

**3.13 MALICIOUS PROSECUTION BASED UPON A PRIOR CIVIL PROCEEDING** (Approved before 1984)

**Elements of a Malicious Prosecution**

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

**First.** The plaintiff must establish that the defendant instituted or caused to be instituted a civil suit against him/her and that he/she suffered special grievance thereby. (Here state the nature of the special grievance such as whether plaintiff was arrested in connection with said suit or whether his/her property or business was interfered with by the appointment of a receiver, the granting of an injunction, by writ of replevin, by the filing of a lis pendens, etc.)

**Second.** The plaintiff must establish that the civil suit 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 voluntary withdrawal or abandonment, etc.)

**Third.** The plaintiff must establish lack of reasonable or probable cause for the civil suit.

On this subject there is a sharp conflict in the proofs.

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 civil action against the plaintiff.

In cases of civil actions reasonable or probable cause exists where there are reasonable grounds for belief that a cause of action exists, supported by circumstances sufficient to warrant an ordinarily prudent person in believing that it exists.

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 civil suit against the plaintiff.

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

If you find that the defendant had reasonable or probable cause to believe that plaintiff was civilly liable it is immaterial that the plaintiff was in fact not liable. Even if you believe that plaintiff was not civilly liable, he/she cannot recover if you find that the defendant had reasonable or probable cause to believe

that he/she was liable. Nor can you draw an inference of lack of reasonable or probable cause just because the civil suit ended by (here state how the suit ended).

On the other hand, if you find that the defendant did not have an honest belief that the plaintiff was liable and the suit was thereby falsely instituted 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.]*

**Fourth.** The plaintiff must establish that the defendant was activated by a malicious motive in instituting the civil suit 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 person would realize that under ordinary circumstances damage would result to one's person or property. The element of malice may be inferred from a lack of reasonable or probable cause.

**Fifth.** 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 civil suit against the plaintiff, the plaintiff cannot recover even if you find 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**

“Originally, no cause of action was recognized in the law for the wrongful institution of a civil action irrespective of the fact that it was brought maliciously and without probable cause. The recovery of costs by the defendant was considered sufficient redress. However, the inadequacy of this remedy asserted itself and as early as 1816 our Supreme Court established an exception to the doctrine. In *Potts v. Imlay*, 4 *N.J.L.* 382 (Sup. Ct. 1816), it was declared that an action for malicious prosecution could not be maintained for prosecuting a civil suit unless the defendant in that suit was ‘arrested without cause and deprived of his/her liberty or made to suffer other special grievance different from and superadded to the ordinary expense of a defense.’” (original emphasis.) This rule has never been changed or criticized and it still represents the law of this State. *Bitz v. Meyer*, 40 *N.J.L.* 252 (Sup. Ct. 1878); *Schneider v. Mueller*, 132 *N.J.L.* 163 (E. & A. 1944).

A special grievance may consist of disbarment proceedings; *Toft v. Ketchum*, 18 *N.J.* 280 (1955) of license revocation proceedings before the Director of Milk Industry, *Rainier’s Dairies v. Raritan Valley Farms, Inc.*, 19 *N.J.* 552 (1955) and where plaintiff’s property or business has been interfered with by appointment of receiver, granting of injunction or restraining order or filing of lis pendens. *Mayflower Industries v. Thor Corp.*, 15 *N.J. Super.* 139 (1951), *aff’d* 9 *N.J.* 605 (1952).

Whether the special grievance pleaded is actionable, as a matter of law, is for the court’s determination.

“The action for malicious prosecution of a civil suit is governed by the same rules governing such an action arising out of a criminal prosecution.”<sup>1</sup> *Prosser on Torts*, § 97, p. 885. In order to succeed, it must appear (1) that the suit was brought without reasonable or probable cause; (2) that it was actuated by malice, and (3) it has terminated favorably to the plaintiff. *Shoemaker v. Shoemaker*, *supra*. These elements must be established in addition to the special

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<sup>1</sup>Since these actions are governed essentially by the same rules, consult the notes dealing with malicious prosecution of a criminal action for any elements not discussed herein.

grievance already mentioned.

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. 729 (E. & A. 1906); *Kamm v. Flink*, 113 N.J.L. 583 (E. & A. 1934).

In *Brennan v. United Hatters*, *supra*, Justice Pitney, for 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 wrongful act within 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 the exercise of an equal or superior right. In *Mogul Steamship Co. v. McGregor*, 23 Q.B. Div. 598-613, at 744-745, Lord Justice Bower said: 'Now, intentionally to that 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. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong.

Reasonable or probable cause for the institution of a civil suit is the presence of reasonable ground for belief that the cause of action exists supported by circumstances sufficient to warrant an ordinarily prudent man in the belief that it exists. *Mayflower v. Thor*, 15 N.J. Super. 139, 151-153 (Chan. Div. 1951).

***COUNTERCLAIM***

If in a civil suit the defendant files a counterclaim alleging that the main suit constitutes malicious prosecution it may well be that under our present liberal practice rules the filing of the counterclaim would be allowed, but trial thereon withheld pending disposition of the original action. *See Mayflower, supra*, and cases cited therein.