaintiff has not met his burden to present *prima facie* evidence of a lack of  
19 probable cause, and that the trial court erred as a matter of law in denying defendants'  
20 special motion to strike.<sup>4</sup>

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<sup>4</sup> In view of our conclusion that plaintiff has not presented *prima facie* evidence that

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defendants brought the underlying action without probable cause, we need not reach defendants' additional contention that plaintiff has failed to present *prima facie* evidence on the element of malice.