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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAVID H. CAIN, an unmarried man,	)	No. 1 CA-CV 10-0858
	)	1 CA-CV 11-0075
Plaintiff/Appellant,	)	1 CA-CV 11-0076
	)	1 CA-CV 11-0077
v.	)	1 CA-CV 11-0420
	)	1 CA-CV 11-0421
FIDELITY NATIONAL TITLE	)	(Consolidated)
INSURANCE COMPANY, et al.)	
)	
	)	DEPARTMENT D
)	
Defendants/Appellees.	)	MEMORANDUM DECISION
	)	(Not for Publication -
<hr/>	)	Rule 28, Arizona Rules of
DAVID H. CAIN, an unmarried man,	)	Civil Appellate
)	Procedure)
Plaintiff/Appellant,)	
)	
v.)	
)	
SNELL & WILMER L.L.P., et al.)	
)	
Defendants/Appellees.)	
)	
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DAVID H. CAIN, an unmarried man)	
)	
Plaintiff/Appellant,)	
)	
v.)	
)	
COOPER & RUETER, L.L.P., et al.)	
)	
Defendants/Appellees.)	
)	
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DAVID H. CAIN, an unmarried man,)
)
 Plaintiff/Appellant,)
)
 v.)
)
 RAVEN II HOLDINGS, L.L.C. and)
 HANNA 120 HOLDINGS, L.L.C.,)
)
 Defendants/Appellees.)
 _____)
 DAVID H. CAIN, an unmarried man,)
)
 Plaintiff/Appellant,)
)
 v.)
)
 FIRST AMERICAN TITLE INSURANCE)
 COMPANY, et al.)
)
 Defendants/Appellees.)
 _____)
 DAVID H. CAIN, an unmarried man,)
)
 Plaintiff/Appellant,)
)
 v.)
)
 QUARLES & BRADY, LLP, et al.)
)
 Defendants/Appellees.)
 _____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-052354

The Honorable Michael R. McVey, Judge, *Retired*

AFFIRMED IN PART; REVERSED IN PART; REMANDED

David H. Cain
 Plaintiff/Appellant *In Propria Persona*

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B R O W N, Judge

¶1 In these six consolidated appeals, David H. Cain challenges the trial court's orders granting motions to dismiss filed by a number of defendants. Cain asserts the court erred in dismissing his claims for wrongful institution of civil proceedings ("WICP"), aiding and abetting, and fraudulent conveyance. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶2 This appeal stems from vigorously contested litigation (“the Hodges litigation”) regarding ownership of an 80-acre parcel of property in Pinal County (“the property”), which we summarize in relevant part as follows. In March 2005, Leveraged Land Company (“LLC”) filed a complaint against Michael Hodges seeking to foreclose Hodges’ ability to redeem a tax lien on the property and quiet title in LLC’s name. *Leveraged Land Co., LLC v. Hodges (“Hodges I”)*, 2 CA-CV 2006-0210, 2007 WL 5556356, at *1, ¶ 2 (Ariz. App. Aug. 8, 2007) (mem. decision). LLC served Hodges by publication and obtained a default judgment after Hodges failed to appear. *Id.* LLC then promptly sold the property to Raven II Holdings, L.L.C. and Hanna 120 Holdings, L.L.C. (collectively “Raven”). *Leveraged Land Co., LLC v. Hodges (“Hodges III”)*, 224 Ariz. 442, 444-45, ¶¶ 1-2, 232 P.3d 756, 758-59 (App. 2010). Raven subsequently conveyed a partial interest in the property to Bingham Arizona Land, L.L.C. (“Bingham”) in 2007. *Id.* at ¶ 2.

¶3 In November 2005, Hodges filed a motion to set aside the default judgment due to insufficient service, or, alternatively, for a new trial under Arizona Rule of Civil Procedure 59(j),¹ asserting he was ready, willing, and able to

¹ Rule 59(j)(1) states: “When judgment has been rendered on service by publication, and the defendant has not appeared, a

redeem the tax lien. *Hodges I*, 2 CA-CV 2006-0210 at *1, ¶ 3. At a hearing on the motion, Hodges testified he and Cain had an arrangement whereby Hodges borrowed money from Cain to pay the lien and deposited it in Hodges' attorney's trust account. *Id.* at ¶ 13. In exchange, Hodges signed a warranty deed conveying his interest in the property to Cain, which Hodges would release to Cain if the court were to set aside the default judgment. *Id.* The trial court denied the motion and Hodges appealed. *Id.* ¶ 3. On appeal, we reversed and remanded for a new trial under Rule 59(j). *Id.* at ¶ 19. On remand, the trial court entered an order "granting a new trial" and restoring Hodges' right to redeem. *Leveraged Land Co., LLC v. Hodges ("Hodges II")*, 2 CA-CV 2009-0057, 2009 WL 3087551, at *1, ¶ 4 (Ariz. App. Sept. 24, 2009) (mem. decision). In March 2008, Hodges redeemed the tax liens using the money provided by Cain and conveyed his interest in the property to Cain by recording the warranty deed. *Id.* at *1-2, 4, ¶¶ 4, 6, 15.

¶4 In April 2008, LLC filed an amended complaint against Hodges challenging the validity of the redemption. LLC alleged that (1) at the time the original judgments were entered, Hodges did not have a good faith defense to the action because he was unable at that time to pay the delinquent taxes; and (2) the

new trial may be granted upon application of the defendant for good cause shown by affidavit, made within one year after rendition of the judgment."

redemption should be set aside as null and void because at the time the certificates of purchase for the delinquent taxes were redeemed in Hodges' name, Hodges no longer had an interest in the property and therefore lacked standing to redeem them. *Id.* at ¶ 5. Raven and Bingham intervened, arguing they were bona fide purchasers of the property. *Hodges III*, 224 Ariz. at 444-45, ¶¶ 1, 3, 232 P.3d at 758-59. Cain also intervened, and the trial court granted partial summary judgment in favor of Cain and Hodges and certified its ruling under Rule of Civil Procedure 54(b). *Hodges II*, 2 CA-CV 2009-0057 at *2, ¶¶ 6-7.

¶5 LLC appealed and we affirmed in *Hodges II*, holding that Hodges was restored to the same legal position he would have occupied had he appeared in the lawsuit prior to the entry of default judgment. *Id.* at *2, 5, ¶¶ 7, 5, 16. In addition, we held that because delivery of the deed conveying the property to Cain "was conditioned on payment of the tax liens, Hodges was the owner of the property at the time of redemption." *Id.* at *6, ¶ 19.

¶6 While *Hodges II* was pending in this court, Hodges and Cain filed a motion for summary judgment against Raven and Bingham seeking to quiet title to the property in favor of Cain. *Hodges III*, 224 Ariz. at 445, ¶ 5, 232 P.3d at 759. The trial court rejected arguments by Raven and Bingham that they were bona fide purchasers of the property and granted the motion for

summary judgment. *Id.* The court ordered Raven and Bingham to pay Hodges' and Cain's attorneys' fees. *Id.* Additionally, LLC requested attorneys' fees of \$153,182 pursuant to Arizona Revised Statutes ("A.R.S.") section 42-18206 (Supp. 2012),² but the trial court deemed that amount "unreasonable" and awarded LLC \$1500. *Id.* at ¶ 17. LLC, Raven, and Bingham filed separate appeals that were ultimately consolidated in *Hodges III*. In May 2010, we affirmed the trial court's judgment in favor of Cain, finding that Raven and Bingham were not bona fide purchasers of the property.³ *Hodges III*, 224 Ariz. at 446, ¶ 9, 232 P.3d at 760.

¶7 The instant litigation commenced in July 2010, when Cain filed a complaint against the entities, individuals, and

² Absent material revisions after the relevant date, we cite a statute's current version.

³ In *Hodges III*, we also vacated the award of attorneys' fees to LLC and remanded to the trial court to reconsider LLC's request for fees and enter an award consistent with our decision. 224 Ariz. at 451, ¶ 33, 232 P.3d at 765. In April 2011, the supreme court vacated our opinion and remanded the case to the trial court. *Leveraged Land Co., L.L.C. v. Hodges (Hodges IV)*, 226 Ariz. 382, 386, ¶ 13, 249 P.3d 341, 345 (2011) (finding "[t]he entitlement to costs and attorney fees under § 42-18206 arises at the time of redemption and relates to work performed before the treasurer's certificate of redemption issues."). On remand, the trial court found that LLC had incurred \$2880 in attorneys' fees "as a result of the redemption." See *Leveraged Land Co., L.L.C. v. Hodges (Hodges V)*, 2 CA-CV 2011-0160, 2012 WL 1268367, at *2, ¶ 6 (Ariz. App. Apr. 13, 2012) (mem. decision). LLC appealed, and on April 13, 2012, we affirmed the trial court's award of \$2880. *Id.* at *3, ¶ 11.

attorneys involved in the Hodges litigation.⁴ Cain alleged the following claims: WICP, fraudulent conveyance, abuse of process, intentional infliction of emotional distress, and aiding and abetting each of those torts. Specifically, Cain alleged that LLC and its attorneys, Craig Kaufman and Jeremy Lite of Quarles & Brady, L.L.P. (collectively "Quarles"), and Raven and its attorneys, William Poorten, Robert Garcia, and Andrew Jacobs of Snell & Wilmer, L.L.P. (collectively "Snell"), brought actions and filed pleadings against him which they knew would be unsuccessful in an effort to "financially and mentally break" Cain. Cain further alleged that Fidelity National Title, which issued title insurance for the transaction from LLC to Raven, through its in-house counsel, Elizabeth McGinnity and Joseph Ward, (collectively "Fidelity") aided and abetted this "scheme" by financing and directing the litigation against Cain.

¶18 Cain also alleged that First American Title Company, which issued title insurance for the transaction from Raven to Bingham, and its in-house counsel, Douglas Thiel, (collectively "First American") and Bingham, through its attorney Stephen Cooper of Cooper & Reuter, L.L.P., instituted proceedings against him "without justification and with the intent to cause

⁴ Cain filed an amended complaint the following day, which appears to be virtually identical to the complaint. For ease of reference, we refer to the amended complaint as "the complaint."

[him] harm." Cain further alleged that Fidelity, Quarles, Snell, First American, and Cooper aided and abetted LLC, Raven, and Bingham in these alleged torts. Cain also alleged that Raven fraudulently conveyed the property to Bingham and that Cooper, First American, and Fidelity aided and abetted in this fraudulent conveyance.

¶19 On separate motions by the defendants, the trial court dismissed the complaint for failure to state a claim. Cain timely filed separate notices of appeal for each dismissal, which have been consolidated on appeal.⁵

¶10 After this case was taken under advisement, Cain filed a notice of supplemental citation of legal authority. Arizona Rule of Civil Appellate Procedure ("ARCAP") 17 permits such a filing when "pertinent and significant authorities come to the attention of a party after the party's brief has been filed[.]" However, the statement must,

clearly identify by page number which portion or portions of the party's appeal brief is intended to be supplemented thereby, and the relevant page or pages of the supplemental authority, and shall further state concisely and without argument the legal proposition for which each supplement authority is cited.

ARCAP 17. In his supplemental citation, Cain directs us to the *Hodges V* decision. He also attached two exhibits to the

⁵ LLC and Bingham are not parties to this appeal.

supplement: Exhibit A, which is a copy of the decision in *Hodges V*; and Exhibit B the hyperlinked index of record on appeal for *Hodges V*. Quarles filed a motion to partially strike Cain's supplement for violating ARCAP 17, alleging that it was argumentative and failed to state which portion of Exhibit B Cain intended to supplement the record with or for what legal propositions. Because we agree that paragraphs 3 through 16 and footnote 10 contain argument, and the supplement fails to address which portions of Exhibit B Cain intends to supplement the record with or for what legal authority it is cited, it is ordered striking those portions of Cain's supplemental authority. To the extent it has any relevance as to whether Cain's complaint sufficiently states claims for relief, we have taken judicial notice of this court's decision in *Hodges V*.

DISCUSSION

¶11 We review dismissal of a complaint⁶ under Rule 12(b)(6) de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, ___, ¶ 7, 284 P.3d 863, 866 (2012). We assess "the sufficiency of a claim

⁶ Cain has not raised any issue regarding the trial court's dismissal of his claim for abuse of process and thus he has waived any such challenge on appeal. See *Amfac Distrib. Corp. v. J.B. Contractors, Inc.*, 146 Ariz. 19, 27, 703 P.2d 566, 574 (App. 1985) (stating issues on appeal must be raised in the opening brief). In addition, Cain conceded his claim for intentional infliction of emotional distress in response to the defendants' motions to dismiss. Therefore, we do not address the validity of those claims as to any of the defendants.

under [Arizona Rule of Civil Procedure] 8's requirement that a pleading contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 6, 189 P.3d 344, 346 (2008) (citation omitted). Arizona courts follow "a notice pleading standard, the purpose of which is to 'give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved.'" *Id.* (citation omitted). If a pleading does not meet the requirements of Rule 8, an opposing party may move to dismiss the action pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. *Id.* at ¶ 7 (quoting Ariz. R. Civ. P. 12(b)(6)). In reviewing a dismissal pursuant to Rule 12(b)(6), we look only to the complaint,⁷ assuming the truth of all well-pled factual allegations and indulging all reasonable inferences. *Id.* We will affirm the dismissal only "if we are 'satisfied as a matter

⁷ Although the parties attached numerous public records, pleadings, and court rulings relating to the Hodges litigation to their motions to dismiss, we are not necessarily required to convert the motions to dismiss to motions for summary judgment. See *Coleman*, 230 Ariz. at ___, ¶ 9, 284 P.3d at 867 (citing *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶ 13, 226 P.3d 1046, 1050 (App. 2010) (noting "a Rule 12(b)(6) motion that presents a document that is a matter of public record need not be treated as a motion for summary judgment.")). We refer to some of these documents to provide context for the current claims and their relation to the underlying litigation. Our primary task is to determine whether the complaint on its face contains well-pled factual allegations that support Cain's claims for relief.

of law that plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Chalpin v. Snyder*, 220 Ariz. 413, 418, ¶ 18, 207 P.3d 666, 671 (App. 2008) (citation omitted). Additionally, we may affirm the court's ruling if it is correct for any reason. *Dube v. Likins*, 216 Ariz. 406, 417 n.3, ¶ 36, 167 P.3d 93, 104 n.3 (App. 2007).

I. WICP

¶12 Cain argues the trial court erred in dismissing his WICP claims against Raven, Quarles, Snell, Fidelity, First American, and Cooper. To establish a WICP claim, the plaintiff must prove that the defendant "(1) instituted a civil action which was (2) motivated by malice, (3) begun without probable cause, (4) terminated in plaintiff's favor, and (5) damaged plaintiff." *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 417, 758 P.2d 1313, 1319 (1988). On appeal, only the first three elements of Cain's WICP claim are disputed.

¶13 Quarles, Raven, First American, and Cooper argue that Cain's complaint failed to allege that they "initiated" civil proceedings against him. Quarles, Snell, Raven, First American, Cooper and Fidelity all argue that Cain's complaint is deficient because it failed to adequately allege that legal proceedings were initiated against him "without probable cause." Finally, Quarles, Snell, Raven, Cooper, and Fidelity argue that Cain's complaint failed to allege that civil proceedings were initiated

against him "with malice." Because Rule 8 requires that Cain plead facts supporting each element of a WICP claim to avoid dismissal, we address the sufficiency of his complaint as to each contested element. See *Grand v. Nacchio*, 222 Ariz. 498, 506, ¶¶ 28-29, 217 P.3d 1203, 1211 (App. 2009) (affirming dismissal of a complaint that failed to allege an essential element).

1. Initiation of Proceedings

¶14 Quarles, First American, Cooper, and Raven (collectively "Defendants" for this subsection) argue that in order to maintain a claim for WICP, Cain was required to allege that they *initiated* legal proceedings against him. Defendants rely on language from *Bradshaw* stating that the first required element of a WICP claim is that the defendant "instituted" a civil action. *Bradshaw*, 157 Ariz. at 417, 758 P.2d at 1319. Although the supreme court in *Bradshaw* used the word "instituted," the meaning of that term is not necessarily synonymous with "commence." In the context of other relevant authority, the first element of WICP also encompasses "continuing" or "procuring" civil proceedings. Cf. *McClinton v. Rice*, 76 Ariz. 358, 367, 265 P.2d 425, 431 (1953) ("The test generally applied is: upon the appearances presented to the defendant, would a reasonably prudent man have instituted or *continued* the proceedings?" (emphasis added)).

¶15 When construing the elements of WICP, Arizona courts have traditionally looked to the Restatement (Second) of Torts ("Restatement") for guidance. See, e.g., *Bradshaw*, 157 Ariz. at 417, 758 P.2d at 1319 (discussing the requirement of probable cause and Restatement § 675); *Frey v. Stoneman*, 150 Ariz. 106, 110, 722 P.2d 274, 278 (1986) (analyzing the Restatement to determine whether a voluntary dismissal constitutes a favorable termination). Restatement § 674 states that a WICP claim may be brought against one who "takes an active part in the initiation, continuation or procurement of civil proceedings against another." (Emphasis added.) Comment c to § 674 further emphasizes that one who "takes an active part in [a civil proceeding's] continuation for an improper purpose after he has learned that there is no probable cause for the proceeding becomes liable as if he had then initiated the proceeding." Accordingly, Cain may sustain a claim for WICP if Defendants instigated or prolonged civil proceedings for an improper purpose after becoming aware that such proceedings lacked probable cause.

¶16 Rule 8(a)(2) requires a litigant to provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." In his complaint, Cain alleged that "Leveraged Land . . . Raven II Holdings . . . and their attorneys Defendants Kaufman [and] Lite . . . filed numerous

pleadings and actions which they [] knew would ultimately be unsuccessful." He also alleged that "Cooper, under the direction and financing of [First American] . . . consciously filed numerous pleadings and actions" against Cain. In addition, Cain specifically identified multiple pleadings, motions, and briefs that Defendants filed and alleged each filing was made without probable cause and with a malicious purpose. Drawing reasonable inferences from these assertions, the complaint sufficiently alleged that Defendants either initiated or continued legal proceedings against Cain by filing a series of motions and other related documents. Cain therefore adequately pled the "institution" element of WICP.

2. Lack of Probable Cause

¶17 Quarles, Snell, Raven, First American, Cooper and Fidelity (collectively "Defendants" for this subsection) argue that the trial court properly dismissed Cain's complaint because it inadequately pled the second required element of a WICP claim, lack of probable cause. Specifically, Defendants urge us to conclude that as a matter of law they had probable cause to initiate their actions against Cain. *See Chalpin*, 220 Ariz. at 419, ¶ 24, 207 P.3d at 672 ("Whether the facts in a particular case are sufficient to constitute probable cause is a question of law to be determined by a reasonable man test." (internal quotations and citations omitted)). Alternatively, Defendants

argue that because Cain previously sought but failed to obtain sanctions pursuant to Arizona Rule of Civil Procedure 11, issue preclusion bars him from alleging that Defendants lacked probable cause when initiating their respective actions. We are not persuaded by either of Defendants' arguments.

¶18 First, in asserting we should conclude as a matter of law that they had probable cause to initiate their actions, Defendants fail to properly acknowledge the standard of review for a dismissal pursuant to Rule 12(b)(6). We are not concerned here with Defendants' ability to prove they had probable cause; instead, we seek only to determine whether Cain's complaint comports with the requirements of Rule 8(a). See *Coleman*, 230 Ariz. at ___, ¶¶ 7-9, 284 P.3d at 866-67.

¶19 Our court has previously recognized that in civil cases, "the test [for probable cause] is whether the initiator reasonably believes that he has a good chance of establishing [his case] to the satisfaction of the court or the jury." *Chalpin*, 220 Ariz. at 420, ¶ 25, 207 P.3d at 673 (internal citations and quotations omitted). Restatement § 675 provides additional guidance:

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either

- (a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or
- (b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

As described in paragraphs 26 through 52 of his complaint,⁸ Cain alleged that Defendants filed various claims and motions knowing those filings would "ultimately be unsuccessful" and that Defendants' filings had "no reasonable likelihood of success given the rulings in *Hodges I*[" Cain referenced a statement from this court's decision in *Hodges I*, which explained that the court did not see "any legitimate basis upon which [prior case

⁸ The complaint includes the following references: petition for review seeking to overturn *Hodges I*; motions filed in the trial court attempting to block the Rule 59(j) motion; LLC's amended complaint contesting Hodges's right to redeem; attempts to depose Cain; "each and every" filing made by LLC leading up to *Hodges II*; the opening brief in *Hodges II* because it failed to cite applicable case law and statutes; LLC's reply brief in *Hodges II* because it failed to cite the controlling statute of *Hodges I*; LLC's petition for review of *Hodges II*; Raven's complaint in intervention, which alleged bona fide purchaser status despite constructive notice; Raven's October 16, 2008 response and motion for summary judgment, containing "multiple false statements," including that Raven did not know of any claim by Hodges when it purchased the property and that the recorded treasurer's deed did not provide facts concerning the default judgment; Raven "lied with the intent of burying [Cain] under mountains of voluminous, deceitful filings;" Raven's supplemental brief which replaced the word "and" with the word "or" in a "blatant attempt to deceive the lower court;" every other pleading made by Raven leading to the denial of Raven's arguments by the trial court; Raven's opening brief in *Hodges III*; and Raven's reply brief in *Hodges III*.

law] can be distinguished" and thus the right to redeem the tax lien would be restored. Cain further alleged that "notwithstanding the clear unambiguous rulings in *Hodges I*, [Defendants] . . . filed voluminous pleading[s] in, and maintained several actions . . . without probable cause." Cain also alleged that Defendants "knew there was zero chance" of (1) overturning established Arizona Supreme Court precedent, (2) repealing applicable statutory authority, (3) repealing a court rule permitting default judgments to be set aside for good cause, and (4) overcoming the law of the case established by *Hodges I*, "all of which [were] necessary in order for Defendants to prevail."

¶120 Assuming these allegations are true, the complaint sufficiently alleges Defendants lacked probable cause to institute or continue their claims against Cain. *See Long v. Ariz. Portland Cement Co.*, 89 Ariz. 366, 369, 362 P.2d 741, 743 (1961) ("The great weight of authority is that the primary objective of the law is to obtain a determination of the merits of any claim [. . .] and that a case should be tried on the proofs rather than the pleadings. We believe a liberal construction of the complaint is consonant with this principle." (internal quotations and citations omitted)).

¶121 In dismissing the complaint, the trial court emphasized that because Cain had unsuccessfully sought Rule 11

sanctions against Defendants in the *Hodges* litigation, issue preclusion barred Cain from alleging that Defendants lacked probable cause when initiating claims against him. The court relied on its understanding that the "standards for attorney behavior set forth in Rule 11 are virtually identical to elements of malicious prosecution."

¶122 "The application of [issue preclusion] is a question of law that we review de novo." *Campbell v. SZL Properties, Ltd.*, 204 Ariz. 221, 223, ¶ 8, 62 P.3d 966, 968 (App. 2003). To invoke the doctrine a proponent must demonstrate the following elements: "(1) the issue was actually litigated in the previous proceeding, (2) the parties had a full and fair opportunity and motive to litigate the issue, (3) a valid and final decision on the merits was entered, (4) resolution of the issue was essential to the decision, and (5) there is common identity of the parties." *Id.* at ¶ 9.

¶123 We are not persuaded by the trial court's equation of the "probable cause" requirement in a WICP claim with the "good faith" standard for attorney conduct under Rule 11. The Rule 11 standard mandates that a filing attorney have "a good faith belief, formed on the basis of . . . reasonable investigation, that a colorable claim exists." *Villa De Jardines Ass'n v. Flagstar Bank, FSB*, 227 Ariz. 91, 96, ¶ 14, 253 P.3d 288, 293 (App. 2011) (internal quotations omitted). In assessing an

attorney's conduct under Rule 11, "[t]he good faith component . . . is not based on whether an attorney subjectively pursues claims in good faith, but instead is judged on an objective standard of what a professional, competent attorney would do in similar circumstances." *Id.* (quoting *Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 230, 866 P.2d 889, 898 (App. 1993)). The sanctions provision in Rule 11 "was designed to encourage honesty in the bar when bringing and defending actions[.]" *Boone v. Superior Court*, 145 Ariz. 235, 239, 700 P.2d 1335, 1339 (1985) (emphasis added) (internal quotations omitted).

¶24 Contrary to the underpinnings of Rule 11, a WICP claim does not aim to ensure honest and reputable attorneys; its purpose instead is to hold accountable those who intentionally initiate or perpetuate civil proceedings without justification, regardless of their status as attorneys. Furthermore, unlike the standard of review for a sanctions request, in the context of a WICP claim, the "proper test is subjective *and* objective." *Bradshaw*, 157 Ariz. at 417, 758 P.2d at 1319. Accordingly, for a WICP claim, a defendant's conduct is evaluated not only against an objective standard of reasonableness, but also against his or her subjective state of mind at the time of the alleged wrongdoing. *Id.* Thus, the trial court erred in applying issue preclusion based on its finding that the resolution of Rule 11 sanctions in the *Hodges* litigation

involved the same issue as the determination of probable cause in the context of Cain's WICP claim.

¶25 Moreover, we disagree that the denial of a request for sanctions constitutes a "valid and final decision on the merits." See *Campbell*, 204 Ariz. at 223, ¶ 9, 62 P.3d at 968. "Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue[.]" *Britt v. Steffen*, 220 Ariz. 265, 271, ¶ 24, 205 P.3d 357, 363 (App. 2008) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990)). Similarly, comment h to the Restatement (Second) of Judgments section 27 states, "[i]f issues are determined but the judgment is not dependent upon the determination, relitigation of those issues in a subsequent action between the parties is not precluded." Here, whether or not to impose sanctions under Rule 11 was not determinative of Cain's underlying claims in the *Hodges* litigation. Indeed, Cain prevailed on those claims, and was awarded attorneys' fees, regardless of the denial of his sanctions' requests. Thus, a Rule 11 decision does not necessarily preclude, as a matter of law, a subsequent WICP claim.

3. Malice

¶26 Finally, Quarles, Snell, Raven, Cooper and Fidelity (collectively "Defendants" for this subsection) argue dismissal of Cain's complaint was proper because he failed to adequately allege they brought their respective claims with malice. Thus, we must evaluate whether Cain has alleged facts supporting the theory "that the [Defendants] primarily used the action for a purpose 'other than that of securing the proper adjudication of the claim.'" *Bradshaw*, 157 Ariz. at 418, 758 P.2d at 1320.

¶27 Restatement § 676, comment c, describes five potential scenarios in which malice may be found. One of those situations occurs when "the person bringing the civil proceeding is aware that his claim is not meritorious." Comment c to § 676 also notes that malice may be found where "the proceedings are begun primarily because of hostility or ill will." Here, the complaint alleged that Defendants, "intentionally, in reckless disregard for the law, without justification, [and] with the intent to cause Plaintiff Cain harm, consciously filed numerous pleadings and actions which they all knew would ultimately be unsuccessful." The complaint further alleged that Defendants, "[f]acing a [t]otal [l]oss on a \$1,120,000.00 title policy . . . concocted and executed a scheme to file multiple actions and appeals . . . in an attempt to financially and mentally break [Cain]" and that "instead of paying legitimate claims . . .

[Defendants] maliciously pursued" the underlying litigation against Cain.

¶128 Based on these allegations, as well as the allegations relating to lack of probable cause, Defendants could reasonably infer that Cain was asserting Defendants had initiated or continued their claims based on hostility and a desire to harm him—purposes that were not directed at securing the proper adjudication of the quiet title action. See *McClinton*, 76 Ariz. at 366-67, 265 P.2d at 430-31 (recognizing that lack of probable cause may give rise to an inference of malice). Accordingly, though generally stated, the allegations of the complaint include enough facts to put Defendants on notice as to the nature of the malice prong of the WICP claim they are facing. See *Long*, 89 Ariz. at 369, 362 P.2d at 743 ("If defendants deemed the notice in the complaint insufficient fairly to apprise them of the nature of plaintiff's claim, there are a variety of discovery and issue-sharpening procedures which could have been utilized for that purpose.").

II. Aiding and Abetting

¶129 Cain further alleged that Fidelity, Quarles, Snell, First American, and Cooper aided and abetted LLC, Raven, and Bingham in wrongfully instituting civil proceedings against Hodges and Cain. A claim for aiding and abetting tortious conduct requires proof of three elements: "(1) the primary

tortfeasor must commit a tort that causes injury to the plaintiff; (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach." *Wells Fargo Bank v. Ariz. Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 485, ¶ 34, 38 P.3d 12, 23 (2002) (citation omitted). Further, "aiding and abetting liability is based on proof of a scienter . . . the defendants must know that the conduct they are aiding and abetting is a tort." *Federico v. Maric*, 224 Ariz. 34, 36, ¶ 8, 226 P.3d 403, 405 (App. 2010).

¶30 As to the second requirement, the complaint fails to allege any facts indicating that when defendants Fidelity, Quarles, Snell, First American, and Cooper aided LLC, Raven, and Bingham, they knew that LLC, Raven, and Bingham were committing a tort. Instead, the complaint makes only conclusory allegations that Fidelity, Quarles, Snell, First American, and Cooper "aided and abetted" LLC, Raven, and Bingham. For example, in paragraph forty-nine of the complaint, Cain alleges "Defendant Bingham, and its attorney Defendant Cooper, under the direction and financing of FATCO *aided and abetted* by Defendant attorney Thiel[,]” wrongfully instituted civil proceedings against Cain. At no point in his complaint does Cain plead

facts suggesting that, at the time they committed the allegedly tortious conduct, Fidelity, Quarles, Snell, First American, or Cooper knew LLC, Raven, or Bingham was engaged in tortious conduct. Because Cain failed to plead sufficient facts to sustain a claim for aiding and abetting tortious conduct, we affirm the trial court's dismissal with respect to that claim.

III. Fraudulent Conveyance

¶31 Cain further alleged that Raven fraudulently conveyed the property to Bingham. Arizona law recognizes a tort claim for fraudulent conveyance under the Uniform Fraudulent Transfer Act ("UFTA"), A.R.S. §§ 44-1001 to -1011 (2003). However, Cain did not base his claim on the UFTA, but on A.R.S. § 44-1211, which provides "[a] person is guilty of a class 2 misdemeanor who . . . [i]s a party to any fraudulent conveyance of any lands" with the intent to defraud creditors or others. Cain alleged that Raven violated this statute by attempting to convey an interest in the property to Bingham while knowing of Cain's interest, thereby defrauding Bingham and subjecting Cain to increased litigation.

¶32 Section 44-1211 is a criminal statute. Cain has not cited, nor has our research revealed, any authority suggesting that it allows for a private right of action. Therefore, the trial court did not err in dismissing Cain's complaint as to this claim. Likewise, because Cain's complaint failed to

adequately allege a claim of fraudulent conveyance, his related aiding and abetting claim must also fail. See *Wells Fargo Bank*, 201 Ariz. at 485, ¶ 34, 38 P.3d at 23 (noting that one of the requirements for an aiding and abetting claim is that the primary tortfeasor actually commit "a tort that causes injury to the plaintiff.").

CONCLUSION

¶33 We affirm the trial court's orders dismissing Cain's claims of aiding and abetting, fraudulent conveyance, abuse of process, and intentional infliction of emotional distress. We reverse, however, the court's orders dismissing Cain's WICP claim and remand for further proceedings consistent with this decision.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Presiding Judge

_____/s/_____
JON W. THOMPSON, Judge