

**3.12 MALICIOUS PROSECUTION ACTION BASED UPON A
PRIOR CRIMINAL PROCEEDING** (Approved before 1984)

A. Elements of a Malicious Prosecution

An action at law for malicious prosecution based upon a prior criminal judicial proceeding consists of several elements.

First. The plaintiff must establish the existence of a criminal judicial proceeding against him/her. On this subject the (undisputed) facts are (state the nature of the criminal charge instituted against the plaintiff, the name of the judicial tribunal in which it was instituted, *etc.*)

Second. The plaintiff must establish that the defendant was responsible for or caused that proceeding to be instituted against him/her.

On this subject the (undisputed) facts are (state what the defendant did to initiate the criminal judicial proceeding against the plaintiff such as signing a complaint, *etc.*)

Third. The plaintiff must establish that the criminal proceeding terminated favorably to him/her or in a manner not adverse to him/her.

On this subject the (undisputed) facts are (state facts relating to the nature of the termination, such as a termination in his/her favor, a failure of the grand jury to indict, a failure of the magistrate to find a prima facie case, a voluntary withdrawal or abandonment, *etc.*).

Fourth. The plaintiff must establish a lack of reasonable or probable cause for the criminal prosecution.

On this subject there is sharp conflict in the proofs.

NOTE TO JUDGE

REASONABLE OR PROBABLE CAUSE

Probable cause has been defined as a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinarily prudent person in believing the party is guilty of the offense. It must be more than mere conjecture or unfounded suspicion. *Galafaro v. Kuenstler*, 53 N.J. Super. 379 (App. Div. 1958); *Dombrowski v. Metropolitan Life Ins. Co.*, 18 N.J. Misc. 240, *aff'd* 126 N.J.L. 545 (E.&A. 1941). See *Earl v. Winne*, 14 N.J. 119 (1953); *Shoemaker v. Shoemaker*, *supra*; *Little v. Little*, 4 N.J. Super. 352 (App. Div. 1949); *Lane v. Pennsylvania R.R. Co.*, 78 N.J.L. 672 (E.&A. 1910).

Where the facts involving probable cause are not in dispute, the question of probable cause is one of law to be determined by the court. *Shoemaker v. Shoemaker*, *supra*. *Vladar v. Klopman*, 89 N.J.L. 575 (E.&A. 1916).

Even an actual determination on the merits against the defendant in the prior proceedings of itself, has no probative force as evidence of want of probable cause. There must be some independent proof of

the other elements. *Mayflower, supra; Shoemaker, supra.*

On the other hand, a judgment favorable to the person who initiated the proceedings is generally conclusive of probable cause even though subsequently reversed on appeal. *Toft v. Ketchum*, 18 N.J. 280 (1955), *aff'd*, 18 N.J. 611 (1955) citing *Restatement of Torts*, § 675, comment (b), § 680, comment (b) (1938).

The holding over by a magistrate is strong evidence or probable cause, though it is not in itself dispositive of the question. Where the accused is committed or held to bail by a magistrate or indicted by the Grand Jury that constitutes *prima facie* evidence of probable or reasonable cause. *Galafaro v. Kuenstler, supra.*

The failure of the Grand Jury to indict is not, however, considered conclusive on the question of probable cause. *Galafaro v. Kuenstler, supra.*

Proof of malice and want of probable cause may be established by proof circumstantial in nature since usually direct evidence is not obtainable. *Mayflower, supra.*

MALICE

Malice in this connection means the intentional commission of a wrongful act without just cause or excuse. *Brennan v. United Hatters*, 73 N.J.L. 72 (E.& A. 1906); *Kamm v. Flink*, 113 N.J.L. 583 (E.& A. 1934); *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552 (1955).

In *Brennan v. United Hatters, supra*, the court said:

. . . But malice in the law means nothing more than the intentional doing of a wrongful act without justification or excuse. . . And what is a wrongful act without the meaning of this definition? We answer, any act which in the ordinary course will infringe upon the rights of another to his/her damage is wrongful, except it be done in exercise of an equal or superior right. In *Mogul*

Steamship Co. v. McGregor, 23 Q.B. Div. pp. 598-613, Lord Justice Bowen said: ‘Now intentionally to do which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person’s property or trade, is actionable if done without just cause or excuse, is what the law calls a malicious wrong.

Malice may be inferred from a lack of probable cause. *Galafaro v. Kuenstler*, *supra*; *Hammill v. Mack International Truck Corp.*, 104 N.J.L. 551 (E. & A. 1928).

(ELEMENTS OF A MALICIOUS PROSECUTION ACTION BASED UPON A PRIOR CRIMINAL PROCEEDING — Fourth Element cont.)

The plaintiff contends that there was a lack of reasonable or probable cause and the defendant contends that there was reasonable or probable cause for instituting the criminal action against the plaintiff.

In cases of criminal prosecution reasonable or probable cause exists where there are reasonable grounds for suspicion or belief that an offense was committed, and there are circumstances, sufficiently strong in themselves, to warrant an ordinarily cautious person to believe that the accused committed it. However, conjecture or unfounded suspicions do not constitute reasonable or probable cause.

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Whether probable cause existed does not depend upon a consideration of what the facts actually were, but rather upon a consideration of what the facts were as they appeared to or were known by or were believed to be by the defendant when he/she instituted the criminal proceeding against the plaintiff.

It was not necessary that the defendant have actual cause to prosecute the plaintiff; it was necessary only that he/she has reasonable or probable cause for so doing.

If you find that the defendant had reasonable or probable cause to believe that plaintiff was guilty of the charge it is immaterial that the plaintiff was in fact innocent. Even if you believe that plaintiff was innocent of the crime, he/she cannot recover if you find that the defendant had reasonable or probable cause to believe that he/she was guilty. Nor can you draw an inference of lack of reasonable or probable cause just because the criminal prosecution ended by (here state how prosecution ended).

On the other hand, if you find that the defendant did not have an honest belief that the plaintiff was guilty and the charges were thereby falsely brought, you must conclude that there was no reasonable or probable cause.

[Here, review the facts dealing with the conflicting contentions as to reasonable or probable cause.]

Fifth. The plaintiff must establish that the defendant was activated by a malicious motive in prosecuting the criminal complaint against him/her.

The malice contemplated by this element is not malice in the sense that the word is sometimes used. The kind of malice I speak of means the intentional doing of a wrongful or unlawful act without just cause or excuse. Such malice is an intentional act which an ordinarily cautious man would realize that under ordinary circumstances damage would result to one's person or property, and which does in fact damage another's person or property. The element of malice may be inferred from a lack of reasonable or probable cause.

Sixth. The last element that must be proved is that the plaintiff suffered damage, as I shall later define that term, as a proximate result of a malicious prosecution.

[If the defense of advice of counsel is within the issues of the case, the following should be added:]

In this case the defendant has raised the defense of advice of counsel. This is an affirmative defense and the burden of establishing it by a preponderance of the credible evidence is upon the defendant.

If you find that the defendant truthfully communicated to his/her attorney all of the material facts of the case and then relied upon the advice of his/her attorney to institute the criminal prosecution against the plaintiff, the plaintiff cannot recover even if you find that he/she has proved all the necessary elements to establish malicious prosecution.

On the other hand, the advice of an attorney will not protect a party who consults an attorney unless all the material facts within his/her knowledge are fully and truthfully stated to the attorney. If you find from the evidence that in seeking the advice of counsel the defendant did not make a full, fair and complete disclosure of all material facts within his/her knowledge to his/her counsel, the advice of counsel is no defense to this action.

NOTE TO JUDGE

The law does not look with favor upon actions for malicious prosecution; it does not encourage them. The reason is embedded deeply in our jurisprudence. Extreme care must be exercised to avoid the creation of a reluctance to seek redress for civil or criminal wrongs for fear of being subjected to a damage suit if the action results adversely. *ayflower v. Thor*, 15 *N.J. Super.* 139 (1951), *aff'd* 9 *N.J.* 605 (1952); *Toft v. Ketchum*, 18 *N.J.* 280 (1955).

B. Plaintiff Must Establish Institution of a Criminal Judicial Proceeding or other Adjudicatory Proceedings Against Him/Her by the Defendant

The general rule is that a malicious prosecution action must be predicated upon the institution of a proceeding before a judicial tribunal.¹

Under certain circumstances, however, a malicious prosecution action may be founded upon the institution of other than a judicial proceeding, at least where such proceedings are adjudicatory in nature and may adversely affect legally protected interests.²

C. Plaintiff Must Establish that the Criminal Proceeding Terminated Favorably to Him/Her or in a Manner Not Adverse

The weight of authority in this country, including New Jersey, is to the effect that the original proceeding must have terminated before an action for malicious prosecution can be instituted. This is a condition precedent to the existence of the cause of action and must be pleaded.

¹*See Toft, supra.*

²*See Toft, supra.* and cases cited therein, which involved a proceeding against an attorney before a county ethics and grievance committee. *See also, Rainier's Dairies v. Raritan Valley Farms Inc.*, 19 N.J. 552 (1952) which involved a complaint before the director of milk industry for revocation of license.

Although the rule is generally stated that the action must have terminated favorably to the plaintiff in the malicious prosecution action, all that is necessary is that there be a termination not adverse to the plaintiff coupled with additional proof of malice and lack of probable cause.³

Cases:

Voluntary withdrawal or abandonment supports cause of action. *Shoemaker v. Shoemaker*, 11 *N.J. Super.* 471 (App. Div. 1951); *Hammill v. Mack International Truck Corp.*, 104 *N.J.L.* 551 (E.& A. 1911).

Failure of Grand Jury to indict is sufficient. *Weisner v. Hansen*, 81 *N.J.L.* 601 (E. & A. 1911).

Failure of magistrate to find prima facie case is sufficient. *Shoemaker v. Shoemaker*, 11 *N.J. Super.* 471 (App. Div. 1951).

Nolle Prosequi is sufficient. *MacLaughlin v. Lehigh Valley R.R. Co.*, 93 *N.J.L.* 263 (Sup. Ct. 1919).

D. Defense of Advice of Counsel

It would appear that the defense of advice of counsel is an affirmative defense and the burden should be upon the defendant in the malicious prosecution action to establish it by a preponderance of the credible evidence.⁴ If the jury

³See *Mayflower*, *supra*.

⁴See *Cabakov v. Thatcher*, 37 *N.J. Super.* 249 (App. Div. 1955).

determines that the defense has been established it is a complete defense and a bar to the action.⁵

The rule requires that a party who requests the advice of counsel must communicate fully all the material facts within his/her knowledge and must not state matters that he/she knows are false.⁶

E. Statute of Limitations

An action for malicious prosecution must be instituted within six years from the date the cause of action arose.⁷ Since the action is personal in nature, a wrong against a person's feelings and reputation, it abates on death.⁸

F. Malicious Prosecution Actions by Professional Persons

In *Toft v. Ketuchum*, [supra], our Supreme Court held that the filing of a groundless complaint with an ethics and grievance committee does not allow an attorney to predicate a malicious prosecution or similar action upon it. To overcome the *Toft* holding the Legislature enacted the following statute [N.J.S.A. 2A:47A-1]:

⁵*Galafaro v. Kuenstler, supra., Dombrowski v. Metropolitan Life Ins. Co.*, 126 N.J.L. 535 (E.&A. 1941).

⁶*Cabakov, supra.; Mayflower, supra.; Dombrowski, supra.*

⁷*Earl v. Winne*, 14 N.J. 119 (1953).

⁸*Patrick v. Esso Standard Oil Co.*, 156 F.Supp. 336 (D.C.N.J. 1957).

Any person who falsely and maliciously and without probable cause makes a complaint, orally or in writing of unprofessional conduct against a member of any profession requiring a license or other authority to practice such profession, to any court or to any ethics and grievance committee, or to any board or other public body authorized to and having the right to hear such complaint and to act thereon or to recommend action thereon and to take or recommend the taking of disciplinary action against the person complained of, such as disbarment or suspension in the case of an attorney-at-law, or the revocation or suspension of a license of other professional persons, shall be liable for any and all damages suffered and sustained by the member of a profession so complained of, to be recovered in a civil action in the nature of an action at law for malicious prosecution. In any such action, exemplary or punitive damages may be awarded.

In the only case interpreting this statute, the Court, in a very brief opinion in *Black v. Koener*, 44 N.J. 140 (1965), said that the malice required by this statute to support a malicious prosecution action is “malice in fact.”

“Malice in fact” seems to be equitable with the kind of malice necessary to establish punitive damages and is different from the common law ingredient of malice necessary to establish the malicious prosecution action. *See Brennan v. United Hatters, supra.*

G. Statute on Shoplifting

In malicious prosecution cases arising out of shoplifting situations the Legislature provided statutory immunity to merchants who feel the need to reasonably detain individuals whom they have cause to believe are concealing or stealing unpurchased merchandise. This law provides further protection if a merchant causes the arrest of a shoplifter.

The statute [*N.J.S.A. 2C:20-11(e)*] is as follows:

A law enforcement officer, or a special officer, or a merchant, who has probable cause for believing that a person has willfully concealed unpurchased merchandise and that he can recover such merchandise by taking the person into custody, may for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for not more than a reasonable time. Such taking into custody by a law enforcement officer or special officer or merchant shall not render such law enforcement officer, special officer or merchant criminally or civilly liable in any manner or to any extent whatsoever.

Any law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the offense of shoplifting as defined in this section.

A merchant who causes the arrest of a person for shoplifting, as provided for in this section, shall not be criminally or civilly liable in any manner or to any extent whatsoever where the merchant has probable cause for believing that the person arrested committed the offense of shoplifting.