IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ROBERT OSBORNE, M.D., A MARRIED MAN
IN HIS SOLE AND SEPARATE CAPACITY,
Plaintiff/Appellant,

v.

HAROLD HYAMS AND SIMONE HYAMS, HUSBAND AND WIFE;
HAROLD HYAMS & ASSOCIATES, P.C., A PROFESSIONAL CORPORATION,
Defendants/Appellees.

No. 2 CA-CV 2015-0161
Filed October 13, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20124677
The Honorable Leslie Miller, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Vásquez concurred.

E S P I N O S A, Judge:

¶1 Robert Osborne, M.D., appeals from the trial court's grant of summary judgment in favor of attorney Harold Hyams in this malicious prosecution action.[1] Asserting the trial court "improperly drew inferences favorable to Hyams, the movant," Osborne argues that Hyams had neither the objective nor subjective belief in a good chance of prevailing at trial, and requests reversal of the trial court's grant of summary judgment. For the following reasons, we affirm.

Factual and Procedural Background

¶2 It is necessary to review the somewhat lengthy factual and procedural backdrop of this case in detail, but the material facts are not in dispute and we recount only the essential ones. In reviewing a grant of summary judgment, we view the evidence in the light most favorable to the nonmoving party. *See Gorney v. Meaney*, 214 Ariz. 226, ¶ 2, 150 P.3d 799, 801 (App. 2007).

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[1] The term "malicious prosecution" is properly used to describe the wrongful institution of criminal proceedings; in the civil context, such an action is one for "wrongful use of civil proceedings." *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, n.1, 758 P.2d 1313, 1316 n.1 (1988). But because the distinction is unimportant in this matter, we employ the term malicious prosecution for consistency with the parties' arguments and lower court decisions.

¶3 In January 2010 attorney Harold Hyams filed a medical malpractice action on behalf of John Sherman against several medical professionals and organizations involved in his treatment and care for ongoing neck and shoulder complaints. Osborne, a pain management doctor and Sherman's coordinating care physician starting in 2001, had referred Sherman for a cervical compression fusion surgery which occurred in July 2003. Soon after the surgery, part of the compression device became detached, allegedly resulting in significant injuries, including pain and difficulty swallowing, which gave rise to the medical malpractice action.

¶4 With regard to Osborne, the complaint alleged the doctor's conduct fell below an objectively reasonable standard of care by failing to observe and inform Sherman of displaced hardware from the device, referred to as a "wingnut" or "cap" throughout the litigation, clearly visible on x-ray films from 2003 and 2007. Hyams thereafter filed an "expert opinion affidavit" pursuant to the requirements of A.R.S. § 12-2603, asserting that a standard of care expert was unnecessary because Osborne "knew that there was a floating wingnut type device but failed to communicate this information to [Sherman]." Osborne did not initially dispute the certification or request a preliminary expert opinion affidavit, as permitted by the statute; the trial court, however, eventually ruled an expert was required.

¶5 Regarding causation, Hyams cited representations from Sherman and affidavits from medical professionals that concluded the displaced wingnut, which had embedded in Sherman's carotid sheath proximate to his jugular vein, could pierce the vein and cause death. Hyams's § 12-2603 affidavit similarly alleged no causation expert was necessary, stating that earlier identification of the displaced hardware "would have lessened the risk imposed by the wingnut and the attendant growth of the osteophyte in the proximate area where the wingnut came off the device." Due to this risk, in May 2010, Sherman underwent surgery to have the displaced wingnut successfully removed, without incident to his jugular vein. Hyams then pursued a theory of damages based on Sherman's complaints of difficulty swallowing, or dysphagia.

¶6 Before causation affidavits regarding the dysphagia claim were secured, Osborne filed a motion for summary judgment based in part on his assertion that Hyams was unable to attribute any specific injury to Osborne's alleged negligence. Hyams requested additional time to complete discovery and the trial court ordered that all disclosure be completed, including the disclosure of medical experts, no later than September 15, 2011. In response to the trial court's suggestion that expert opinion evidence would be necessary, Hyams filed affidavits from two doctors who opined that the installed hardware "put pressure on Mr. Sherman's esophagus by pushing and compressing [it]," which "was a cause of Mr. Sherman's dysphagia as either a neurological seque[]lae or . . . a learned response from the initial insult of the migrated [wingnut]."

¶7 The trial court heard Osborne's motion for summary judgment in December 2011, and Hyams continued to assert the grossly apparent negligence exception regarding the standard of care. The court, however, ruled that Arizona's adoption of § 12-2603 in 2004 abrogated the grossly apparent negligence exception and that a standard of care expert was required for the claim against Osborne. The court also found the causation affidavits inadequately attributed Sherman's injuries to Osborne's alleged negligence, and denied Hyams's motion to amend the affidavits. In response to the adverse rulings, Hyams and Sherman dismissed Osborne from the lawsuit.

¶8 Osborne then brought this malicious prosecution action, alleging "[n]either Hyams nor Sherman believed that their medical malpractice claim against Dr. Osborne might be found meritorious," and any such belief they may have had was "objectively unreasonable." Hyams filed a motion for summary judgment, arguing Osborne could not satisfy the lack of probable cause element of his malicious prosecution action. Hyams maintained it was objectively reasonable to file and pursue the claim against Osborne, and the "arguments advanced in the [u]nderlying [l]itigation were all made with a subjective belief in the merits of Sherman's allegations." Osborne responded that Hyams had known he could not establish causation, and given the rulings in the malpractice action that medical experts were necessary, it had been

objectively unreasonable for Hyams to believe Sherman could prevail.

¶9 The trial court initially denied Hyams's motion in part, finding he had probable cause to bring the medical malpractice suit against Osborne, but his "position that a standard of care or causation expert was not necessary as to Osborne was neither objectively or subjectively reasonable after the . . . deadline for the disclosure of experts as to Osborne." Hyams moved for reconsideration, pointing out that two causation experts had been disclosed before the judicially imposed deadline, and the court had mistakenly concluded § 12-2603 abrogated the common law "grossly apparent negligen[ce] exception" in medical malpractice cases.

¶10 Before Osborne responded to the motion for reconsideration, he settled his claim against Sherman with the agreement that Sherman waive attorney-client privilege. The motion for reconsideration was granted, and Osborne then filed a "motion for a new trial" based on "newly discovered evidence" obtained upon Sherman's waiver of privilege. The trial court granted Osborne's motion and Hyams again moved for summary judgment on the issue of probable cause. Responding to essentially the same argument raised in the first motion and subsequent motion for reconsideration, Osborne claimed for the first time "the facts and reasonable inferences to be drawn from them [we]re in dispute," and again asserted Hyams had neither an objective nor a subjective belief he could prevail against Osborne.

¶11 In ruling on Hyams's second motion for summary judgment, the trial court cited its "exhaustive review of both the facts and law when considering the first [m]otion," and determined the only new evidence to be considered stemmed from Sherman's waiver of privilege. Finding nothing in that evidence affecting the necessity for a standard of care expert, the court considered the issue of Hyams's objective and subjective belief that he could prove causation. The court noted that Hyams had filed an unsuccessful motion to withdraw in April 2011 when he was unable to secure a causation expert, but had continued to pursue experts, albeit unsuccessfully, until his motion was heard. The court further noted Hyams's continued pursuit of expert testimony after his motion to

withdraw had been denied, and that he ultimately had "found two doctors who were willing to serve as causation experts." The court therefore concluded that up until the time Osborne was dismissed, Hyams had maintained probable cause to pursue Sherman's medical malpractice claim.

¶12 The trial court entered judgment in Hyams's favor, and Osborne appealed. The court thereafter amended its judgment order to include Rule 54(c), Ariz. R. Civ. P., finality language. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Summary Judgment on Malicious Prosecution

¶13 To sustain a claim for malicious prosecution, Osborne had the burden to prove: (1) the institution of a civil proceeding, (2) actuated by malice, (3) begun or maintained without probable cause, (4) which terminated in Osborne's favor, and (5) caused him damages. *See Chalpin v. Snyder*, 220 Ariz. 413, ¶ 20, 207 P.3d 666, 671-72 (App. 2008). The only element challenged and discussed in this appeal is that of probable cause.

¶14 Osborne first argues the trial court erred in concluding Hyams had begun and maintained the malpractice action with probable cause, and therefore its grant of summary judgment for Hyams was erroneous. Summary judgment is generally appropriate when there are no genuine disputes as to any material facts and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). Summary judgment is not intended to resolve factual disputes and is inappropriate if the court must choose among competing reasonable inferences. *Taser Int'l, Inc. v. Ward*, 224 Ariz. 389, ¶ 12, 231 P.3d 921, 925 (App. 2010). However, when only questions of law are presented, summary disposition is proper. *See, e.g.*, *Midland Risk Mgmt. Co. v. Watford*, 179 Ariz. 168, 170, 876 P.2d 1203, 1205 (App. 1994) (summary judgment suitable where facts settled and pure question of law presented); *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 280, 681 P.2d 390, 432 (App. 1983) ("Summary judgment is an appropriate vehicle for resolving disputes over the legal meaning or effect of facts or conduct not in dispute."); *Blue Lakes Rancheria v. United States*, 653

F.3d 1112, 1115 (9th Cir. 2011) (when "disputes [only] relate to the legal significance of undisputed facts, 'the controversy collapses into a question of law suitable to disposition on summary judgment'"), *quoting Thrifty Oil Co. v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003).

¶15 A probable cause determination in a malicious prosecution case presents such a question of law. *See Carroll v. Kalar*, 112 Ariz. 595, 599, 545 P.2d 411, 415 (1976) ("[I]t is the responsibility of the trial judge to say whether the facts give rise to probable cause."); *Wolfinger v. Cheche*, 206 Ariz. 504, ¶ 25, 80 P.3d 783, 788 (App. 2003) ("[A]s to the element of probable cause in a [malicious prosecution] claim, that is always a question of law for the court unless there are conflicting facts such that the facts need to be resolved in order to determine whether probable cause exists."); *Bird v. Rothman*, 128 Ariz. 599, 603, 627 P.2d 1097, 1101 (App. 1981) ("All issues of a party's reasonable belief and prudence in bringing an action are to be decided by the court.").

Reasonable Inferences

¶16 Osborne does not dispute any material facts in evidence, but he argues repeatedly that "the court below failed to draw any reasonable inference" favorable to him, the non-moving party, from the admittedly undisputed facts,[2] and thereby inappropriately applied the summary judgment standard. In support, Osborne quotes our supreme court's statement in *Carroll*: "[i]f from one set of facts the conclusion can be inferred that probable cause exists, and from another that it does not, it is for the jury to determine the true set of facts." 112 Ariz. at 598-99, 545 P.2d at 414-15. Osborne thus asserts that summary judgment is

[2]Osborne did not dispute or controvert any facts asserted in Hyams's summary judgment motion, and during oral argument stated to the trial court that "what I have done really is I have gone through a litany of facts. And as to a lot of those facts, Your Honor, you're correct. Everyone agrees the light was red."

inappropriate if "a jury could conclude, based on one interpretation of the facts," that probable cause was lacking. The court in *Carroll*, however, was referring only to disputed facts, as made clear in the preceding sentence to the quoted language: "The only function of the jury is to determine what the actual facts are *if the facts are conflicting*." *Id.* at 598, 545 P.2d at 414 (emphasis added). The court went on to uphold the summary judgment granted by the trial court because there were no factual disputes to submit to a jury, only "conflict[s] in personal opinions as to the significance of the [undisputed] facts." *Id.* at 599, 545 P.2d at 415. Therefore, *Carroll* does not support Osborne's claim.

¶17 Osborne also relies on two cases in which the issue of probable cause in the context of summary dispositions was extensively addressed. In *Bradshaw v. State Farm Mutual Automobile Insurance Co.*, our supreme court determined that the evidence permitted "an inference" that the defendant had lacked probable cause in bringing an action against the plaintiffs. 157 Ariz. 411, 418, 758 P.2d 1313, 1320 (1988). The court, however, noted not only conflicting material statements, unlike the present case, but "direct evidence disclosing the true reason that State Farm filed the [underlying] lawsuit," which was "to get subpoena power" against the plaintiffs as a "good defensive move" rather than to prevail on a meritorious claim. *Id.* Thus the conflicting evidence of ulterior motive in *Bradshaw* required resolution by a jury.

¶18 In the same vein, *Chalpin*, also relied on by Osborne, reversed a summary judgment in a malicious prosecution action on the issue of probable cause because material facts were in dispute. 220 Ariz. 413, ¶¶ 40, 48, 207 P.3d at 676, 678. The *Chalpin* court found the plaintiff's characterization of the underlying litigation as an attempt to "exert improper pressure," to be a "reasonable interpretation" of the "complicated and disputed" facts, which included the defendants' knowledge of insurance coverage factors before its initiation of cross-claims against the plaintiffs. *Id.* ¶¶ 22, 33. As in *Bradshaw,* the disputed evidence precluded summary judgment, and Osborne's reliance on *Chalpin* is similarly misplaced.

¶19 Finally, Osborne cites *Taser International, Inc.*, a tort and contract case in which summary judgment was overturned.

224 Ariz. 389, 231 P.3d 921. Again, although the court noted that summary judgment is inappropriate if the trial court must "choose among competing inferences," as in *Bradshaw* and *Chalpin*, the *Taser* court noted disputed facts, including conflicting statements and documents as to whether the defendant employee had misappropriated the plaintiff employer's resources, inside information, and trade secrets in planning a competing business. *Id.* ¶¶ 25-26, 32, 40. In reversing summary judgment, the court referred to much of this evidence, including defendant's statements regarding the extent of his development efforts and disavowing knowledge of "any information or technology exclusive to Taser that can be found in [defendant's] products," in the face of the plaintiff's evidence to the contrary. *Id.* ¶¶ 26, 32.

¶20 In the case at hand, Osborne identifies no evidence in his malicious prosecution case comparable to the conflicting documents and statements at issue in *Taser*.[3] And it is apparent that in all of the cases on which Osborne relies, the propriety of summary judgment either turned on, or was heavily influenced by, the existence of disputed material facts, requiring resolution by a trier of fact.

¶21 In contrast, this court in *Bird* addressed a probable cause challenge analogous to the one before us, in which no facts were in dispute. 128 Ariz. 599, 627 P.2d 1097. Observing that "[t]he record herein clearly shows no conflict as to what research and investigation [defendants] had undertaken before bringing [plaintiff] into the lawsuit," we determined that under such circumstances, "[t]he jury, then, had no role in the determination of probable cause." *Id.* at 603, 627 P.2d at 1101. In *Visco v. First National Bank of Arizona*, the court drew a similar conclusion, noting that when "no essential facts [were] in dispute before the trial court," a probable cause determination in a malicious prosecution case was "properly terminated as a matter of law in the summary

[3]That there was conflicting evidence in the underlying medical malpractice action bears only marginal, if any, relevance to the issue of summary judgment in the malicious prosecution action, as discussed *infra*.

proceedings before the trial court." 3 Ariz. App. 504, 507, 415 P.2d 902, 905 (1966).

¶22 Furthermore, although Osborne identifies no disputed facts and repeatedly asserts the trial court "failed to draw inferences in his favor" as the non-moving party, the numerous "inferences" he proposes more closely resemble argument, conclusory statements, and at times mischaracterizations of the facts, than true deductions drawn from the evidence. *See Buzard v. Griffin*, 89 Ariz. 42, 48, 358 P.2d 155, 159 (1960) ("An inference is a fact which may be presumed from the proof of the existence or non-existence of other facts."); *see also Inference*, Black's Law Dictionary (10th ed. 2014) ("A conclusion reached by considering other facts and deducing a logical consequence from them."). For example, Osborne asserts that after discovery revealed that Hyams's initial client agreement with Sherman did not list Osborne as a defendant in the action, "[t]he [trial] court . . . failed to draw any reasonable inference favorable to Osborne from this fact." He does not explain, however, why this initial determination, or possible oversight,[4] would be germane to the development or assessment of probable cause over the course of the litigation.

¶23 Osborne further contends that "[n]one of the medical evidence" prior to the removal of the wingnut "supported the conclusion that the displaced hardware had caused Sherman's dysphagia," requiring another inference in his favor. But Sherman's complaint at that time was based on his medically-supported fear of life-threatening injury to his jugular vein. Moreover, Osborne ignores the fact that nearly a year before the surgery, Sherman's neurosurgeon determined that "the loose set screw" in Sherman's neck could have been a cause of Sherman's "sense of dysphagia." Osborne additionally asserts he received no favorable inference when Hyams "was unable to secure a causation expert to support Sherman's claims against Osborne." But Hyams, in fact, obtained and submitted two medical affidavits backing Sherman's dysphagia

[4] Although the initial client agreement did not reference Osborne, the complaint filed the very next day included Osborne as a named defendant.

claim. That the trial court in the underlying case eventually found the affidavits insufficient does not alter that fact.

¶24 Similarly, a repeated theme in Osborne's briefs is that the trial court should have "inferred" that Hyams lacked probable cause to maintain the medical malpractice action because he had not secured a standard of care expert at certain points in the litigation. Osborne's arguments, however, discount the well-established doctrine of grossly apparent negligence, *see Riedisser v. Nelson*, 111 Ariz. 542, 544, 534 P.2d 1052, 1054 (1975), upon which Hyams consistently relied, as well as actual, undisputed evidence that supported the court's probable cause determination, both of which are more fully discussed *infra*. In sum, when a party responds to a motion for summary judgment with no more than conclusory statements alleging issues of fact, our supreme court has directed that summary disposition is proper if the party is entitled to judgment as a matter of law. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990); *see also Carroll*, 112 Ariz. at 599, 545 P.2d at 415 ("expressions of opinions" not relevant and immaterial to question of probable cause if underlying facts undisputed).

¶25 As noted earlier, if the operative facts are undisputed, the issue of probable cause as an element of a malicious prosecution action is a question of law to be determined solely by the trial court. *Wolfinger*, 206 Ariz. 504, ¶ 25, 80 P.3d at 788, *citing Carroll*, 112 Ariz. at 598-99, 545 P.2d at 414-15. "All issues of a party's reasonable belief and prudence in bringing an action are to be decided by the court," *Bird*, 128 Ariz. at 603, 627 P.2d 1101, "[t]he only function of the jury in this respect is to determine what the actual facts were," *Murphy v. Russell*, 40 Ariz. 109, 112, 9 P.2d 1020, 1021 (1932). Here, Osborne has not established any dispute of genuine material fact requiring such a determination, nor has he identified any legitimate competing inference drawn from the undisputed facts.

Probable Cause

¶26 The question then remains whether the trial court properly granted summary judgment on the legal question of probable cause. When determining the existence of probable cause in malicious prosecution actions, courts consider both objective and

subjective factors, beginning with an inquiry as to the objective reasonableness of bringing or maintaining the suit. *See Bradshaw*, 157 Ariz. at 417, 758 P.2d at 1319. Only if it is determined the challenged litigation is objectively meritless is an inquiry as to the proponent's subjective beliefs necessary. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993); *Wolfinger*, 206 Ariz. 504, ¶ 27, 80 P.3d at 788-89 (*Columbia Pictures* "precludes . . . consider[ation of] the subjective prong of probable cause as identified in the *Bradshaw* case unless [it is] determine[d] that the action was not objectively reasonable."). When assessing whether a lawyer's conduct in filing and maintaining a lawsuit was objectively reasonable, courts will inquire if "[u]pon the appearances presented . . . a reasonably prudent [lawyer would] have instituted or continued the proceeding." *Wolfinger*, 206 Ariz. 504, ¶ 28, 80 P.3d at 789, *quoting Smith v. Lucia*, 173 Ariz. 290, 297, 842 P.2d 1303, 1310 (App. 1992), *quoting Carroll*, 112 Ariz. at 596, 545 P.2d at 412 (first alteration added, remaining alterations in *Smith*).

¶27 Osborne correctly points out that this court has looked to Rule 11 of the Arizona and Federal Rules of Civil Procedure for guidance in applying an objective standard in a malicious prosecution case. *Smith*, 173 Ariz. at 297, 842 P.2d at 1310. Incorporating Rule 11 standards, modified to be consistent with the test announced in *Bradshaw*, this court in *Chalpin* concluded the standard is violated when: (1) there was no reasonable inquiry into the basis of the motion or pleading, (2) there was no good chance of success under existing precedent, and (3) there was no reasonable argument to extend, modify, or reverse controlling law. *Chalpin*, 220 Ariz. 413, ¶¶ 29-31, 207 P.3d at 674; *see also Smith*, 173 Ariz. at 297, 842 P.2d at 1310; *Bradshaw*, 157 Ariz. at 417, 758 P.2d at 1319 (test is whether "initiator 'reasonably believes that he has a good chance of establishing [his case] to the satisfaction of the court or the jury'"), *quoting* Prosser and Keeton on the Law of Torts § 120 (5th ed. 1984). We address each prong of the objective reasonableness test in turn.

1. Reasonable Inquiry

¶28 Rule 11 is violated when counsel knew, or should have known by such investigation as was reasonable and feasible under all the circumstances, that a claim is insubstantial, groundless,

frivolous, or otherwise unjustified. *Boone v. Superior Court*, 145 Ariz. 235, 241, 700 P.2d 1335, 1341 (1985). Osborne first takes issue with Hyams's initial inquiry and investigation, which he characterizes as "amount[ing] to nothing more than a meeting with Sherman that lasted 'maybe an hour'" and "did not include any of Sherman's records from Osborne." Osborne's claims, however, ignore Sherman's unrefuted representation to Hyams that Osborne had in his possession, and had discussed with Sherman, x-rays showing the displaced hardware. Further, Hyams agreed to represent Sherman shortly before the statute of limitations on Sherman's claims was to expire. Although their initial written client agreement did not name Osborne, based on Sherman's specific allegations that Osborne had reviewed x-ray films from 2003 and 2007 in which the displaced wingnut was clearly visible, the doctor was included as a defendant in the complaint filed the following day.

¶29 The trial court determined there had been sufficient probable cause to initiate the lawsuit, citing Hyams's "belief that various doctors [including Osborne] had the necessary information and opportunity to detect the dislodged [hardware]," despite Hyams's "limited review due to the impending expiration of the statu[t]e of limitations." The court relied on *Boone*, in which our supreme court directed trial courts to assess "reasonable efforts . . . in light of the situation existing, the facts known, the amount of time available for investigation, the need for reliance upon the client or others for obtaining facts, the plausibility of the claim, and other relevant factors." 145 Ariz. at 241, 700 P.2d at 1341.

¶30 In civil proceedings probable cause may exist if the "existence [of facts] is not certain but [the attorney] believes that he can establish their existence to the satisfaction of court and jury." *Bradshaw*, 157 Ariz. at 417, 758 P.2d at 1319, *quoting* Restatement (Second) of Torts § 675 cmt. d (1965). Thus, the fact that Hyams did not have all available medical records at the time the complaint was filed is not dispositive of the probable cause inquiry. *Cf. Boone*, 145 Ariz. at 241, 700 P.2d at 1341 (under Rule 11, lawyer not required to prepare a prima facie case before filing complaint).

¶31 Osborne also contends that Hyams failed to conduct adequate investigation between filing the complaint and serving

Osborne with notice of the lawsuit. Osborne highlights expert medical testimony that opined the displaced hardware may not have been a cause of Sherman's complaints, but he fails to refute evidence that before service of the complaint, Hyams had retained a medical consultant, discussed Sherman's pain complaints with his treating physicians, and had a radiologist review all of Sherman's radiological films, including films showing the displaced hardware embedded next to Sherman's jugular vein, which presented a risk of serious injury or even death. Again, the Rule 11 standard requires reasonable investigation, pursuit of reasonable legal theories, and ensuring claims are not frivolous or unsupported. *See Wolfinger*, 206 Ariz. 504, ¶ 29, 80 P.3d at 789; *Boone*, 145 Ariz. at 241, 700 P.2d at 1341. That standard does not require attorneys to abandon a case in the face of adverse evidence. *See, e.g.*, *Oliveri v. Thompson*, 803 F.2d 1265, 1278 (2d Cir. 1986) (reversing federal Rule 11 sanction for malicious prosecution claim where it had arguable merit notwithstanding evidence contrary to plaintiff's account of events);[5] *cf. Boone*, 145 Ariz. at 241, 700 P.2d at 1341 (Rule 11 requires good faith belief based on reasonable investigation, that colorable claim exists). We thus cannot say the trial court erred in concluding Hyams had adequate probable cause to pursue the medical malpractice suit against Osborne.

¶32 The record further shows that Hyams made reasonable factual inquiries until Osborne was dismissed from the suit. As noted above, there was evidence that after the action was filed, Hyams contacted several doctors to better understand the medical evidence underlying Sherman's claims. Hyams's initial damages theory related to the threat to Sherman's jugular vein, and "given the fragile nature of that vein, the hardware could pierce the jugular vein and Mr. Sherman could die." After that theory was obviated by the successful removal of the wingnut in May 2010, Hyams advanced a "dysphagia theory," attributing Sherman's swallowing

[5] "Cases decided under Rule 11, Federal Rules of Civil Procedure . . . are helpful in determining the standard by which we may measure the reasonableness of an attorney's conduct." *Smith*, 173 Ariz. at 297, 842 P.2d at 1310.

complaints to the alleged malpractice. Hyams submitted with his motion for summary judgment notes reflecting discussions with several of Sherman's treating physicians, ultimately resulting in the additional filing of two "causation affidavits." Thus, there was unrefuted evidence supporting the trial court's implicit determination that Hyams had investigated the facts, and proceeded as would a reasonably prudent lawyer, notwithstanding the change in causation theories.

¶33 Osborne also takes issue with Hyams's reliance on the grossly apparent negligence exception. He points out that Hyams secured expert testimony as to other named defendants, and argues that his decision to not obtain expert testimony as to Osborne required the trial court to draw the inference that Hyams had no reasonable belief of prevailing against him. But Osborne does not refute that when Hyams agreed to pursue Sherman's claims, he relied on Sherman's "emphatic" assertions that Osborne possessed x-ray films clearly showing the displaced hardware, that Osborne had reviewed those films, and he then failed to inform Sherman of the obvious abnormality.

¶34 Nor does Osborne controvert the fact that Hyams relied on the gross negligence exception, having concluded the failure to notice and warn of the displaced wingnut in Sherman's neck was so grossly apparent that any layperson would have no difficulty recognizing the negligence. Hyams also submitted evidence that standard of care affidavits had been secured for other defendants out of an abundance of caution, and because their liability was premised on slightly different theories than Osborne's. But as to Osborne, throughout the action Hyams maintained that the x-rays were "obvious on their face" and sufficient evidence for any reasonable juror to conclude Osborne's conduct fell below the standard of care.

¶35 The grossly apparent negligence exception has been long-recognized in medical malpractice cases, *see*, *e.g.*, *Riedisser*, 111 Ariz. at 544, 534 P.2d at 1054, and neither A.R.S. § 12-2603 nor § 12-2604 has abrogated it, *see Sanchez v. Old Pueblo Anesthesia, P.C.*, 218 Ariz. 317, ¶¶ 13-14, 183 P.3d 1285, 1289-90 (App. 2008). On review, the applicable inquiry is whether a reasonably prudent

lawyer would have been justified in relying on that exception under these facts. *See Smith*, 173 Ariz. at 297, 842 P.2d at 1310 (articulating test as "would a reasonably prudent [lawyer] have instituted or continued the proceeding"), *quoting Carroll*, 112 Ariz. at 596, 545 P.2d at 412 (modification in *Smith*). Osborne acknowledged that in 2007 he failed to inform Sherman of the dislodged hardware embedded in Sherman's neck, clearly separated from the device to which it was supposed to be attached. On the record before us we conclude a reasonably prudent attorney could justifiably rely on the grossly apparent negligence exception in these circumstances. *See Revels v. Pohle*, 101 Ariz. 208, 210-11, 418 P.2d 364, 366-67 (1966) (steel sutures left in patient sufficient to meet grossly apparent negligence test); *cf. Tiller v. Von Pohle*, 72 Ariz. 11, 15-16, 230 P.2d 213, 215-16 (1951) (applying doctrine of res ipsa loquitur where "cloth sack" left in patient's abdomen).

¶36 We also conclude Hyams could properly rely on an increased risk of harm theory as to the issue of causation. That theory recognizes that one who undertakes "to render services to another . . . is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform the undertaking . . . if . . . his failure to exercise such care increases the risk of such harm." *Thompson v. Sun City Cmty. Hosp., Inc.*, 141 Ariz. 597, 608, 688 P.2d 605, 616 (1984), *quoting* Restatement (Second) of Torts § 323 (1965) (emphasis omitted). Hyams obtained affidavits from two doctors who opined that the displaced hardware was a cause of Sherman's dysphagia, and one of whom determined that earlier removal of the hardware would have lessened the risk of the dysphagia. Although Hyams's motion to file the amended affidavit was denied without explanation, we conclude a reasonably prudent attorney could rely on an increased risk of harm theory on this evidence.

2. Good Chance of Success

¶37 The second prong of an objective probable cause determination requires that Osborne demonstrate Hyams had no "good chance" of establishing Sherman's case. *Bradshaw*, 157 Ariz. at 417, 758 P.2d at 1319; *Chalpin*, 220 Ariz. 413, ¶ 38, 207 P.3d at 676. As described above, at the commencement of the malpractice action

Hyams relied on Sherman's "emphatic" allegations that Osborne was in possession of Sherman's films since at least 2003, and that Osborne's records would indicate he had reviewed them. Osborne admitted it was his practice, "on occasion," to review patient films, and further admitted he had reviewed Sherman's 2007 films and did not notice or report the displaced hardware.

¶38 Osborne points to evidence indicating he did not review the initial 2003 films, thus potentially limiting any damages relating to Sherman's injuries. Under Hyams's increased risk of harm theory, however, the shortened time frame for attributing damages to Osborne did not affect the merits of the case, even if it might have curtailed a significant portion of the damages attributable to Osborne's alleged negligence. And, as noted above, Hyams secured causation affidavits from two doctors attributing Sherman's dysphagia to the displaced hardware, notwithstanding the trial court's ultimately finding those affidavits inadequate.[6] When Sherman's motion for reconsideration was denied, Hyams immediately began negotiations to dismiss Osborne.

¶39 We agree with the trial court's implicit conclusion that until the motion for reconsideration was denied, Hyams could have reasonably determined he had a good chance of prevailing against Osborne. Hyams's increased risk of harm theory had a valid basis in the law, *see Thompson*, 141 Ariz. at 608, 688 P.2d at 616, and he had secured a causation expert who connected Sherman's dysphagia to the displaced hardware.

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[6]The inquiry on appeal being limited to whether there was probable cause for Hyams to maintain the malpractice action, we need not dwell on the trial court's unexplained rejection of the causation affidavits or the court's error of law regarding the grossly apparent negligence exception, other than in the context of the reasonableness of Hyams's actions. *See Wolfinger*, 206 Ariz. 504, ¶ 28, 80 P.3d at 789 (objective reasonableness inquiry on issue of probable cause is whether a reasonably prudent attorney would have instituted or continued the proceedings); *see also Boone*, 145 Ariz. at 241, 700 P.2d at 1341 (Rule 11 does not require attorneys to prepare prima facie case before filing complaint).

3. Modification of the Law

¶40 Hyams offered no arguments or theories suggesting a possible modification of existing law, thus we need not address the third prong of the objective reasonableness inquiry. *See Wolfinger*, 206 Ariz. 504, ¶ 57, 80 P.3d at 796. Moreover, because we conclude Hyams acted as a reasonably prudent lawyer in instituting and maintaining the proceedings against Osborne, we need not address Osborne's arguments alleging Hyams's lack of subjective belief in the merits of Sherman's claim. *Chalpin*, 220 Ariz. 413, ¶ 21, 207 P.3d at 672 ("[A] party's subjective belief in the merits of a claim only becomes an issue if there is no objective probable cause.").

Conclusion

¶41 We reject Osborne's argument that the trial court's determination on the legal issue of probable cause was subject to Osborne's conclusory, nonmaterial, or inaccurate inferences from the undisputed evidence. And, upon our de novo review of the undisputed evidence, the court could find that Hyams relied on viable legal theories supported by reasonable facts, and thus had probable cause to begin and maintain the proceedings against Osborne until his stipulated dismissal from the case. Accordingly, the court's grant of summary judgment is affirmed.