Appeal No. XXX

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
NINTH APPELLATE DISTRICT

JOHN SMITH,
Plaintiff, Cross-Defendant, and Appellant,

vs.

DEFCO, LLC, et al.,
Defendants, Cross-Complainants, and Respondents.

APPEAL FROM THE JUDGMENT OF THE
REDWOOD COUNTY SUPERIOR COURT
THE HONORABLE ABLE JURIST, JUDGE
SUPERIOR COURT NO. XXXXXXX

APPELLANT'S OPENING BRIEF

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, Rule 8.208

No other person or entity has a financial or other interest in the outcome of this proceeding.

I declare under penalty of perjury under California law that the foregoing is true and correct.

Dated:

_____

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ISSUE PRESENTED

A cause of action for malicious prosecution requires proof that the underlying matter was resolved in the plaintiff's favor. But as a matter of law, evidence about a claim for unemployment benefits cannot be admitted in any later proceeding. Without that evidence, the plaintiff cannot possibly prove that the underlying matter terminated in its favor. Thus, the probability that a plaintiff will prevail on a cause of action for malicious prosecution of an unemployment claim is zero.

Should the trial court therefore have granted appellant John Smith's special motion to strike the cause of action for malicious prosecution of respondent Defco, LLC's cross-complaint?

STATEMENT OF THE CASE

1. Facts

Appellant John Smith filed for unemployment benefits following what he believed was his dismissal without cause from respondent Defco, LLC ("Defco"). His claim was approved, and that decision was upheld by the Administrative Law Judge ("ALJ") who heard Defco's appeal. Defco then appealed to the California Unemployment Insurance Appeals Board ("the Board"), which found that Smith had not been dismissed, but had voluntarily quit. The Board therefore held that Smith was not entitled to benefits.

Every year, millions of Californians file a claim for unemployment benefits with the Employment Development Department ("EDD"). A worker or the worker's former employer may appeal the initial decision to grant or deny the worker benefits. Although an ALJ determines the vast

majority of appeals, about 8% of those cases are referred to and ultimately decided by the Board. For example, in 2011, ALJs heard about 467,000 appeals; the Board heard more than 36,000 appeals from ALJs' decisions. http://www.cuiab.ca.gov/WhoIs/whoIsMore.shtm. The Board's decision is usually the final determination.

2. Nature of the Action and Relief Sought

After the Board's denial of his benefits claim, Smith sued Defco in superior court, claiming, among other things, wrongful termination. Defco cross-complained, alleging in part a claim for malicious prosecution because the Board had ruled that Smith was not entitled to unemployment benefits. Appellant's Appendix ("AA") _____. Smith brought a special motion to strike under Code of Civil Procedure § 425.16 in response to the malicious prosecution claim. AA _____.

Smith seeks relief from the trial court's denial of his special motion to strike, including an order from this Court requiring the trial court to grant his motion and to determine an award to Smith of attorney fees and costs, including those incurred in bringing this appeal.

STATEMENT OF APPEALABILITY

Code of Civil Procedure § 904.1(13) permits appeal from an order denying a special motion to strike. The order denying Smith's motion was filed on _____ AA __. Timely notice of appeal was filed on _____ AA __.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the denial of a special motion to strike under Code of Civil Procedure § 425.16, the standard of review is de novo. *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103.

ARGUMENT

1. Code of Civil Procedure § 425.16 protects defendants' exercise of their constitutional rights to petition for relief.

Section § 425.16 authorizes the filing of a special motion to strike an entire action or an individual cause of action that qualifies as a "Strategic Lawsuit Against Public Policy" or "SLAPP"—i.e., an action brought for the sole purpose of chilling a defendant's rights to either petition for relief or to exercise rights of free speech.

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
>
> § 425.16(b)(1).

The statute encourages participation in matters of public significance by allowing a court to promptly dismiss claims brought to chill another's valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.

2. An action for malicious prosecution is subject to a special motion to strike under Code of Civil Procedure § 425.16.

"The anti-SLAPP statute is not ambiguous with respect to whether its protection of 'any act' furthering protected rights encompasses suing for malicious prosecution." *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 742. The anti-SLAPP statute is to be construed broadly. § 425.16(a); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1130.

3. In ruling on a § 425.16 motion, the court applies a two-prong test.

First, the defendant must show that the cause of action arose from protected activity, i.e., activity in furtherance of the defendant's constitutional right of petition or free speech. § 425.16(b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67. A defendant meets this threshold burden by showing that the acts underlying the claim fit the categories described in § 425.16(e). *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.

An "act in furtherance of a person's right of petition or free speech" includes, among other things,

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . .
>
> Code Civ. Proc. § 425.16(e).

Communications leading to an official proceeding fall within the ambit of these subdivisions and need not pertain to an issue of public interest. *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.

Second, once the defendant has made a prima facie showing that the plaintiff's suit is subject to § 425.16, the burden shifts to the plaintiff to show, by admissible and competent evidence, a reasonable probability of prevailing on the merits at trial. § 425.16(b)(1); *Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at 733. The plaintiff must make a prima facie showing of facts that would be sufficient to sustain a favorable judgment under the applicable evidentiary standard. *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 358.

In deciding the question of potential merit, the court considers both the plaintiff's and the defendant's pleadings and evidentiary submissions. § 425.16(b)(2). Although the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. *Taus v. Loftus* (2007) 40 Cal.4th 683, 714.

A. Prong One: Smith's application for benefits was a petition under § 425.16.

A claim for unemployment benefits is an "other official proceeding authorized by law" under § 425.16. Thus Smith's application, the appeals and oppositions, and any statements made at the hearings or in correspondence related to the application and hearings are all protected speech under

the statute. *Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 850 (employer's statements in EDD proceeding subject to motion to strike under § 425.16).

The trial court correctly held that Smith had met this test: "Here the first step of the inquiry is not disputed." AA _____.

B. Prong Two: Defco must prove a probability of prevailing on its cause of action for malicious prosecution.

To prevail on its malicious prosecution claim, Defco must show that it was the prevailing party in an underlying action that was brought without merit.

> [T]o establish a cause of action for malicious prosecution of either a criminal or civil proceeding, a plaintiff must demonstrate "that the prior action (1) was commenced by or at the direction of the defendant ***and was pursued to a legal termination in his, plaintiff's, favor***; (2) was brought without probable cause; and (3) was initiated with malice."
>
> *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872, citing *Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 50 (emphasis added, citations omitted).

The trial court here denied the motion, finding that "Defco has presented sufficient evidence to show a probability of success on the merits of its malicious prosecution claim." AA _____, citing the declaration of Defco's owner and exhibits from the Board hearing. See AA _____.

But none of the evidence Defco presented in opposition to Smith's motion was admissible.

4. The Board's findings of fact and decision are inadmissible as evidence in *any* later action.

As a matter of public policy, as set forth in Unemployment Insurance Code § 1960, the Board's findings of fact and decisions (including any prior proceedings) are inadmissible as evidence in any subsequent action:

> Any finding of fact or law, judgment, conclusion, or final order made by a hearing officer, administrative law judge, or any person with the authority to make findings of fact or law in any action or proceeding before the appeals board, shall not be conclusive or binding in any separate or subsequent action or proceeding, and ***shall not be used as evidence in any separate or subsequent action or proceeding***, between an individual and his or her present or prior employer brought before an arbitrator, court, or judge of this state or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.
>
> Unemp. Ins. Code § 1960 (emphasis added).

The court of appeals explained the rationale behind this statute in two cases decided soon after it was enacted:

> The amount of money at stake in a UIB hearing will often be small in comparison to the costs of full blown litigation that could be warranted by the substantially greater stake in a wrongful discharge claim. Accordingly, a party to a UIB proceeding might be unfairly sandbagged if the results of the proceeding are given issue preclusion effect. Second, the administrative scheme for resolution of UIB claims was intended to be speedy and informal.
>
> *Mahon v. Safeco Title Insurance Company* (1988) 199 Cal.App.3d 616, 622.
>
> In light of our determination that Unemployment

> Insurance Code section 1960 precludes us from giving the findings of the CUIAB collateral estoppel effect, we need not address appellant's contention that that decision did not adversely determine all of the issues in this lawsuit.
>
> *Pichon v. Pacific Gas & Electric Co.* (1989) 212 Cal.App.3d 488, 504.

Defco's allegation in its cross-complaint that it prevailed against Smith in its appeal of the EDD decision to award Smith benefits is also inadmissible. "The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence." *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017. A "plaintiff cannot rely on his pleading at all, even if verified, to demonstrate a probability of success on the merits. [Citations.]" *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 474.

Neither Defco's allegations regarding the Board's findings of fact and decisions, nor any of those decisions or findings of fact themselves, could be admitted as evidence in this action. Thus Defco has no admissible evidence to show that it prevailed at the EDD proceeding. The trial court erred in considering the evidence Defco submitted as proof that it had prevailed in a prior action.

5. The trial court ignored Unemployment Insurance Code § 1960.

Smith's motion and his reply to Defco's opposition both raised § 1960 as a bar to the admission of the Board's proceedings. AA _____. But the trial court's tentative ruling denying the motion did not discuss the statute. AA _____. The trial court's ruling says nothing about § 1960,

despite the lengthy discussions in both of Smith's briefs that focused on it.

Smith's counsel attempted to remedy this omission by citing § 1960 at the hearing. Reporter's Transcript ("RT") _____.

THE COURT: I'll read it.

MR. LAWYER: The key language —

THE COURT: I said I'll read it. I do better reading it then [*sic*] hearing it.

MR.LAWYER: Okay. Fair enough.

RT _____.

Yet despite the trial court's assurance to counsel that it would "take a further look" (RT at _____), its order is the same as the tentative ruling, and it does not mention § 1960. AA _____.

The language of the statute itself is clear. Its application is cited in *Mahon* and *Pichon*. Defco's opposing brief addressed it. Yet the trial court did not discuss the statute, let alone offer any reason why it did not apply. The only possible conclusion is that the trial court did not consider Smith's argument *at all*.

6. The trial court's ruling is against public policy.

Millions of claims and thousands of appeals have been filed with the EDD since Unemployment Insurance Code § 1960 was enacted in 1986. Yet Smith has found not one reported—or even one unreported—case in which an employer brought a malicious prosecution action against a claimant who had been denied benefits. This appears to be a case of first impression.

The reason is simple. Section 1960 protects claimants from such actions for the reasons set forth in *Mahon*: the dollar amounts involved are small, the proceedings are relatively informal, and the Legislature did not want a party to such a proceeding to be "unfairly sandbagged," as the *Mahon* court put it, if those proceedings were used against him or her in a later action. *Mahon, supra*, at 622.

The chilling effect of the trial court's ruling should not be underestimated—Defco's cross-complaint says it incurred more than $22,000 in fees and costs in defending Smith's unemployment claim. AA _____. The threat of liability on that scale would surely deter anyone from applying for benefits.

The only two reported cases that address the effect of § 1960 on subsequent actions are *Mahon* and *Pichon,* both decided more than twenty years ago. Although the subsequent actions in those two cases involved wrongful termination and related claims, while this case is based on malicious prosecution, the application of the statute is no different—it does not differentiate between types of cases. Its language plainly applies to ***any*** subsequent proceeding, including one for malicious prosecution.

CONCLUSION

For more than twenty-five years, Unemployment Insurance Code § 1960 has barred actions such as the malicious prosecution claim brought against Smith by his former employer. This Court should find that the trial court erred in admitting as evidence the findings of fact and the ruling of the Board in Defco's favor. Absent that evidence, the trial court had no grounds for determining that Defco has a probability of prevailing on its claim

against Smith. This Court should reverse the trial court's ruling denying Smith's motion, and direct the trial court to award Smith costs and fees for his special motion to strike and for this appeal.

Dated: November 2, 2012

Respectfully submitted,

LOUIS LAWYER
Attorneys for Appellant
John Smith

CERTIFICATE OF LENGTH

I certify that this brief was prepared using Word Perfect, which reports that it contains a total of **2,472** words, including footnotes but excluding tables.

I declare under penalty of perjury under California law that the foregoing is true and correct.

Dated:

LOUIS LAWYER

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INTRODUCTION

Defco's opposition rests on an unfounded assumption that itself is based on a flawed interpretation of the rules of statutory construction, and is unsupported by the case law it cites. As Smith argued in his Appellant's Opening Brief (AOB), nothing that happened before the Unemployment Insurance Appeals Board was admissible at the trial court hearing on Smith's Special Motion to Strike under Code of Civil Procedure § 425.16 as a matter of law. Any documents related to those proceedings must be disregarded here, just as they should have been in the trial court.

ARGUMENT

1. Defco misstates Smith's argument.

Defco states that "Smith does not dispute that the elements of malicious prosecution are satisfied." Respondent's Brief (RB) at _____. But of course Smith *does* dispute it: one of those essential elements is proof that the malicious prosecution plaintiff prevailed in the underlying action. The entire premise of Smith's argument is that Defco cannot possibly satisfy that element. The trial court erred in denying Smith's § 425.16 motion because its finding that Defco was the prevailing party rested on evidence made inadmissible by statute.[1] See AOB at 9.

[1]Seeking to exalt form over substance, Defco complains that Smith filed no objections to its evidence. RB 1, fn.1. But Smith's entire motion to strike was just such an objection, directed at every scrap of evidence Defco was offering to prove the outcome of the UI proceeding. There was no doubt about Smith's position.

2. Defco's interpretation of the statute is flawed.

Defco argues that Unemployment Insurance Code § 1960 collaterally estops a *claimant* from litigating claims in a subsequent proceeding, but does not bar claims by the *employer* against the claimant. This interpretation is not supported by the statute's plain language, nor by the case law Defco cites.

Hardy v. Vial (1957) 48 Cal.2d 577, allowing malicious prosecution suits to be based on unsuccessful administrative proceedings, was decided 29 years before § 1960 was passed. Its holding could not have addressed a statute that did not exist. *Brennan v. Tremco, Inc.* (2001) 25 Cal.4th 310, cited *Hardy* in *dicta*, but *Brennan* did not address the exception to the general rule carved out by UIC § 1960. The issue in *Brennan* was not the scope of § 1960, but whether a ruling in favor of a defendant in a private arbitration is grounds for a malicious prosecution action. (It is not.) *Id.* at 317.

In discussing *Hardy*, Defco contends that "Neither the Supreme Court nor the Legislature excepted proceedings for unemployment benefits from this rule, ..." If this were true, the Legislature would never have passed § 1960—but it did. That was the whole purpose of the statute. What purpose does it serve if *not* to carve out this exception?

The only published cases that cite § 1960 are *Mahon v. Safeco Title Insurance Company* (1988) 199 Cal.App.3d 616 and *Pichon v. Pacific Gas & Electric Co.* (1989) 212 Cal.App.3d 488. Neither supports Defco' argument.[2]

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[2]Smith is aware of four unpublished cases citing UIC § 1960, but under CRC Rule 8.1115, they are not cited here.

In *Pace v. Hillcrest Motor Company* (1980) 101 Cal.App.3d 476, a case involving small claims court, the court's reasoning as to the purpose and effect of informal proceedings is instructive. The defendant, an attorney, was sued over an unpaid car repair bill of $167.33. He won, and then filed a malicious prosecution action against the repair shop, demanding $105,000 in attorney fees. The court held that a victory in small claims court cannot support a claim for malicious prosecution:

> To permit an action for malicious prosecution to be grounded on a small claims proceeding would frustrate the intent of the Legislature in adopting an expeditious and informal means of resolving small disputes, would inject into a simple and accessible proceeding elements of time, expense, and complexity which the small claims process was established to avoid, and would require a prudent claimant to consult with an attorney before making use of this supposedly attorney-free method for settling disputes over small amounts.
>
> *Id.* at 479.

The court's reasoning in *Pichon* was almost identical to that in *Pace.* Using much the same language, *Pichon* held that the purpose of the UIAB hearing scheme is to provide a "speedy, informal administrative scheme" for resolving disputes. *Pichon* at 503.

3. The rules of statutory construction support Smith.

> The rules governing statutory interpretation are well settled. We begin with the fundamental principle that [t]he objective of statutory construction is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent. To ascertain that intent, we turn first to the words of the

> statute, giving them their usual and ordinary meaning. The statute's every word and clause should be given effect so that no part or provision is rendered meaningless or inoperative. Moreover, a statute is not to be read in isolation, but construed in context and with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute governs.
>
> *Plancich v. United Parcel Service* (2011) 198 Cal.App.4th 308, 313 (internal citations and quotation marks omitted).

A. Defco offers no support for its argument.

Defco makes the following unsupported contentions:

- "The context and Legislative intent of the statute confirm the section does not apply as a grant of immunity for malicious prosecution." RB at ____.
- "Section 1960 contains no language indicative of an intent to confer a grant of privilege or immunity for the prosecution with malice of a meritless administrative proceeding for unemployment benefits." RB at ____.
- "The term 'any' cannot be interpreted so expansively in the context of §1960." RB at ____.
- "Notwithstanding the fact that the statute references 'any separate or subsequent action or proceeding', the statute was not intended to extend immunity in malicious prosecution actions . . . ." RB at ____.

None of these statements is supported by any citations to case law,

legislative history, rules of statutory construction, or the commonly used practice guides published by The Rutter Group or Matthew Bender. If it was the Legislature's intent to exclude malicious prosecution from the statute's application, Defco has completely failed to produce any evidence of that intent. Nor does Defco explain why the Legislature failed to expressly state this purported limitation by including the phrase "except actions for malicious prosecution" or similar language in the statute, when it could easily have done so.

Merely assuming the Legislature's intent, as Defco does here, is not proof of intent.

> In construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language. The court is limited to the intention expressed.
>
> *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475.

Given this long-standing rule, it is settled law that if the Legislature intended to limit the scope of a statute, it would do so by expressly including limiting language. But it did not do so in 1986 when it passed this legislation, and the court may not do so now by rewriting the statute 36 years after its enactment.

B. Defco's argument that the statute is ambiguous goes against the "plain meaning" rule of construction.

Defco argues that the statute implicitly excludes malicious prosecution because it fails to expressly include it. Defco's logic is

backwards: the express use of "any" means that the statute is all-inclusive.

Delaney v. Superior Court (1990) 50 Cal.3d 785 analyzed the meaning of the word "any" in a statute. At issue was whether the phrase "any unpublished information" in the reporter's shield law (a constitutional amendment passed by the voters in 1980 as Proposition 5) applied only to unpublished information obtained in confidence. The court held that it did not: where the amendment stated "any" information, it was the intent of the voters who approved the language in the proposition not to limit the scope of the protected information.

> In the context of article I, section 2(b), the word "any" means without limit and no matter what kind. (Webster's New World Dict. (2d college ed. 1982) p. 62.) To restrict the scope of article I, section 2(b) to confidential information would be to read the word "any" out of the section. We decline to do so. Significance should be given, if possible, to every word of an act. [Citation.] Conversely, a construction that renders a word surplusage should be avoided.
>
> *Id.* at 798.

Defco has cited no case law or other authority to support its contention that, when the Legislature passed Unemployment Insurance Code § 1960 in 1986 and used the phrase "shall not be used as evidence in any separate or subsequent action or proceeding," it intended that this phrase did not actually mean "*any*" as in the common meanings of "one, no matter which, of more than two" or "without limit." WEBSTER'S NEW WORLD DICTIONARY, 2d College Ed., Collins, 1980, p. 62. Instead, Defco argues—without proof or authority—that despite its plain language the Legislature intended to limit the meaning of "any."

Courts are not at liberty to impose their own views of a statute that contradict the plain meaning of its text.

> We hold that except in the most extreme cases where legislative intent and the underlying purpose are at odds with the plain language of the statute, an appellate court should exercise judicial restraint, stay its hand, and refrain from rewriting a statute to find an intent not expressed by the Legislature.
>
> *Unzueta v. Ocean View School District* (1992) 6 Cal.App.4th 1689, 1700.

In both *Delaney* and *Souza v. Lauppe* (1997) 59 Cal.App.4th 865, the plaintiff challenged the inclusive language in a statute barring a farmer's nuisance claim against a neighbor. Souza argued that the statute barred only actions against urban encroachment, not actions between farmers. The court held that the statute did not have to list every type of nuisance to avoid being ambiguous. It enforced the statute's plain meaning and refused to consider the legislative history submitted by the plaintiff.

> The absence of a definition for each of the statute's terms does not automatically create an ambiguity which requires our resort to the volume of documents plaintiffs proffer as legislative history . . . .
>
> We discern no such ambiguity in the phrases "any changed condition" and "in or about the locality." That the phrases encompass countless varieties of change in all manner of conditions in the general area surrounding the alleged nuisance does not mean the language of the statute is ambiguous. To the contrary, the word "any" expresses an *unambiguous* legislative intent to broadly apply the statute.
>
> *Id.* at 873 (emphasis added).

The legislative intent of the use of "any" in a motor vehicle statute was at issue in *Department of California Highway Patrol v. Superior Court* (2008)158 Cal.App.4th 726, in which the CHP challenged the application of the correctable violation ("fix-it ticket") statute to violations of the statute requiring the use of a helmet by motorcycle riders and passengers. In holding that a helmet law violation was a fix-it ticket violation, the court looked at the express language of the statute and followed the court's reasoning in *Delaney*.

> We further observe that the ordinary meaning of the word "any" is clear, and its use in a statute unambiguously reflects a legislative intent for that statute to have a broad application. (*Souza v. Lauppe* (1997) 59 Cal.App.4th 865, 873 [69 Cal. Rptr. 2d 494]; see *Utility Cost Management v. Indian Wells Valley Water Dist*. (2001) 26 Cal.4th 1185, 1191 [114 Cal. Rptr. 2d 459, 36 P.3d 2] [use of the word " 'any' " serves to "broaden the applicability" of a provision].) Thus, the phrase "any infraction" indicates that the Legislature did not intend to restrict the type of equipment infractions in the enumerated divisions that could be potentially correctable; rather, that phrase means exactly what it says: *Any—and thus every—* equipment infraction in the enumerated divisions is potentially correctable—i.e., the subject of a "fix-it" ticket.
>
> *Id.* at 736 (emphasis added).

The courts' reasoning in *Delaney, Souza*, and *Department of California Highway Patrol* applies here. The outcome of a UI proceeding is inadmissible in *any—and thus every—*subsequent action or proceeding. Defco' argument to the contrary has no foundation.

Neither of the two widely used employment law practice guides published in California supports Defco's interpretation of the statute.

CALIFORNIA PRACTICE GUIDE: EMPLOYMENT LITIGATION (Ching, et al., The Rutter Group, 2007, updated 2011) § 16:680 discusses the application of collateral estoppel of administrative hearings to subsequent proceedings, but notes the exception:

> Exception—unemployment compensation proceedings: Findings made in unemployment compensation proceedings are not collateral estoppel in subsequent litigation. By statute, the findings and judgment "shall not be used as evidence" in any separate or subsequent litigation or arbitration proceeding between employer and employee.
>
> (Citing § 1960 and *Pichon.*)

CALIFORNIA EMPLOYMENT LAW (Matthew Bender & Company, 2011) § 80.88 also notes the exception:

> Nonbinding Effect of Findings, Judgments, or Final Orders in Judicial or Arbitration Proceedings Between Employee and Employer
>
> Any finding of fact or law, judgment, conclusion, or final order made by a hearing officer, administrative law judge, or any person with the authority to make findings of fact or law in any action or proceeding before the Appeals Board is not conclusive or binding in any separate or subsequent action or proceeding, and may not be used as evidence in any separate or subsequent action or proceeding between an individual and his or her present or prior employer brought before an arbitrator, court, or judge of California or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts. Thus, for example, an Appeals Board decision finding that an employee was discharged for misconduct does not collaterally estop the employee from relitigating the reasons for discharge in a civil action for wrongful termination.

(Also citing § 1960 and *Pichon.*)

If the court were to adopt Defco' interpretation of § 1960, the statute's plain language—and the statute itself—would be meaningless. Anyone could argue that their particular claim was exempt from the statute because—surely, just as Defco argues now—the Legislature must have meant to exempt their claim as well. The court should follow *Delaney* and find that, when the Legislature put that word in the statute, "any" really meant "*any*"—not "some," and certainly not "all proceedings except malicious prosecution actions."

Defco's attempt to equate § 1960 to the litigation privilege of Civil Code § 47 also fails. Section 1960 bars a finding of a favorable termination in the underlying action, a prerequisite to the exception to the litigation privilege. *Action Apartment Association v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242. Without a finding of a favorable termination, the malicious prosecution case cannot go forward and the issue of the privilege is moot.

CONCLUSION

The trial court erred in denying Appellant John Smith's Special Motion to Strike. The trial court erred in relying on the UIAB's rulings and decision as proof that Defco had prevailed in the underlying administrative proceeding—a mandatory element of a malicious prosecution action. Had the trial court followed Unemployment Insurance Code § 1960 as it should have done, it would of necessity have granted Smith's motion.

Therefore, this court should reverse the trial court's ruling denying Smith' Special Motion to Strike under Code of Civil Procedure § 425.16,

and order that the trial court grant that motion.

Dated: Respectfully submitted,

LOUIS LAWYER
Attorneys for Appellant
John Smith

CERTIFICATE OF LENGTH

I certify that this brief was prepared using Word Perfect, which reports that it contains a total of **2,599** words, including footnotes but excluding tables.

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