

# Probable Cause as a Matter of Law in Dragonetti Cases

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**A**s we have written before, Pennsylvania’s codification of the common law tort of wrongful use of civil proceedings, the Dragonetti Act, does not create a “loser pays” rule. Dragonetti Act plaintiffs bear the heavy burden to prove lack of probable cause or gross negligence, and an improper purpose as to each and every claim in the underlying action. As our Superior Court noted: “when a Pennsylvania court does not find in favor of a claimant, that does not render the claim so suspect that a Dragonetti action should follow.” See *Philadelphia Contributionship Insurance v. Wright*, 237 A.3d 447 (Pa. Super.), appeal denied, 242 A.3d 914 (Pa. 2020). In *Wright*, the court rejected an argument that a plaintiff establishes an absence of probable cause merely because the other side lost, stating that such an argument is “repugnant to this court as a matter of policy, this argument fails as a matter of law.”

The existence of probable cause in an underlying action has always been considered in the first instance to be a matter of law for the court to decide. There is a growing Pennsylvania consensus that, absent allegations of fraud, probable cause exists as a

matter of law if an underlying action survives attempts by the underlying defendant (Dragonetti plaintiff) to dismiss the underlying action.

Most recently, the Pennsylvania Superior Court issued its opinion in *Touraine v. Spruce* 1530, No. 1848 EDA 2021, 2023 WL 6806146, at \*8 (Pa. Super. 2023) affirming a trial court order sustaining preliminary objections to a wrongful use claim. The wrongful-use claim arose out of an underlying property dispute that Touraine ultimately won. However, the underlying action survived not only a motion for summary judgment, but a motion for nonsuit where the underlying judge noted “Factual determinations ... still have to be made.” The Superior Court’s review of the record showed that “the trial court here properly acknowledged the existence of triable issues of fact in the property litigation.” The fact that the underlying plaintiff “lacked direct evidence to overcome Touraine’s assertions ... was relevant to the ultimate merits of the property litigation ... not whether the appellants possessed probable cause in procuring, initiating, or continuing the property litigation.” The Superior Court found this was

sufficient for the trial court to determine that probable cause existed for the underlying action as a matter of law and affirmed the order sustaining preliminary objections and dismissing the Dragonetti claim.

This is consistent with a line of cases which have found that when an action survives summary judgment, it presumptively had probable cause for Dragonetti purposes. These cases include *Meiksin v. Howard Hanna*, 590 A.2d 1303 (Pa. Super. 1991) (where Dragonetti plaintiffs in prior lawsuit unsuccessfully moved pre-trial for summary judgment and had compulsory nonsuit denied, probable cause existed as a matter of law in prior lawsuit to defeat Dragonetti action); *Fisher v. Exley*, No. 1170 EDA 2014, 2015 WL 7573352, at \*3 (Pa. Super. 2015) (“the fact that the appellants were unsuccessful in moving for summary judgment and nonsuit, as well as the fact that the case was submitted to the jury for a determination on factual issues, further supports the conclusion that probable cause existed for the appellees to file the underlying defamation action.”); *Bobrick v. Santana Products*, 698 F. Supp. 2d 479, 494 (M.D. Pa. 2010), *aff’d sub nom. Bobrick v. Santana Products*, 422 F. App’x 84 (3d Cir. 2011) (“The evidence and legal arguments that were presented in the underlying action on the parties’ summary judgment motions preclude the plaintiffs from showing the absence of probable cause in the procurement, initiation and continuation of that civil proceeding.”); *Garges v. Genisys Credit Union*, No. 1196 EDA 2019, 2020 WL 1079261, at \*5 (Pa. Super. 2020) (“Although it is not clear whether the denial of a defendant’s motion for summary judgment establishes per se that there was probable cause to pursue the claim against the defendant, the Superior Court has made clear that such

denial of summary judgment is an important factor in making the probable-cause determination.”).

There is an undeniable logic to those cases that find that surviving motions for summary judgment, nonsuit, or directed verdict precludes a plaintiff from establishing a lack of probable cause. Our Supreme Court has held “probable cause,” as defined by the wrongful use of civil proceedings act, is a less rigorous standard than that necessary to set forth a prima facie case in order to survive preliminary objections. See *McNeil v. Jordan*, 894 A.2d 1260, 1273-1274 (Pa. 2006). The standard to survive a motion for summary judgment is more rigorous than the standard to survive preliminary objections. To survive a motion for summary judgment, the nonmoving party must establish a genuine issue of material fact, and must adduce sufficient evidence on any issue essential to his case and on which she bears the burden of proof. See *Keffer v. Bob Nolan’s Auto Service*, 59 A.3d 621, 636 (Pa. Super. 2012). On summary judgment, a judge is asked to determine if a jury can reach a verdict on a non-speculative basis. Summary judgment “encompasses two concepts: the absence of a dispute as to any material fact and the absence of evidence sufficient to permit a jury to find a fact essential to the cause of action or defense. See *Young v. Department of Transportation*, 560 Pa. 373, 375–76, 744 A.2d 1276, 1277 (2000). If the court is doing its job, then, in order for a plaintiff to survive summary judgment, the plaintiff must establish that they have adduced sufficient evidence for the jury to make a determination of at least one claim in their favor. This is the very essence of probable cause.

With each phase that an underlying action survives, the assertion that probable cause

exists as a matter of law for purpose of defense of a Dragonetti claim gets stronger. There is a reasonable argument under *McNeil* that surviving preliminary objections establishes the existence of probable cause as a matter of law; there is good case law to support the contention that probable cause exists as a matter of law if a matter survives summary judgment; and if a case survives a motion of nonsuit or directed verdict, then the court should have very little question that probable cause existed as a matter of law to commence and maintain the underlying action.



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