

DOCKET NO: LLI CV 09 5006417S : SUPERIOR COURT
CHARLOTTE HUNGERFORD HOSPITAL : JUDICIAL DISTRICT OF
LITCHFIELD
V. : AT LITCHFIELD
KEVIN E. CREED, ET AL : JANUARY 11, 2012

MEMORANDUM OF DECISION RE:

MOTIONS FOR SUMMARY JUDGMENT #134, #142

ISSUES:

The first issue before the court is whether to grant the plaintiff's motion for summary judgment on the ground that there is no genuine issue of material fact that the defendants lacked probable cause to bring the two lawsuits underlying the plaintiff's vexatious litigation claim. The second issue before the court is whether to grant the defendants' motion for summary judgment on the ground that there is no genuine issue of material fact that the defendants had probable cause to bring both of the lawsuits that form the basis of the plaintiff's vexatious litigation claim. The Court holds that the defendants' motion for summary judgment should be granted and the plaintiff's motion for summary judgment should be denied.

I

FACTS

On January 14, 2011, the plaintiff, Charlotte Hungerford Hospital ("CHH"), filed an amended complaint against the defendants, Kevin Creed, Newman Creed & Associates, Newman & Creed, LLC and William Plante, asserting vexatious litigation.¹ CHH's claim arises out of the

¹ The underlying basis for the vexatious litigation action is the allegedly tortious conduct of defendant Kevin Creed in commencing and prosecuting two medical malpractice actions against CHH. The remaining defendants are being sued under a theory of vicarious liability for

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commencement of two medical malpractice actions on behalf of defendant William Plante and the Estate of Joanne Plante.²

William Plante retained Kevin Creed for the purpose of commencing and prosecuting a civil action against CHH and other employees of CHH in connection with the death of Mr. Plante's wife, Joanne Plante. The first action was commenced on April 26, 2006, and alleged that Joanne Plante committed suicide as a result of the professional malpractice of CHH and its employees, including Karen Nash and Eleanor Stutz, M.D.³ Creed attached to the complaint a certificate of good faith but failed to attach a written opinion of a similar health care provider as required by General Statutes § 52-190a (a). On June 19, 2006, CHH filed a motion to dismiss for failure to attach the written opinion letter. Creed filed an objection to the motion to dismiss, representing to the court that he had, in fact, obtained an opinion letter but inadvertently failed to attach it the complaint. Attached to the objection was a certificate of good faith and an opinion letter, purportedly from an experienced and qualified health care professional in a similar field, supporting the cause of action. The opinion letter, however, was dated May 12, 2006, a date subsequent to the commencement of the first action. The opinion letter provided a review of Joanne Plante's hospital records and included the author's opinion that CHH committed

Creed's conduct.

² *Plante v. Charlotte Hungerford Hospital*, Superior Court, judicial district of Litchfield, Docket No. CV 06 5000587; *Plante v. Charlotte Hungerford Hospital*, Superior Court, judicial district of Litchfield, Docket No. CV 07 5001512.

³ Nash is a clinical social worker and Stutz is a psychiatrist. The initial complaint also named certain individual defendants, both emergency room physicians practicing at CHH. Those individual defendants as well as Nash and Stutz are not parties to CHH's action for vexatious litigation.

malpractice, but the opinion letter had the author's name redacted and did not contain the author's credentials.

CHH filed a reply to Creed's objection, "noting that the memorandum purporting to be a written opinion of a similar health care provider was dated subsequent to the date of the complaint and the expiration of the applicable statute of limitations on May 1, 2006. The reply also pointed out that 1) [Creed] never requested permission to extend the statute of limitations by 90 days, 2) the memorandum does not appear to have ever been signed, and 3) the memorandum contains no indicia that it was prepared by a physician of any description." *Plante v. Charlotte Hungerford Hospital*, Superior Court, judicial district of Litchfield, Docket No. CV 07 5001512 (April 16, 2009, *Pickard, J.*) (47 Conn. L. Rptr. 581). On August 9, 2006, Creed filed a response, arguing that the May 12, 2006 opinion letter was obtained in the middle of April, 2006 and had been mis-dated. Creed attached an affidavit from the author of the opinion letter attesting to the mistake in the date. The affidavit, however, had an entire paragraph redacted and the affiant's signature was also redacted.

On September 1, 2006, the court, *Alexander, J.*, granted CHH's motion to dismiss without a written opinion.

Thereafter, on December 29, 2006, a second medical malpractice action was filed against CHH. The second action alleged the same causes of action as did the first action, and was commenced pursuant to the accidental failure of suit statute, General Statutes § 52-592. In the second action, the complaint alleged that the statute of limitations was extended by one year on the ground that the first action had been dismissed due to a matter of form, i.e., the failure to

obtain a written opinion from a similar health care provider. A certificate of good faith and a written opinion letter, dated November 3, 2006, from a physician identified as a board certified psychiatrist, were attached to the complaint. The trial court, *Pickard, J.*, denied CHH's motion to dismiss and, subsequently, CHH's motion for summary judgment, in which CHH claimed that the second action was time barred under General Statutes §§ 52-555 and 52-584, as well as the doctrine of res judicata, because the action did not meet the criteria necessary to constitute an accidental failure of suit saved by General Statutes § 52-592 (a).

The second action proceeded to a bifurcated trial to first determine whether Mr. Plante could bring the action pursuant to the accidental failure of suit statute. The court heard testimony from Grace Williamson, the registered nurse who authored the opinion letter used in the first action, as well as Creed, himself. On April 14, 2009, the court, *Pickard, J.*, issued a judgment, concluding that Mr. Plante could not avail himself the accidental failure of suit statute and dismissing the action. The court concluded that the dismissal of the first action was not for a matter of form as contemplated by the accidental failure of suit statute. The court found that, as to CHH, Williamson was not qualified to render an opinion as to CHH's vicarious liability with respect to Nash or Stutz, or as to CHH's independent negligence for facility or staffing inadequacies. Our Supreme Court upheld the trial court's ruling.⁴

In the present case, CHH's complaint alleges that the defendants lacked probable cause to commence and continue the first action because (1) Creed did not obtain an opinion letter from a similar health care provider prior to filing the first action as required by General Statutes § 52-

⁴ *Plante v. Charlotte Hungerford Hospital*, 300 Conn. 33, 12 A.3d 885 (2011).

190a; (2) any attorney familiar with Connecticut law would not reasonably have believed that the person whom Creed consulted prior to filing the first action was a similar health care provider; and (3) Creed did not withdraw the first action when CHH filed its motion to dismiss but instead continued to prosecute the action without an opinion that complied with General Statutes § 52-190a.

Additionally, CHH's complaint alleges that the defendants lacked probable cause to commence and prosecute the second action because (1) the first action was commenced and prosecuted without probable cause to reasonably believe that General Statutes § 52-190a had been complied with; (2) the second action did not comply with the two-year statute of limitations in General Statutes § 52-555 (a); and (3) an attorney familiar with Connecticut law would not reasonably have believed that the statute of limitations was extended by General Statutes § 52-592 on the ground that the dismissal of the first action was due to a matter of form within the meaning of General Statutes § 52-592.

On February 15, 2011, CHH filed a motion for summary judgment against all defendants along with a supporting memorandum of law and evidentiary support. Defendants Creed, Newman & Creed Associates, and Newman & Creed, LLC filed a memorandum of law in opposition along with evidentiary support. Defendant Plante did not file an opposition. Thereafter, on May 13, 2011, CHH filed a reply memorandum, followed by a surreply from defendants Creed, Newman & Creed Associates, and Newman & Creed, LLC on December 7, 2011.

On March 31, 2011, defendants Creed, Newman & Creed Associates, and Newman &

Creed, LLC filed a motion for summary judgment along with a supporting memorandum of law and evidentiary support.⁵ On May 16, 2011, CHH filed a memorandum of law in opposition. Creed, Newman & Creed Associates, and Newman & Creed, LLC (hereinafter, “the defendants”) filed a reply on December 7, 2011.

The matter was heard on the December 12, 2011 short calendar. At that time, the parties agreed that the court could treat their motions as cross-motions for summary judgment.

II

DISCUSSION

A

Summary Judgment Standard

“Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party.” (Internal quotation marks omitted.) *Sherman v. Ronco*, 294 Conn. 548, 553-54, 985 A.2d 1042 (2010). “[T]he ‘genuine issue’ aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference

⁵ Defendant Plante is represented by separate counsel and is not a party to the defendants’ motion for summary judgment.

in the result of the case.” (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc. v. Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002).

“In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45].” (Internal quotation marks omitted.) *Ramirez v. Health Net of the Northeast, Inc.*, 285 Conn. 1, 10-11, 938 A.2d 576 (2008).

B

Analysis

“The cause of action for vexatious litigation permits a party who has been wrongfully sued to recover damages.” *Bernhard-Thomas Building Systems, LLC v. Dunican*, 286 Conn. 548, 553, 944 A.2d 329 (2008). “Vexatious litigation requires a plaintiff to establish that (1) the previous lawsuit or action was initiated or procured by the defendant against the plaintiff; (2) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice; (3) the defendant acted without probable cause; and (4) the proceeding terminated in the plaintiff’s favor.” (Internal quotation marks omitted.) *Norberg v. Hurlburt*, Superior Court, judicial district of Litchfield, Docket No. CV 11 5007329 (October 25, 2011, *Pickard, J.*).⁶

CHH moves for summary judgment on the grounds that (1) Creed is collaterally estopped from denying that he lacked probable cause to commence and prosecute the two medical malpractice actions against CHH that are the basis of CHH’s vexatious litigation claim; (2) even if collateral estoppel does not apply, there is no genuine issue of material fact that Creed lacked probable cause to commence and prosecute the two medical malpractice actions; and (3) there is no genuine issue of material fact that the remaining defendants are vicariously liable for Creed’s tortious conduct.

The defendants object and also move for summary judgment on the grounds that there are

⁶ CHH brought a statutory cause of action for vexatious litigation under General Statutes § 52-568. “[T]he statutory cause of action for vexatious litigation . . . differs from the common-law action only in that a finding of malice is not an essential element but will serve as a basis for higher damages.” (Internal quotation marks omitted.) *Norberg v. Hurlburt*, *supra*, Superior Court, Docket No. CV 11 5007329.

no genuine issues of material fact, that collateral estoppel does not apply and that Creed did have probable cause to commence and prosecute the two medical malpractice actions.

1

Collateral Estoppel

CHH first moves for summary judgment on the ground that Creed is collaterally estopped from denying that he lacked probable cause to commence and prosecute the two medical malpractice actions against CHH that are the basis of CHH's vexatious litigation claim.

"Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. . . . To assert successfully the doctrine of issue preclusion, therefore, a party must establish that the issue sought to be foreclosed actually was litigated and determined in the prior action between the parties or their privies, and that the determination was essential to the decision in the prior case." (Internal quotation marks omitted.) *Wiacek Farms, LLC v. Shelton*, 132 Conn. App. 163, 168, 30 A.3d 27 (2011).

CHH claims that the issue of probable cause was fully and fairly litigated in both underlying actions. Concerning the first action, CHH argues that the court, in dismissing the first action for failure to attach a written opinion of a similar health care provider, must necessarily have determined that there was no probable cause to bring that action, and thus, probable cause was fully and fairly litigated. As to the second action, CHH contends that, in finding that the failure to attach the written opinion letter was not a matter of form, and in prohibiting those plaintiffs from taking advantage of the extension of the statute of limitations permitted by the

accidental failure of suit statute, the court determined that Creed lacked probable cause to bring the second action. CHH argues that probable cause was litigated because the court had to find that no reasonable attorney familiar with Connecticut law would have believed that an egregious violation of General Statutes § 52-190a, which resulted in dismissal of the first action, was merely the result of mistake, inadvertence or excusable neglect such that the statute of limitations was extended by the accidental failure of suit statute.

The court finds that the issue of probable cause was not fully and fairly litigated in either the first or second actions. Under a collateral estoppel analysis, “[a]n issue is *actually litigated* if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered.” (Emphasis in original; internal quotation marks omitted.) *Wiacek Farms, LLC v. Shelton*, supra, 132 Conn. App. 168-69.

“Before collateral estoppel applies there must be an identity of issues between the prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding. . . . [T]he court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding. . . . Simply put, collateral estoppel has no application in the absence of an identical issue. . . . Further, [t]he [party seeking estoppel] has the burden of showing that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.” (Citations omitted; internal quotation marks omitted.) *Id.*, 169-70.

“For purposes of a vexatious suit action, [t]he legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. . . . Thus, in the context of a vexatious suit action, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted.” (Internal quotation marks omitted.) *Ancona v. Manafort Bros., Inc.*, 56 Conn. App. 701, 709, 746 A.2d 184 (2000); see *Byrne v. Burke*, 112 Conn. App. 262, 275, 962 A.2d 825 (2009) (“whether on the basis of the facts known by the law firm, a reasonable attorney familiar with Connecticut law would believe he or she had probable cause to bring the lawsuit”).

General Statutes § 52-190a (a) provides in relevant part that in a civil action “in which it is alleged that . . . injury . . . resulted from the negligence of a health care provider . . . the attorney or party filing the action . . . [must make] a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. . . . To show the existence of such good faith, the claimant or the claimant’s attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in [General Statutes §] 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion.”

“[T]he attachment of a written opinion letter that does not comply with [General Statutes] § 52-190a, constitutes insufficient process and, thus, service of that insufficient process does not

subject the defendant to the jurisdiction of the court.” *Morgan v. Hartford Hospital*, 301 Conn. 388, 401, 21 A.3d 451 (2011). “Failure to comply with the statutory requirements of service renders a complaint subject to a motion to dismiss on the ground of lack of personal jurisdiction.” *Id.* “[T]he legislature envisioned the dismissal as being without prejudice . . . and even if the statute of limitations has run, relief may well be available under the accidental failure of suit statute” (Internal quotation marks omitted.) *Id.*, 398. “[T]he written opinion letter . . . [involves] a matter of form whose deficiencies, at least in the case of simple mistake or omission, could be remedied by the failure of form provisions of the accidental failure of suit statute.” (Citation omitted.) *Id.*, 400.

Although “the purpose of [General Statutes] § 52-190a . . . is to screen out frivolous medical malpractice actions;” *Bennett v. New Milford Hospital, Inc.*, 300 Conn. 1, 31, 12 A.3d 865 (2011); a court’s decision to dismiss an action for failure to comply with General Statutes § 52-190a is a dismissal based on the insufficiency of service of process. “A ruling on a motion to dismiss is neither a ruling on the merits of the action . . . nor a test of whether the complaint states a cause of action.” (Internal quotation marks omitted.) *Dime Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Superior Court, complex litigation docket at Stamford-Norwalk, Docket No. X05 CV 09 4017091 (January 15, 2010, *Blawie, J.*). It may be that an inquiry into the sufficiency of the opinion letter overlaps with an inquiry into the merits of the action. “Our Supreme Court has held, however, that an overlap in issues does not necessitate a finding of identity of issues for the purposes of collateral estoppel. . . . [T]he linchpin of collateral estoppel is the identity of the issues decided by both tribunals Because [our Supreme Court] [has] recognized that applying the doctrine of collateral estoppel has harsh consequences, namely,

cutting off a party's right to future litigation on a given issue, [it] [has] been reluctant to uphold the invocation of the doctrine unless the issues are completely identical." (Internal quotation marks omitted.) *Wiacek Farms, LLC v. Shelton*, supra, 132 Conn. App. 172. Thus, in the present case, foreclosing the defendants' right to assert that probable cause existed to institute the first action is inappropriate because the issue of whether probable cause existed is not identical to the issue of whether the action should have been dismissed for failure to comply with the requirements of General Statutes § 52-190a.

Likewise, the issue of whether the defendants had probable cause to institute the second action under the accidental failure of suit statute requires a broader inquiry into all the facts known by the defendants at the time the second action was filed, and whether a reasonable attorney familiar with Connecticut law would believe, based on those facts, that probable cause existed to bring the lawsuit under General Statutes § 52-592 (a). See *Byrne v. Burke*, supra, 112 Conn. App. 275. A narrow focus only on the sufficiency of the written opinion letter is inappropriate. Although there may be some overlap in the facts relevant to these issues, they are, nonetheless, not identical, and the defendants should not be precluded from asserting that probable cause existed to bring the second action.

As the issue of probable cause was not fully and fairly litigated in the underlying actions, the defendants are not collaterally estopped from asserting that they had probable cause to bring the first and second actions.

“[T]he existence of probable cause is an absolute protection against an action for [vexatious litigation], and what facts, and whether particular facts, constitute probable cause is always a question of law.” (Internal quotation marks omitted.) *Byrne v. Burke*, supra, 112 Conn. App. 275.

“Our Supreme Court . . . had the opportunity to consider whether a higher legal standard of probable cause should be applied to attorneys and law firms sued for vexatious litigation. . . . After considering the statute and the competing policy interests, the court concluded that a higher standard should not apply. . . . Instead, in assessing probable cause, the court phrased the critical question as whether on the basis of the facts known by the law firm, a reasonable attorney familiar with Connecticut law would believe he or she had probable cause to bring the lawsuit. . . . As is implied by its phrasing, the standard is an objective one that is necessarily dependent on what the attorney knew when he or she initiated the lawsuit. . . . Further, the court warned that [p]robable cause may be present even where a suit lacks merit. [Although] [f]avorable termination of the suit often establishes lack of merit . . . the plaintiff in [vexatious litigation] must separately show lack of probable cause.” (Internal quotation marks omitted.) *Id.*⁷

The following additional facts are relevant to the discussion. The underlying actions alleged that, on April 30, 2004, Joanne Plante voluntarily brought herself to CHH, complaining, primarily, of moderate to severe depression. Mrs. Plante had a history of psychiatric problems

⁷ Our Appellate Court “has noted the restraint with which such claims will be recognized: ‘Counsel should . . . be aware that despite the increasing frequency with which resort is had to a malicious prosecution suit, it has been noted that few plaintiffs have been successful in malicious prosecution actions against their former adversary’s attorneys.’” (Internal quotation marks omitted.) *Hebrew Home & Hospital, Inc. v. Brewer*, 92 Conn. App. 762, 768 n.8, 886 A.2d 1248 (2005) citing *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP*, 89 Conn. App. 459, 469 n.6, 874 A.2d 266 (2005).

and depression. On May 1, 2004, after eighteen hours of observation and evaluation, Mrs. Plante was given a prescription and discharged. Mrs. Plante refused to sign the discharge papers and requested to be admitted to CHH. Nonetheless, Mrs. Plante was discharged and told that, if she need to, she could return to the emergency room on May 3, 2004. On May 3, 2004, Mrs. Plante was found deceased in her home with a suicide note nearby. The medical examiner's report concluded that Mrs. Plante died of multiple drug toxicity.

In the first action, Grace Williamson was the author of the written opinion letter, which was not attached to the complaint but was attached to the objection to the motion to dismiss. Williamson's name, however, was redacted from the opinion letter and the opinion letter did not contain Williamson's credentials. Without a written decision, the court, *Alexander, J.*, dismissed the first action for failure to comply with General Statutes § 52-190a.

In the second action, the court bifurcated the trial to determine, first, whether the accidental failure of suit statute applied to extend the statute of limitations. The court heard testimony from Grace Williamson, as well as Creed, himself, concerning, inter alia, Williamson's qualifications. The court, *Pickard, J.*, concluded that Williamson did not constitute a similar health care provider and was not qualified to render an opinion concerning the alleged malpractice of CHH. The court noted that Williamson "is a registered nurse who retired in 2002. Her formal medical training consists of a three-year nursing degree obtained in 1960. Her experience in psychiatric nursing consists of [three] months at a hospital in 1960. She has never evaluated a potentially suicidal patient. She last worked in a general hospital in 1979 and in an emergency room in 1974. For the [twenty-two] years prior to her retirement, she worked in a nursing home and rehabilitation facility." *Plante v. Charlotte Hungerford Hospital*, Superior

Court, judicial district of Litchfield, Docket No. CV 07 5001512 (April 16, 2009, *Pickard, J.*) (47 Conn. L. Rptr. 581), *aff'd*, 300 Conn. 33, 12 A.3d 885 (2011).

The court explained that “Nurse Williamson is not a physician. There is no way that anyone could argue that Nurse Williamson is a ‘similar health care provider’ with respect to Dr. Stutz. . . . As to Karen Nash . . . Nurse Williamson is not licensed as a social worker, nor was she trained in the same discipline, nor was she active in the practice or teaching of crisis work No persuasive argument can be made that Nurse Williamson is a similar health care provider with respect to Karen Nash. . . . In addition, Nurse Williamson is not qualified to render an opinion concerning the alleged malpractice of the hospital. . . . [S]he is not a similar health care provider to Dr. Stutz or Ms. Nash. Therefore, she is not able to express an opinion which would support the potential vicarious liability of the hospital for the actions of Eleanor Stutz or Karen Nash. Furthermore, Nurse Williamson is not qualified in any way to render an opinion about the alleged independent negligence of the hospital for facility or staffing inadequacies.” *Id.*

The court held that “the dismissal of the first action cannot be found to be a matter of form. The decision to engage Nurse Williamson to review the file and to provide a written opinion of negligence is inexplicable. Even a cursory reading of [General Statutes] § 52-190a would have revealed that Nurse Williamson did not qualify as a similar health care provider. [General Statutes] § 52-592 is designed to aid the diligent suitor. . . . The plaintiff’s lack of diligence in selecting an appropriate person or persons to review the case for malpractice can only be characterized as blatant and egregious conduct which was never intended to be condoned and sanctioned by the ‘matter of form’ provision of [General Statutes] § 52-592.” (Citation omitted.) *Plante v. Charlotte Hungerford Hospital*, *supra*, 47 Conn. L. Rptr. 581.

(a)

First Action

CHH asserts that there is no genuine issue of material fact that the defendants lacked probable cause to bring the first action because the facts known to Creed demonstrate that an objectively reasonable attorney would not have believed that Williamson was a similar health care provider such that an opinion from Williamson would satisfy the requirements of General Statutes § 52-190a. The defendants, on the other hand, argue that there is no genuine issue of material fact that they did have probable cause to bring the first action and that CHH improperly assumes that an insufficient opinion letter equates to a lack of probable cause. The defendants contend that the opinion letter of a similar health care provider is just one factor in determining whether there was probable cause to believe that the claim for medical malpractice was viable. According to the defendants, Creed's pre-complaint inquiry demonstrates that probable cause existed to institute the first action.

"[W]e must be ever mindful that an attorney's role is to facilitate access to our judicial system for any person seeking legal relief. As such, probable cause is not to be judged merely upon some personal assessment of a claim's merit. It must encompass consideration of the law's desire to fully meet the client's needs. While an attorney is under an ethical duty to avoid suit where its only purpose is to harass or injure, *if a balance must be struck between the desire of an adversary to be free from unwarranted accusations and the need of the client for undivided loyalty, the client's interests must be paramount.* . . . [T]he very nature of our adversary system of law mandates that the most useful and meaningful tests in this area must be derived from an attorney's ethical and professional obligations to his client. . . .

“We thus emphasize that any standard of probable cause must insure that the attorney’s duty to his client to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit is preserved. . . . Mere negligence in asserting a claim is not sufficient to subject an attorney to liability for the bringing of suit. As [one] court . . . astutely observed, [t]o create liability only for negligence, for the bringing of a weak case, would be to destroy his efficacy as advocate of his client and his value to the court, since only the rare attorney would have the courage to take other than the easy case. . . .

“We recognize that through an effort to protect every citizen’s free access to the courts some innocent persons may suffer the publicity, expense and other burdens of defending ill-founded lawsuits. While this is regrettable, the chilling effect that a broad rule of attorney liability would have upon the legal system, and ultimately upon its popular acceptance as a means of dispute resolution, appears to outweigh the value of the protection it would afford to those who might be deemed innocent defendants.” (Emphasis in original; internal quotation marks omitted.) *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP*, 89 Conn. App. 459, 470-71, 874 A.2d 266 (2005).

“[R]easonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which *all* reasonable lawyers agree totally lack merit – that is, those which lack probable cause – are the least meritorious of all meritless suits. Only this subgroup of meritless suits present no probable cause. . . . This lenient standard for bringing a civil action reflects the important public policy of avoiding the chilling of novel or debatable legal claims and allows attorneys and litigants to present issues that are arguably correct, even if

it is extremely unlikely that they will win.” (Citation omitted; emphasis in original; internal quotation marks omitted.) *Id.*, 474.

“[A]n attorney’s subjective belief in the tenability of a claim and the extent of an attorney’s investigation and research have no place in determining the existence of probable cause in a vexatious litigation action against an attorney . . . the presence or absence of probable cause should be judged by an objective standard.”⁸ *Id.*, 473. “The question of probable cause relates to the initial question of whether the elements of the prima facie case are met.” *Hebrew Home & Hospital, Inc. v. Brewer*, 92 Conn. App. 762, 771, 886 A.2d 1248 (2005). “Resolving the question of probable cause, then, requires [the court] to determine (1) the facts known to the law firm at the time that it filed suit . . . and (2) whether, with knowledge of those facts, a reasonable attorney familiar with Connecticut law would believe that he or she had probable cause to bring suit” *Embalmers’ Supply Co. v. Giannitti*, 103 Conn. App. 20, 35, 929 A.2d 729 (2007).

⁸ It is worth noting that in *Plante v. Charlotte Hungerford Hospital*, *supra*, 300 Conn. 54, our Supreme Court stated that “the legislature, by requiring a comprehensive prelitigation inquiry, including the provision of an opinion letter by an objectively qualified health care professional in an attempt to reduce the filing of frivolous medical malpractice actions . . . has in effect made the prelitigation inquiry pursuant to § 52-190a (a) a significant aspect of the medical malpractice action. This is particularly so given that: (1) § 52-190a (a) requires that the opinion letter be attached to the complaint; and (2) § 52-190a (c) mandates the dismissal of cases commenced without adequate prelitigation investigations. . . . Thus, the diligence inquiry under § 52-592 (a) is equally applicable to an attorney’s prelitigation investigation of a medical malpractice case pursuant to § 52-190a (a).” (Citations omitted.) Nonetheless, in determining the existence of probable cause in a vexatious litigation action against an attorney where the underlying case was a medical malpractice action, the extent of the attorney’s prelitigation inquiry is not a determining factor. Rather, an attorney’s prelitigation inquiry may be relevant to the extent that it relates to a determination of whether the prima facie elements of a medical malpractice action are met.

“[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury.” (Internal quotation marks omitted.) *Boone v. William W. Backus Hospital*, 272 Conn. 551, 567, 864 A.2d 1 (2005).

In asserting that the court can find a lack of probable cause based solely on the insufficiency of the written opinion letter, CHH defines the scope of the court’s inquiry too narrowly. In fact, our Supreme Court has concluded “that the phrase ‘medical negligence,’ as used in [General Statutes] § 52-190a (a), means breach of the standard of care and was not intended to encompass all of the elements of a cause of action for negligence.” *Dias v. Grady*, 292 Conn. 350, 359, 972 A.2d 715 (2009). Therefore, “in order to fulfill the requirement of § 52-190a (a) and to provide assurance that there appears to be evidence of medical negligence, a claimant’s written opinion from a similar health care provider need not address the issue of causation.” (Internal quotation marks omitted.) *Wilcox v. Schwartz*, 119 Conn. App. 808, 815, 990 A.2d 366, cert. granted, 296 Conn. 908, 993 A.2d 469 (2010). Thus, this court must look beyond the sufficiency of the written opinion letter to determine whether Creed had probable cause to institute the first action.

In his affidavit, Creed attests that, prior to commencing suit, he undertook an investigation which revealed the following relevant facts:

- (a) Mrs. Plante voluntarily brought herself to CHH on April 30, 2004, at 4:44 p.m.;
- (b) At the time of intake, Mrs. Plante was weak, speaking in low mumbling voices and had a high level of stress;
- (c) Her chief complaint was moderate to severe depression, having a depressed “affect”

and was tearful;

(d) She had a history of psychiatric problems and depression;

(e) Mrs. Plante was observed in the emergency room for approximately eighteen hours, but was never admitted to the hospital;

(f) Mrs. Plante was primarily evaluated and treated by Karen Nash, who Creed believed was an unlicensed social worker, but who Creed later learned was a licensed social worker who worked in the hospital once a month and at all other times performed mostly administrative work;

(g) Dr. Stutz never saw Mrs. Plante, but relied on the representation of Karen Nash to diagnose the nature of her condition and to order additional medication;

(h) During observation and evaluation of Mrs. Plante by Karen Nash, it was noted that Mrs. Plante had increased stress, increased depression and multiple somatic complaints. Mrs. Plante complained that she was overwhelmed by her children and had DCF put them in foster care. She described that she had recently separated from her husband. She complained of an inability to sleep and decreased appetite. Mrs. Plante was diagnosed as positive for paranoia and described as very hopeless. She asked to be medically admitted to the hospital;

(i) The emergency room records revealed that Mrs. Plante was diagnosed as psychotic, depressive, with high anxiety, positive for paranoia with psychosis developed to a point where she was losing contact with reality;

(j) On May 4, 2004, prior to her discharge, Mrs. Plante was acting intense, overwhelmed and complaining of depression. She reported decreased sleep, an inability to concentrate, decreased energy, increased confusion, a poor memory, feelings of weakness and a decreased

appetite. She was described as having delusional thoughts;

(k) At least two years prior to this incident, Mrs. Plante had been treating with the Behavioral Health Center at CHH. Sixteen months prior to her death, Mrs. Plante had received prescriptions for numerous medications including sedatives, sleeping pills, anti-anxiety drugs, and psychotropic drugs, including Trazodone. The records further indicated that Mrs. Plante had trouble complying with her regime of prescription medications;

(l) Mrs. Plante's prescriptions, including Trazodone, were increased at CHH and she was then released;

(m) Prior to her release, Mrs. Plante asked to be admitted to the hospital but was denied admission. She refused to sign the discharge form. The discharge form reveals an entry that 'patient refuses to sign.' Someone later crossed this entry out and her name was written next to it;

(n) She was ultimately released by treatment providers at CHH and was told by those treatment providers to call for an appointment with the Behavioral Health Center in two days and to see Dr. Stutz on May 4, 2004;

(o) Subsequently, on May 3, 2004, Mrs. Plante committed suicide by ingesting the very drugs prescribed to her by the hospital. She was found at her home with the empty pill bottles of those prescriptions provided to her and a suicide note;

(p) In the note, Mrs. Plante wrote "I love my children more than anything in the world. I don't want to go on without them. I told the worker at the hospital this but they said there wasn't any bed and discharged me. That's why I did not want to sign the discharge papers.";

(q) The warning signs associated with Trazodone include suicide with feelings of hopelessness, loss of appetite, withdrawing from family and friends, and a change in sleeping

habits; and

(r) The drugs prescribed for Mrs. Plante, including the Ativan and Trazodone, include warnings that an individual taking those drugs may experience suicidal ideation and should be monitored closely while taking those drugs for symptoms of depression and suicide.

CHH submitted excerpts from Creed's deposition as well as the transcript from the bifurcated trial in the second action. These exhibits focus primarily on Nurse Williamson's qualifications to author the written opinion letter, as well as on how Creed went about obtaining the opinion letter from Williamson. This evidence, however, sheds little light on the facts known to Creed at the time he instituted the first action and which formed the basis for the substantive allegations in the complaint. The trial transcript does, however, include testimony from Creed supporting the facts set forth in Creed's affidavit.

This court cannot say that the facts and evidence available to the defendants at the time the first action was instituted were such that no reasonable attorney would have found the claim worthy of litigation. Thus, this court finds that the defendants had probable cause to institute the first action.

(b)

Second Action

"[A] plaintiff may bring a subsequent medical malpractice action pursuant to the matter of form provision of [General Statutes] § 52-592 (a) only when the trial court finds as a matter of fact that the failure in the first action to provide an opinion letter that satisfies [General Statutes] § 52-190a (a) was the result of mistake, inadvertence or excusable neglect, rather than egregious conduct or gross negligence on the part of the plaintiff or his attorney." *Plante v. Charlotte*

Hungerford Hospital, 300 Conn. 33, 56, 12 A.3d 885 (2011).

CHH asserts that there is no genuine issue of material fact that the defendants lacked probable cause to bring the second action because the facts known to the defendants demonstrate that an objectively reasonable attorney would not have believed that the termination of the first action was merely a 'matter of form' within the meaning of the accidental failure of suit statute. According to CHH, "Judge Pickard's conclusion that Creed's conduct in filing the first action was 'blatant and egregious' necessarily means that 'a reasonable attorney familiar with Connecticut law' would not have believed that an egregious violation of General Statutes § 52-190a that resulted in dismissal of the first action was merely the result of 'mistake, inadvertence, or excusable neglect' such that the statute of limitations was extended by [the accidental failure of suit statute]." In contrast, the defendants argue that Creed did have probable cause for believing that the first action was dismissed as a matter of form and that the statute of limitations was extended by the accidental failure of suit statute.

"Whether [General Statutes § 52-592] applies cannot be decided in a factual vacuum. To enable a plaintiff to meet the burden of establishing the right to avail himself or herself of the statute, a plaintiff must be afforded an opportunity to make a factual showing that the prior dismissal was a 'matter of form' in the sense that the plaintiff's noncompliance with a court order occurred in circumstances such as mistake, inadvertence or excusable neglect." *Ruddock v. Burrowes*, 243 Conn. 569, 576-77, 706 A.2d 967 (1998); see *Stevenson v. Peerless Industries, Inc.*, 72 Conn. App. 601, 607, 806 A.2d 567 (2002) quoting *Ruddock v. Burrowes*, supra.

"[T]he objective standard which should govern the reasonableness of an attorney's action in instituting litigation for a client is whether the claim merits litigation against the defendant in

question on the basis of the facts known to the attorney when suit is commenced. The question is answered by determining that *no* competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney who instituted suit.” (Emphasis in original; internal quotation marks omitted.)

Hebrew Home & Hospital, Inc. v. Brewer, supra, 92 Conn. App. 768.

It has already been determined that Creed had probable cause to bring the first action. The second action asserted the same causes of action as the first. The issue that this court must resolve is whether, on the basis of the facts known by Creed, no competent and reasonable attorney familiar with Connecticut law would consider bringing the second action pursuant to the accidental failure of suit statute.

Because the first action was dismissed without a written decision, the court held a bifurcated trial in the second action to determine the proper characterization of the dismissal. CHH argues that Creed should have known that, based on the dismissal of the first action, his conduct in attaching the written opinion by Williamson was blatant and egregious. CHH fails to acknowledge, however, that it was not until after the bifurcated trial that the court determined that Creed’s conduct in the first action was blatant and egregious. Thus, at the time Creed instituted the second action, no court had expounded on the nature of the dismissal, beyond the ground alleged in CHH’s motion to dismiss, i.e., the failure to attach a written opinion letter.

Moreover, our Supreme Court, in reviewing the judgment of the trial court dismissing the second action, noted that “whether dismissal for the failure to supply an opinion letter authored by a similar health care provider is a matter of form subject to being saved by the accidental

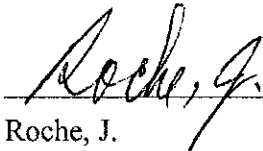
failure of suit statute, § 52-592 (a) . . . presents an issue of first impression for this court.” *Plante v. Charlotte Hungerford Hospital*, supra, 300 Conn. 49. Our Supreme Court began its analysis “with the threshold determination that § 52-592 (a) is ambiguous about what constitutes a matter of form” *Id.*

In his affidavit, in addition to the facts already noted, Creed attests that in bringing the second action, “[he] believed that based on the facts and the law that existed at the time, the first action was dismissed as a matter of form.” As previously noted, CHH submitted the transcript from the bifurcated trial as well as excerpts from Creed’s deposition. Neither piece of evidentiary support provides insight into whether, after the dismissal of a first action for failure to comply with General Statutes § 52-190a and absent a written decision providing any characterization of that failure, a competent and reasonable attorney familiar with Connecticut law would consider bringing the second action pursuant to the accidental failure of suit statute.

Given that a plaintiff must be afforded the opportunity to make a factual showing that the prior dismissal was a matter of form, that there was no characterization of the first dismissal by the court, and the state of our law at the time the second action was instituted, this court, once again, cannot say that no reasonable attorney would have instituted the second action pursuant to the accidental failure of suit statute. Accordingly, there is no genuine issue of material fact as to whether Creed had probable cause to institute the second action. Therefore, Charlotte Hungerford Hospital’s Motion For Summary Judgment is hereby denied.

The defendants' Cross Motion For Summary Judgment in effect says that the defendants did have probable cause to proceed with the underlying action in spite of certain procedural flaws. Therefore, the only conclusion left for the Court to draw is that Charlotte Hungerford Hospital's cause of action is lacking a key element, i.e., probable cause, in their basic claim of vexatious litigation. Therefore, the defendants' position reflected in their Motion For Summary Judgment prevails and their Motion For Summary Judgment is hereby granted.

BY THE COURT,



Roche, J.