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Florida Torts

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II. ACTIONS BASED ON INTENTIONAL CONDUCT  
CHAPTER 22 MALICIOUS PROSECUTION AND ABUSE OF PROCESS  
A. Malicious Prosecution

*1-22 Florida Torts § 22.05*

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**§ 22.05 Malice and Lack of Probable Cause****[1] Generally**

Two of the elements of a malicious prosecution action that a plaintiff must plead and prove are that the underlying legal proceedings were begun or maintained (1) without probable cause; and (2) with malice. <sup>1</sup> In an action for malicious prosecution, probable cause is generally considered to be the reasonable suspicion held by a prudent and cautious person and supported by facts and circumstances that in and of themselves strongly indicate that plaintiff is guilty of the offense charged. <sup>2</sup> The outcome of the trial in the underlying action need not be certain for there to have been probable cause to commence it. <sup>3</sup> For example, the binding over of a plaintiff has been held sufficient to establish probable cause, even though the plaintiff was subsequently acquitted at trial. <sup>4</sup> Moreover, an acquittal or a dismissal of criminal charges does not in itself establish lack of probable cause to have initiated the charges. <sup>5</sup>

If criminal charges in an underlying case were resolved in favor of the plaintiff in a subsequent malicious prosecution case, the plaintiff must be given an opportunity to prove the absence of probable cause to prosecute, unless in the prior action, the court made an explicit finding of probable cause. For example, a court that heard a malicious prosecution suit was found to be in error when it conclusively presumed that probable cause existed for a criminal prosecution on the ground that an award of attorneys' fees to the person prosecuted was reversed in the underlying action. <sup>6</sup>

The good faith of the defendant in a malicious prosecution action is crucial in determining whether probable cause exists. Thus, even if a reasonable person would believe that probable cause exists, a defendant who does not actually believe in the guilt of the accused does not have probable cause to bring the underlying action. <sup>7</sup>

## [2] Lack of Probable Cause

**[a] What Constitutes Probable Cause.** As already noted above, <sup>8</sup> probable cause is defined as the reasonable suspicion held by a prudent and cautious person and supported by facts and circumstances that in and of themselves strongly indicate that the plaintiff is guilty of the offense charged. <sup>9</sup> There was probable cause to initiate criminal proceedings against parties who removed equipment from someone else's boat, who told a passerby that they owned the boat, and who covered up their identification numbers and fled when challenged. <sup>10</sup>

Similarly, the Third District Court of Appeal in *DeMarie v. Jefferson Stores, Inc.*, <sup>11</sup> found that there was probable cause to justify arrest and prosecution for theft. There, the plaintiff purchased several household items, including wall fasteners, from the defendant's store. After finding that the wall fasteners were defective, he returned to the store but without the wall fasteners or the receipt. When told by a cashier that there could be no exchange without a receipt, the plaintiff by his own admission picked up another package of fasteners and put them in his pocket. He also selected several other items for which he paid. As he was leaving he was detained by two security guards, one of whom had seen him place the fasteners in his pocket. He admitted to not having paid for them and explained that the fasteners he had already purchased were defective. He was arrested and charged with theft but the prosecution terminated with an entry of *nolle prosequi*. The plaintiff filed suit against the defendant for malicious prosecution. The trial court entered a summary judgment in favor of the defendant on the ground that there was probable cause to arrest for shoplifting. The plaintiff appealed. The district court summarily affirmed the trial court, finding that there was no genuine issue of material fact as to whether there was probable cause to arrest and detain the plaintiff. <sup>12</sup>

In contrast, when another shopper explained that she had brought allegedly stolen artificial flowers from home to try to purchase matching ones, and when there was testimony to the effect that the store did not carry any flowers like hers for sale, there was a material question of fact as to whether the store had probable cause to seek the plaintiff's prosecution for theft. A summary judgment in favor of the store was thus reversed. <sup>13</sup>

**[b] Finding of Probable Cause by Court or Magistrate.** In a probable cause hearing, a judge or magistrate reviews the results of a preliminary investigation and determines whether there is enough evidence to charge the accused with a crime. Such probable cause hearings present a unique situation when they are the underlying cause of action in a suit for malicious prosecution. The issue becomes whether a magistrate's finding of probable cause to arrest amounts to a conclusive presumption of probable cause in a subsequent suit for malicious prosecution, absent fraud on the part of the person initiating the prosecution. This question was certified to the Florida Supreme Court by the First District Court of Appeal in *Burns v. GCC Beverages, Inc.* <sup>14</sup> There, the plaintiff filed a malicious prosecution suit against his former employer, GCC Beverages (GCC), alleging that GCC had instigated and pursued theft charges against him without probable cause. The theft charges arose out of a dispute between GCC and a customer. When GCC requested payment, the customer initially responded that the check had been placed in the mail. Subsequently, GCC was informed that the customer had paid one of the defendant's employees in cash. GCC contacted the law enforcement authorities and reported what the customer had said. The investigating officer filed an affidavit and obtained an arrest warrant for the plaintiff from the magistrate. The plaintiff was formally charged, tried, and found not guilty. <sup>15</sup>

The plaintiff filed a malicious prosecution action against the defendant and the trial court granted a summary judgment in favor of the defendant. In affirming the plaintiff's appeal of the decision, the First District Court of Appeal held that the magistrate's issuance of the arrest warrant raised a conclusive

presumption of probable cause, except in instances in which the warrant was obtained by fraud or other dishonest means. <sup>16</sup>

The Supreme Court of Florida affirmed the district court, first citing its holding in *Gallucci v. Milavic*, <sup>17</sup> that for purposes of malicious prosecution, a conclusive presumption of probable cause arises when, after an adversarial hearing, a magistrate finds probable cause to arrest, so long as no fraud or other corrupt means were used to obtain the warrant. In *Gallucci*, the plaintiff presented evidence to refute the allegations supporting probable cause. Accordingly, such a hearing would transfer the responsibility for the prosecution from the complainant to a neutral and detached magistrate, who hears both sides, thus allowing for the conclusive presumption of probable cause. <sup>18</sup> The Court in *Burns* distinguished *Gallucci* in that in the present case, the arrest warrant was issued on the basis of an *ex parte* hearing at which the plaintiff had no notice or opportunity to refute the evidence against him. There could be no conclusive presumption that probable cause existed, the lack of which is an essential element to the plaintiff's malicious prosecution action, when the plaintiff was afforded no opportunity to participate in the probable cause hearing. <sup>19</sup>

The Fifth District Court of Appeal has cited *Burns v. GCC Beverages, Inc.*, <sup>20</sup> in support of the position that the filing of an information by a prosecutor cannot be taken as conclusive evidence of probable cause, <sup>21</sup> even though an information must contain the officer's affirmation that it is brought in good faith. <sup>22</sup> It seems logical that the mere filing of an information by a state attorney, being even further removed from an adversarial probable cause hearing, may not give rise to a conclusive presumption of probable cause, although it tends to refute the lack of it. <sup>23</sup>

**[c] Effect of Resolution of Underlying Criminal or Other Proceedings.** In the context of an action for malicious prosecution, although the plaintiff must have had a bona fide termination of the underlying action in his or her favor, <sup>24</sup> the ultimate exoneration of the plaintiff is not determinative, in itself, of whether probable cause existed for the defendant's commencement of the underlying legal proceeding. <sup>25</sup> The determinative factor as to the existence of probable cause as an element of a malicious prosecution action is whether the suit was brought without a reasonable prospect of success. An acquittal or dismissal of charges does not by itself establish that the suit was unlikely to succeed or that there was a lack of probable cause. <sup>26</sup> On the other hand, the denial of a motion for acquittal does not necessarily create a presumption of probable cause even if the verdict is later for acquittal. <sup>27</sup> This principle is illustrated in *Pinkerton v. Edwards*, <sup>28</sup> in which the plaintiff was arrested and charged with battery of a law enforcement officer. During the plaintiff's trial, the judge denied her motion for a judgment of acquittal. The jury subsequently found the plaintiff not guilty. The plaintiff then brought an action for malicious prosecution against the officer, but the trial judge granted a summary judgment against the plaintiff, concluding that the denial of the motion for a judgment of acquittal after presentation of the state's case, amounted to a finding of probable cause to prosecute. Accordingly, the plaintiff's action for malicious prosecution was barred. <sup>29</sup>

The district court reversed the trial court and held that the plaintiff's action for malicious prosecution should be reinstated. The court noted that a judgment of acquittal, under [Fla. R. Crim. P. 3.380](#), is a method by which to test the sufficiency of the state's case without having to proceed with the time and expense of a full trial. <sup>30</sup> The court then compared a judgment of acquittal with a probable cause hearing, since a finding of probable cause in the context of such a hearing raises a conclusive presumption of probable cause, thus protecting the accuser from subsequent suit for malicious prosecution. <sup>31</sup> In distinguishing a motion for a judgment of acquittal from a probable cause hearing, the Court observed that in the former, the judge makes an independent judgment, as would a jury, of probable cause based on all the evidence before him; in the latter, the judge is curtailed from drawing the inferences that a jury would by the fact that a defendant who moves for a judgment of acquittal admits all the facts as contained in the record and, moreover, admits every conclusion that a jury might draw that is favorable to the opposing party. As such, the motion for a judgment of acquittal should not be granted unless no reasonable person could find for the party who opposes the motion. While there may be some overlap, the evidence that supports a finding of probable cause <sup>32</sup> is inherently different

from that which would establish the legal sufficiency of the state's case, and the question of probable cause is not even presented to the judge whodetermines whether to grant a judgment of acquittal. Thus, the court concluded that a denial of a motion for acquittal does not constitute a finding of probable cause. It indicates only that the state has produced competent evidence of the existence of the elements of the crime with which the accused is charged. <sup>33</sup>

### [3] Malice

Another essential element that a plaintiff in an action for malicious prosecution must plead and prove is that the underlying action was instituted with malice. <sup>33.1</sup> This must be proved in addition to proof of lack of probable cause. <sup>34</sup> The Fifth District Court of Appeal has noted that in the context of malicious prosecution, "malice" connotes the initiation of criminal proceedings without probable cause and for the purpose of causing harm or venting ill-will rather than seeing that justice is done. <sup>35</sup>

While malice is not synonymous with lack of probable cause, it may be inferred from a finding of lack of probable cause. <sup>36</sup> That is, when the defendant has instituted suit against the plaintiff without probable cause, it may be inferred that the defendant was motivated by ill-will or by an improper purpose. <sup>37</sup> However, the converse is not true; lack of probable cause may not be inferred from the existence of malice. <sup>38</sup> Moreover, an inference of malice is not a presumption of law, but merely one of fact that may be rebutted. <sup>39</sup>

There are two kinds of malice, either of which may satisfy this element of malicious prosecution: (1) actual or subjective malice, also known as malice in fact, which results in intentional wrongdoing, and (2) legal malice, which may be inferred from the circumstances, even though no actual wrongful intention can be demonstrated. <sup>40</sup> Legal malice requires proof of an intentional act performed without justification or excuse. It may inferred from one's acts and, unlike actual malice, does not require proof of evil intent or motive. <sup>41</sup>

### Legal Topics:

For related research and practice materials, see the following legal topics:

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### FOOTNOTES:

Footnote 1. See, e.g., *Lindeman v. C.J. Stoll, Inc.*, 490 So. 2d 101 (Fla. 2d DCA 1986) ; *Pellegrini v. Winter*, 476 So. 2d 1363 (Fla. 5th DCA 1985) ; *Pearce v. U.S. Fidelity and Guaranty Co.*, 476 So. 2d 750 (Fla. 4th DCA 1985) ; *Northwest Florida Home Health Agency v. Merrill*, 469 So. 2d 893 (Fla. 1st DCA 1985) ; *Wagner v. Nottingham Associates*, 464 So. 2d 166 (Fla. 3d DCA 1985) . See also § 22.01[3].

Footnote 2. *Fee, Parker & Lloyd, [REDACTED] v. Sullivan*, 379 So. 2d 412 (Fla. 4th DCA 1980) ; *Heard v. Mathis*, 344 So. 2d 651 (Fla. 1st DCA 1977) ; *Gallucci v. Milavic*, 100 So. 2d 375 (Fla. 1958) ; *Glass v. Parrish*, 51 So. 2d 717 (Fla. 1951) .

Footnote 3. *Gallucci v. Milavic*, 100 So. 2d 375 (Fla. 1958) .

- Footnote 4. See *Gallucci v. Milavic*, 100 So. 2d 375 (Fla. 1958) , citing *Lewton v. Hower*, 35 Fla. 58, 16 So. 616 (1895) .
- Footnote 5. *Phelan v. City of Coral Gables*, 415 So. 2d 1292 (Fla. 3d DCA 1982) .
- Footnote 6. *McLain v. Hall*, 521 So. 2d 190 (Fla. 4th DCA 1988) .
- Footnote 7. *Glass v. Parrish*, 51 So. 2d 717 (Fla. 1951) .
- Footnote 8. See also [1], above.
- Footnote 9. *Fee, Parker & Lloyd, [REDACTED] v. Sullivan*, 379 So. 2d 412 (Fla. 4th DCA 1980) ; *Heard v. Mathis*, 344 So. 2d 651 (Fla. 1st DCA 1977) ; *Gallucci v. Milavic*, 100 So. 2d 375 (Fla. 1958) ; *Glass v. Parrish*, 51 So. 2d 717 (Fla. 1951) .
- Footnote 10. *Phelan v. City of Coral Gables*, 415 So. 2d 1292 (Fla. 3d DCA 1982) .
- Footnote 11. *DeMarie v. Jefferson Stores, Inc.*, 442 So. 2d 1014 (Fla. 3d DCA 1983) .
- Footnote 12. *DeMarie v. Jefferson Stores, Inc.*, 442 So. 2d 1014 (Fla. 3d DCA 1983) .
- Footnote 13. *Templin v. K-Mart Corp.*, 504 So. 2d 18 (Fla. 5th DCA 1987) ; see also *Calleja v. Wiley*, 290 So. 2d 123 (Fla. 2d DCA 1974) (no probable cause to prosecute woman for passing worthless check with intent to injure and defraud when check was drawn on her husband's company's account and payment was stopped by her husband).
- Footnote 14. *Burns v. GCC Beverages, Inc.* 502 So. 2d 1217 (Fla. 1986) .
- Footnote 15. See *Burns v. GCC Beverages, Inc.*, 502 So. 2d 1217 (Fla. 1986) .
- Footnote 16. See *Burns v. GCC Beverages, Inc.*, 502 So. 2d 1217 (Fla. 1986) .
- Footnote 17. *Gallucci v. Milavic*, 100 So. 2d 375 (Fla. 1958) .
- Footnote 18. *Gallucci v. Milavic*, 100 So. 2d 375 (Fla. 1958) .
- Footnote 19. *Burns v. GCC Beverages, Inc.*, 502 So. 2d 1217 (Fla. 1986) .
- Footnote 20. *Burns v. GCC Beverages, Inc.*, 502 So. 2d 1217 (Fla. 1986) .
- Footnote 21. *Orr v. Belk Lindsey Stores, Inc.*, 501 So. 2d 714 (Fla. 5th DCA 1987) .
- Footnote 22. Fla. R. Crim. P. 3.140(g).
- Footnote 23. See *Burns v. GCC Beverages, Inc.*, 502 So. 2d 1217 (Fla. 1986) .
- Footnote 24. See also § 22.01[3].
- Footnote 25. *Duncan v. Germaine*, 330 So. 2d 479 (Fla. 4th DCA 1976) .
- Footnote 26. *Phelan v. City of Coral Gables*, 415 So. 2d 1292 (Fla. 3d DCA 1982) ; *Weissman v. K-Mart Corp.*, 396 So. 2d 1164 (Fla. 3d DCA 1981) ; *Sponder v. Brickman*, 214 So. 2d 631 (Fla. 3d DCA 1968) .

Footnote 27. *Pinkerton v. Edwards*, 425 So. 2d 147 (Fla. 1st DCA 1983) .

Footnote 28. *Pinkerton v. Edwards*, 425 So. 2d 147 (Fla. 1st DCA 1983) .

Footnote 29. *See Pinkerton v. Edwards*, 425 So. 2d 147 (Fla. 1st DCA 1983) .

Footnote 30. *See Pinkerton v. Edwards*, 425 So. 2d 147 (Fla. 1st DCA 1983) .

Footnote 31. *See Pinkerton v. Edwards*, 425 So. 2d 147 (Fla. 1st DCA 1983) , citing *Gallucci v. Milavic*, 100 So. 2d 375 (Fla. 1958) .

Footnote 32. *See also* § 22.05[2].

Footnote 33. *See Pinkerton v. Edwards*, 425 So. 2d 147 (Fla. 1st DCA 1983) .

Footnote 33.1. *See Olson v. Johnson*, 961 So. 2d 356, 359 (Fla. 2d DCA 2007) (either legal malice or actual malice is sufficient).

Footnote 34. *See, e.g., Lindeman v. C.J. Stoll, Inc.*, 490 So. 2d 101 (Fla. 2d DCA 1986) ; *Pellegrini v. Winter*, 476 So. 2d 1363 (Fla. 5th DCA 1985) ; *Wagner v. Nottingham Associates*, 464 So. 2d 166 (Fla. 3d DCA 1985) ; *Pearce v. U.S. Fidelity and Guaranty Co.*, 476 So. 2d 750 (Fla. 4th DCA 1985) ; *Northwest Florida Home Health Agency v. Merrill*, 469 So. 2d 893 (Fla. 1st DCA 1985) . *See also* § 22.05[3].

Footnote 35. *Erp v. Carroll*, 438 So. 2d 31 (Fla. 5th DCA 1983) .

Footnote 36. *Northwest Florida Home Health Agency v. Merrill*, 469 So. 2d 893 (Fla. 1st DCA 1985) ; *Johnson v. City of Pompano Beach*, 406 So. 2d 1257 (Fla. 4th DCA 1981) ; *Burchell v. Bechert*, 356 So. 2d 377 (Fla. 4th DCA 1978) ; *Gallucci v. Milavic*, 100 So. 2d 375 (Fla. 1958) .

Footnote 37. *See Azrikan v. O'Brien*, 173 So. 2d 711 (Fla. 3d DCA 1965) .

Footnote 38. *Central Florida Machinery Co., Inc. v. Williams*, 424 So. 2d 201 (Fla. 2d DCA 1983) ; *Thompson v. Taylor*, 183 So. 2d 16 (Fla. 1st DCA 1966) ; *Gallucci v. Milavic*, 100 So. 2d 375 (Fla. 1958) .

Footnote 39. *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181 (Fla. 1977) .

Footnote 40. *Wilson v. O'Neal*, 118 So. 2d 101 (Fla. 1st DCA 1960) , *cert. denied*, 365 U.S. 850 ; *see Azrikan v. O'Brien*, 173 So. 2d 711 (Fla. 3d DCA 1965) .

Footnote 41. *Olson v. Johnson*, 961 So. 2d 356, 359 (Fla. 2d DCA 2007).

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