IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

BRADLEY J. EDWARDS,

Appellant,

-vs- CASE NO. 4D14-2282

JEFFREY EPSTEIN,

Appellee.
_____/

APPENDIX TO APPELLANT'S INITIAL BRIEF

1. Motion for Reconsideration dated February 6, 2014. A1-37

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on December 30, 2014.

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Case No. 4D14-2282

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff,

vs.

SCOTT ROTHSTEIN, individually,
BRADLEY J. EDWARDS, individually, and
L.M., individually,

Defendant,
_____/

**COUNTER-PLAINTIFF BRADLEY EDWARDS'
MOTION FOR RECONSIDERATION**

Counter-Plaintiff, BRADLEY EDWARDS (EDWARDS), moves this Honorable Court to reconsider the Court's announced intention to grant a summary judgment in favor of the Counter-Defendant, JEFFREY EPSTEIN (EPSTEIN), and in support of this motion would show:

1. The issue squarely presented by EPSTEIN'S Motion for Summary Judgment is whether a non-lawyer is protected from liability by the litigation privilege when he initiates a civil lawsuit knowing that it is not only unsupported by probable cause but that it is completely unsupported by both the facts and the law and is filed solely for the purpose of intimidation and extorting a negotiating advantage in other civil litigation.

2. Prior to the decision of the Third District Court of Appeal in Wolfe v. Foreman, 128 So.3d 67 (2013), no reported decision in the State of Florida or in any other jurisdiction in the nation had ever extended the absolute immunity of the litigation privilege to bar a properly pled claim for malicious prosecution.

As misinterpreted by the Third DCA, the litigation privilege would be converted from a tool to allow properly-filed litigation to move forward unimpeded into a license to deliberately file baseless litigation purely for purposes of harassment. If the Florida litigation privilege is interpreted to mean that even a maliciously filed lawsuit somehow becomes protected activity, then Florida will stand alone among all the states.

Counsel have undertaken a broad survey of the laws and court decisions in fifty states and the District of Columbia. At this point, counsel have been unable to locate even a single precedent from another state that would support such an extreme result. On the other hand, many states have written opinions making clear that while conduct *within* a properly-filed lawsuit supported by probable cause may be protected, the litigation privilege (sometimes referred to as the "judicial privilege") does not give license to maliciously file or maintain a lawsuit that is known to have no factual or legal support. As a recent decision explains, "A vast number of other jurisdictions . . . hold that even where an absolute privilege bars an action for defamation based on statements made during a judicial proceeding, it does not bar an action for malicious prosecution." *Estate of Mayer v. Lax, Inc.*, 998 N.E.2d 238, 250 (Ind. App. 2013).

The cases supporting this fundamental proposition are legion, including (arranged in alphabetical order by state):

Alaska -- *Indus. Power & Lighting Corp. v. W. Modular Corp.*, 623 P.2d 291, 298 (Alaska 1981) ("This [the litigation privilege] does not mean that [the defendant] may not maintain an action for malicious prosecution if the current litigation is terminated favorably to it,

and if malice on the part of [the plaintiff] and lack of probable cause for the claim asserted are pleaded and proven.");

Arizona -- *Sierra Madre Dev., Inc. v. Via Entrada Townhouses Ass'n*, 20 Ariz. App. 550, 554, 514 P.2d 503, 507 (1973) ("We note that this [litigation] privilege is not unlimited. . . . [N]othing said herein is intended to affect the validity of any claim for relief based upon malicious prosecution or abuse of process. See Comment (a), Restatement of Torts, supra, § 587 . . . .");

California -- *Hogen v. Valley Hosp.,* 147 Cal.App.3d 119, 195 Cal.Rptr. 5, 7 (1983) ("... the fact that a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied." (internal citations omitted)).

Colorado -- *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A.*, 892 P.2d 230, 241 (Colo. 1995) ("an attorney '[w]hile fulfilling his obligation to his client, [ ] is liable for injuries to third parties . . . when his conduct is fraudulent or malicious'" (internal quotation omitted));

Connecticut -- *Simms v. Seaman*, 308 Conn. 523, 541, 69 A.3d 880, 890 (2013) ("This court also has determined that absolute immunity [i.e., litigation privilege] does not bar claims against attorneys for . . . malicious prosecution.").

Delaware -- *Nix v. Sawyer*, 466 A.2d 407, 411 (Del.Super. 1983) ("any litigant seeking application of a 'sham litigation' exception [to judicial privilege] would have to present an exceedingly strong factual showing in order to defeat operation of the privilege. . . . [T]he plaintiffs' burden in this respect is analogous to the requisite showing for a claim of malicious prosecution . . . .");

District of Columbia -- *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 346 (D.C. 2001) ("An attorney who makes false and defamatory statements to inveigle a client into filing a frivolous lawsuit risks . . . a malicious prosecution action by the party defamed, from which the judicial proceedings privilege will afford no protection.",) *overruled on other grounds* 3 A.3d 1132 (D.C. 2010);

Hawaii – *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 113 Hawai'i 251, 268-269, 151 P.3d 732, 749-50 (Ha. 2007)("[A]bsolute privileges, such as the litigation privilege, should only be permitted in limited circumstances. Thus, we do not believe that a litigation privilege should apply to bar liability of an attorney in *all* circumstances. In *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.,* 892 P.2d 230, 235 (Colo.1995), the Colorado Supreme [C]ourt noted that "an attorney is not liable to a non-client absent a finding of fraud or malicious conduct by the attorney." *See also Baglini v. Lauletta,* ... [338 N.J.Super.

282,] 768 A.2d 825, 833–34 (2001) ("The one tort excepted from the reach of the litigation privilege is malicious prosecution, or malicious use of process."). We believe such exceptions to an absolute litigation privilege arising from conduct occurring during the litigation process are reasonable accommodations which preserve an attorney's duty of zealous advocacy while providing a deterrent to intentional conduct which is unrelated to legitimate litigation tactics and which harms an opposing party.");

Idaho -- *Taylor v. McNichols*, 149 Idaho 826, 840-41, 243 P.3d 642, 656-57 (2010) ("Application of the litigation privilege varies across jurisdictions, but the common thread found throughout is the idea that an attorney acting within the law, in a legitimate effort to zealously advance the interests of his client, shall be protected from civil claims arising due to that zealous representation. An attorney engaging in malicious prosecution, which is necessarily pursued in bad faith, is not acting in a manner reasonably calculated to advance his client's interests, and an attorney engaging in fraud is likewise acting in a manner foreign to his duties as an attorney.");

Indiana -- *Estate of Mayer v. Lax, Inc.,* 998 N.E.2d 238, 250-51 (Ind. Ct. App. 2013), *transfer denied*, 2014 WL 223507 (Ind. Jan. 16, 2014) ("A vast number of other jurisdictions also hold that even where an absolute privilege bars an action for defamation based on statements made during a judicial proceeding, it does not bar an action for malicious prosecution. We see no reason to depart from this wealth of authority and, thus, hold that the absolute privilege for communications made during a judicial proceeding does not bar Lax and Lasco's cause of action for malicious prosecution arising from such communications." (internal quotations omitted)).

Iowa -- *Wilson v. Hayes*, 464 N.W.2d 250, 261 (Iowa 1990) ("an attorney would only be liable if the attorney knowingly initiated or continued a suit for a clearly improper purpose."

Louisiana -- *Goldstein v. Serio*, 496 So.2d 412, 415 (La. App. 1986) ("Malicious prosecution, however, is not concerned with the statements made during a proceeding but rather with the intent of the parties in instituting the original proceeding. Therefore, we cannot hold that absolute privilege is an affirmative defense to a malicious prosecution action.").

Maryland -- *Keys v. Chrysler Credit Corp.*, 303 Md. 397, 407-08, 494 A.2d 200, 205 (1985) ("Thus, even the intentional and wrongful bringing or maintaining of litigation will not destroy the absolute privilege that attends the litigation, and a cause of action other than defamation must be employed to redress such a wrong. . . . The elements of the cause of action of malicious use of process are: 1. A prior civil proceeding was instituted by the defendant. 2. The proceeding was instituted without probable cause. 3. The proceeding was instituted with malice. 4. The proceeding terminated in favor of the plaintiff. . . . We conclude the evidence was sufficient to permit the trier of fact to find the existence of all elements of this cause of action.").

Mississippi -- *McCorkle v. McCorkle*, 811 So.2d 258, 266 (Miss.App.,2001) ("There is precedent indicating that the presence of malice prohibits the assertion of judicial privilege. . . . Because we find there is evidence in the record to support a finding of malice in the case at bar, . . . we do not find that Donald may assert judicial privilege and find no merit to this assignment of error." (internal citations omitted)).

Nebraska -- *McKinney v. Okoye,* 282 Neb. 880, 889, 804-06 N.W.2d 571, 577-79 (2011) ("[B]ecause the elements of the tort [of malicious prosecution] are difficult to prove, it is unnecessary to grant . . . absolute privilege. '[T]here [is] a kind of qualified immunity built into the elements of the tort.' Indeed, 'all those who instigate litigation are given partial protection by the rules that require a plaintiff claiming malicious prosecution to show improper purpose, a lack of probable cause for the suit or prosecution, and other elements.' These elements effectively act as and could be analogized to the defamation defense of qualified or conditional privilege, which protects speakers in certain situations, but is lost if the speaker abuses it. . . . We conclude that absolute privilege does not bar an action for malicious prosecution.").

New Jersey -- *Dello Russo v. Nagel*, 358 N.J. Super. 254, 266, 817 A.2d 426, 433 (App. Div. 2003) ("The litigation privilege is not absolute. For example, it does not insulate a litigant from liability for malicious prosecution.");

New York -- *Lacher v. Engel*, 33 A.D.3d 10, 13, 817 N.Y.S.2d 37, 40 (N.Y. App. Div. 2006) ("[T]his absolute [litigation] privilege may be 'lost if abused.' More specifically, this Court held that the privilege is limited to statements which are not only pertinent to the subject matter of the lawsuit but are made 'in good faith and without malice.'" (internal quotations omitted);

Ohio -- *Willis & Linnen Co., L.P.A. v. Linnen*, 163 Ohio App.3d 400, 403, 837 N.E.2d 1263, 1265 - 1266 (Ohio App. 9 Dist.,2005) ("appellant asserts that his claims, abuse of process

and malicious prosecution, do not fall within the privilege. We agree that appellant's claims themselves are not barred by the doctrine of absolute privilege.").

Oregon -- *Mantia v. Hanson*, 190 Or. App. 412, 429, 79 P.3d 404, 414 (2003) ("When is an absolute privilege not absolute? But at least with respect to the absolute privilege pertaining to participation in judicial and quasi-judicial proceedings, there is a ready answer: An actor's conduct is so egregious as to be deprived of the protections of the absolute privilege when that conduct satisfies the elements of wrongful initiation. *See Restatement* at § 587, comment a (absolute privilege does not apply to claim for wrongful initiation of civil proceedings/malicious prosecution).");

West Virginia -- *Clark v. Druckman*, 218 W. Va. 427, 435, 624 S.E.2d 864, 872 (2005) ("However, the litigation privilege does not apply to claims of malicious prosecution and fraud.").

The principle that a malicious prosecution action is not barred by the litigation privilege is so widely-accepted that it has been explicitly recognized in the *Restatement (Second) of Torts* as conventional tort theory. The *Restatement* begins by noting the existence of a litigation privilege, stating, "A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding." *Restatement (Second) of Torts* § 587. However, as Comment (a) of

that section immediately explains, a malicious prosecution action is *not* covered by the privilege. The Comment explains: "One against whom civil or criminal proceedings are initiated *may recover in an action for the wrongful initiation of the proceedings*, under the rules stated in §§ 674 to 680 if the proceedings have terminated in his favor and were initiated without probable cause and for an improper purpose." *Id.* cmt. a (emphasis added). The cited provisions (i.e., §§ 674 to 680) are the provisions stating the tort of malicious prosecution.

3. Florida has long adhered to the universal recognition of malicious prosecution as an exception to the absolute litigation privilege.

Indeed the Fifth District Court of Appeal in Wright v. Yurko, 446 So.2d 1162 (5 DCA 1984), applied the privilege to bar various claims for tortious conduct alleged to have occurred in the course of prior judicial proceedings, but the Court expressly excluded the malicious prosecution claim from that bar:

> The only private remedy in this context allowed or recognized is the ancient cause of action for malicious prosecution.* This tort has its own special elements and defenses. They are:
>
> (1) a criminal or civil judicial proceeding has been commenced against the plaintiff in the malicious prosecution action;
>
> (2) the proceeding was instigated by the defendant in the malicious prosecution action;
>
> (3) the proceeding has ended in favor of the plaintiff in the malicious prosecution;
>
> (4) the proceeding was instigated with malice;
>
> (5) without probable cause and

(6) resulted in damage to the plaintiff in the malicious prosecution action.

Kalt v. Dollar Rent-A-Car, 422 So.2d 1031, 1032 (Fla. 3d DCA 1982). If all of these elements of malicious prosecution are properly pleaded in a complaint, the suit must be allowed to proceed. [Emphasis Added.]

*W. Prosser, Law of Torts, §119 (4th ed. 1971); see Bencomo v. Morgan, 210 So.2d 236 (Fla. 3d DCA 1968); Leach v. Feinberg, 101 So.2d 52 (Fla. 3d DCA), cert. denied, 104 So.2d 596 (Fla. 1958); Wright v. Yurko, 440 So.2d at 1165. Attached as Appendix A.

4. This same position expressly recognizing that claims for malicious prosecution are outside the protection of the litigation privilege is reflected in the holding of the Fourth District Court of Appeal in Graham-Eckes Palm Beach Academy, Inc. v. Johnson, 573 So.2d 1007 (4 DCA 1991). There the Court affirmed a judgment on the pleadings on a counterclaim for intentional interference with a contract, but the Court specifically observed that the privilege did not extend to a claim for malicious prosecution:

> Appellant contends that the absolute privilege normally afforded to pleadings should not apply where the complaint is wholly frivolous and filed to interfere with the performance of a contract for the sale of property. While appellant's argument is persuasive, we hold that its proper cause of action would have been one for malicious prosecution and affirm on the authority of Procacci v. Zacco, 402 So.2d 425 (Fla. 4th DCA 1981).

5. Thus, both the Fourth and Fifth DCAs have each expressly ruled that while the absolute litigation privilege bars other tort claims, "the ancient cause of action for malicious prosecution" remains a viable means to address the injuries caused by baseless and purely vexatious litigation.

6. The compelling public policy considerations that support the need to recognize this "ancient cause of action" are succinctly summarized in the Comments to Restatement (Second) of Torts §676 (1977), copy attached as Appendix C.

7. EPSTEIN makes repeated reference to "the trilogy of cases" that includes not only Wolfe, but also Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Insurance Co., 639 So.2d 606 (Fla. 1994) and Echevarria, etal v. Cole, 950 So.2d 380 (2007). In doing so, EPSTEIN makes the same fatal error that misled the Third DCA. The general holdings of Levin Middlebrooks and Echevarria which addressed and barred claims *other than malicious prosecution* were extended by the Third DCA to the sole exception to the litigation privilege without any recognition of or analysis of the existence of or basis for the exception.

8. Confronted with the issue of whether malicious prosecution claims are an exception to the litigation privilege, the Fourth and Fifth DCAs have clearly recognized that they are an exception. Wolfe is wrongly decided, and on the authority of Wright v. Yurko, this Court has the discretion to reject the erroneous opinion of the Third DCA. On the authority of the Fourth DCA's opinion in Graham-Eckes, this Court is compelled to reject the erroneous opinion of the Third DCA.

WHEREFORE, EDWARDS respectfully requests that this Honorable Court reconsider its announced position that it is obliged to follow Wolfe. This Court is not compelled to follow Wolfe and to grant a summary judgment that would immunize EPSTEIN's blatant attempt at extortion through the malicious misuse of the civil justice system. Fourth DCA precedent

requires the continued recognition of the ancient cause of action of malicious prosecution and denial of EPSTEIN's Motion for Summary Judgment.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 6th day of February, 2014.

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446 So.2d 1162
District Court of Appeal of Florida,
Fifth District.

Benjamin E. WRIGHT, Appellant,
v.
Albert YURKO, Leon C. Dorman, Lila Dorman and Barnette Greene, Appellees.

Nos. 82-1438, 82-1497. | March 15, 1984.

Doctor appealed from judgments of the Circuit Court, Orange County, Victor O. Wehle, J., denying him relief in malicious prosecution cases brought against medical malpractice plaintiffs, their expert witness, and their attorney. The District Court of Appeal, Sharp, J., held that: (1) counts in both lawsuits attempting to allege cause of action in defamation, conspiracy to commit defamation, or perjury with respect to statements made by defendants herein in course of prior judicial proceedings in medical malpractice action were insufficient as matter of law, such statements being accorded absolute immunity; (2) complaint as against medical malpractice plaintiffs and their expert witness sufficiently pleaded required elements of malicious prosecution and, hence, was improperly dismissed; (3) affidavit of defendant's attorney in support of summary judgment was in proper form, indicating by nature of statements therein that it was based on personal belief and knowledge; and (4) that affidavit, showing that attorney reasonably researched and investigated medical malpractice case and had tenable theory to present to the court and jury, negated essential element for malicious prosecution claim against the attorney, namely, filing of challenged action without probable cause.

Affirmed in part, reversed in part and remanded.

Dauksch, J., concurred in part, dissented in part and filed opinion.

West Headnotes (12)

[1] **Libel and Slander**
Judicial Proceedings

237Libel and Slander
237IIPrivileged Communications, and Malice Therein
237k35Absolute Privilege
237k38Judicial Proceedings
237k38(1)In General

Parties, witnesses, and counsel are accorded absolute immunity as to civil liability with regard to what is said or written in course of a lawsuit, providing the statements are relevant to the litigation.

5 Cases that cite this headnote

[2] **Libel and Slander**
Judicial Proceedings

237Libel and Slander
237IIPrivileged Communications, and Malice

APPENDIX A

Therein
237k35Absolute Privilege
237k38Judicial Proceedings
237k38(1)In General

Reason for rule according parties, witnesses, and counsel absolute immunity from civil liability for statements made in course of lawsuit is that, although it may bar recovery for bona fide injuries, chilling effect on free testimony and access to courts if such suits were allowed would severely hamper adversary system.

15 Cases that cite this headnote

[3] **Libel and Slander**
⇦Nature and Elements of Defamation in General
Torts
⇦Perjury or False Testimony

237Libel and Slander
237IWords and Acts Actionable, and Liability Therefor
237k1Nature and Elements of Defamation in General
379Torts
379IIITortious Interference
379III(D)Obstruction of or Interference with Legal Remedies; Spoliation
379k307Perjury or False Testimony
(Formerly 379k13)

Remedies for perjury, slander, and the like committed during judicial proceedings are left to discipline of the courts, bar association, and the State.

7 Cases that cite this headnote

[4] **Conspiracy**
⇦Nature and Elements in General

91Conspiracy
91ICivil Liability
91I(A)Acts Constituting Conspiracy and Liability Therefor
91k1Nature and Elements in General
91k1.1In General
(Formerly 91k1)

Actionable conspiracy requires actionable underlying tort or wrong; act which does not constitute basis for cause of action against one person cannot be made basis for civil action for conspiracy.

15 Cases that cite this headnote

[5] **Conspiracy**
⇦Conspiracy to Injure in Person or Reputation
Libel and Slander
⇦Evidence
Torts
⇦Perjury or False Testimony

91Conspiracy
91ICivil Liability
91I(A)Acts Constituting Conspiracy and Liability Therefor
91k7Conspiracy to Injure in Person or Reputation
237Libel and Slander
237IIPrivileged Communications, and Malice Therein
237k35Absolute Privilege
237k38Judicial Proceedings
237k38(4)Evidence
379Torts
379IIITortious Interference
379III(D)Obstruction of or Interference with Legal Remedies; Spoliation
379k307Perjury or False Testimony
(Formerly 379k13)

Plaintiffs and their expert witness could not be held liable for defamation, conspiracy to commit defamation, or perjury with respect to statements made by them in course of judicial proceedings in medical malpractice action.

14 Cases that cite this headnote

[6] **Malicious Prosecution**
⇐Requisites and Sufficiency in General

249Malicious Prosecution
249VActions
249k46Pleading
249k47Requisites and Sufficiency in General

If all elements of malicious prosecution are properly pleaded in a complaint, suit must be allowed to proceed; however, if one element is not sufficiently pleaded, complaint should be dismissed.

1 Cases that cite this headnote

[7] **Malicious Prosecution**
⇐Requisites and Sufficiency in General

249Malicious Prosecution
249VActions
249k46Pleading
249k47Requisites and Sufficiency in General

Allegations that medical malpractice suit was filed without probable cause and with malice and intent to injure doctor and that it concluded in doctor's favor, resulting in special and general damages to him, together with allegation that plaintiffs' expert witness conspired with plaintiffs to bring the suit, stated cause of action for malicious prosecution.

2 Cases that cite this headnote

[8] **Judgment**
⇐Personal Knowledge or Belief of Affiant

228Judgment
228VOn Motion or Summary Proceeding
228k182Motion or Other Application
228k185.1Affidavits, Form, Requisites and Execution of
228k185.1(3)Personal Knowledge or Belief of Affiant

Affidavit of attorney, who unsuccessfully represented parties in medical malpractice action, in support of summary judgment in subsequent malicious prosecution action against him was in proper form, though omitting introductory statement that it was made based on personal belief and knowledge, inasmuch as it was clear from statements made in body of the affidavit with respect to consultations with medical experts and review of medical treatises that they were based on defendant's own knowledge. West's F.S.A. RCP Rules 1.510(e), 1.510 comment.

2 Cases that cite this headnote

[9] **Judgment**
Presumptions and Burden of Proof

228Judgment
228VOn Motion or Summary Proceeding
228k182Motion or Other Application
228k185Evidence in General
228k185(2)Presumptions and Burden of Proof

Effect of defendant's motion for summary judgment in malicious prosecution action was to shift burden to plaintiff to come forward and show with proper proofs that material question of fact existed as to whether defendant, who represented parties in prior medical malpractice action, brought that action without probable cause.

1 Cases that cite this headnote

[10] **Malicious Prosecution**
Civil Actions and Proceedings

249Malicious Prosecution
249IIWant of Probable Cause
249k25Civil Actions and Proceedings
249k25(1)In General

To establish in malicious prosecution action probable cause for having brought prior action, it is not necessary to show that instigator of the prior lawsuit was certain of outcome of the proceeding but, rather, that he had reasonable belief, based on facts and circumstances known to him, in validity of the claim.

5 Cases that cite this headnote

[11] **Malicious Prosecution**
Probable Cause and Malice

249Malicious Prosecution
249VActions
249k64Weight and Sufficiency of Evidence
249k64(2)Probable Cause and Malice

Affidavit of attorney, against whom malicious prosecution action was brought, showing that he reasonably researched and investigated medical malpractice case and had tenable theory to present to the court and jury, together with fact that case went to the jury and survived motions for summary judgment and directed verdict, which, while not conclusively proving probable cause, was strong indication of substantial case, served to negate essential element for malicious prosecution, namely, filing without probable cause.

2 Cases that cite this headnote

[12] **Malicious Prosecution**
Advice of Counsel

249Malicious Prosecution
249IIWant of Probable Cause
249k17Criminal Prosecutions
249k21Advice of Counsel

249k21(1)In General

Reliance on advice of counsel is not an absolute defense in malicious prosecution case.

2 Cases that cite this headnote

Attorneys and Law Firms

***1163** Robert W. Bowles, Jr., Orlando, and Joe Alfred Izen, Jr., Houston, Tex., for appellant.

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Michael R. Walsh, Orlando, for appellees Dorman.

Roy B. Dalton, Jr., of Dalton & Provencher, P.A., Orlando, for appellee Greene.

Opinion

SHARP, Judge.

Wright appeals from judgments denying him relief as plaintiff in two malicious prosecution cases. The cases were consolidated ***1164** on appeal because they involved the same parties and the same incident. In one suit, which was disposed of by summary judgment, Wright sued Yurko, who represented Leon and Lila Dorman in their malpractice case against Wright. We affirm the summary judgment in that case.

The other suit was filed by Wright against the Dormans and Barnett Greene, an expert witness who testified at the malpractice trial for Leon Dorman. This case was dismissed because the lower court ruled the amended complaint failed to state a cause of action. Greene was also awarded attorney's fees pursuant to section 57.105, Florida Statutes (1981). We reverse the dismissal of the complaint and the award of attorney's fees.

The issue in the Greene-Dorman case is whether the second amended complaint states a cause of action on any ground. The complaint sets forth the factual background out of which both lawsuits arose. In 1976 Wright administered a treatment called a caudal epidural block to Leon Dorman for the purpose of alleviating his lower back pain. During the course of these treatments or thereafter, both retinas of Leon's eyes hemorrhaged, resulting in impaired vision. The Dormans retained Yurko to represent them in bringing a malpractice suit against Wright. The case was tried before a jury for two weeks, and resulted in a favorable verdict for Wright.

Wright then brought suit against the Dormans and Greene, in essence[1] alleging that the Dormans conspired with Greene to bring the malpractice case, with malice and intent to injure Wright, and without any basis or probable cause to have done so. In addition, there are also allegations that Dormans and Greene conspired to, and gave, false and perjured testimony at the trial with the intent to injure Wright. Wright alleged damages of lost business profits, suit money, and attorney's fees incurred by defending the suit.

1 The complaint is exceedingly prolix and disorganized and, therefore, we have had to summarize its content rather than quote it as we would have preferred to do.

Wright's complaint against Yurko contains essentially the same allegations except it claims Yurko instigated the suit and conspired with others to injure Wright by presenting perjured testimony. A third count alleges a cause of action of libel and slander against Yurko for statements he and his witnesses made in connection with the malpractice case.

[1] [2] [3] With regard to civil suits for perjury, libel, slander, defamation, and the like based on statements made in connection with judicial proceedings, this state has long followed the rule, overwhelmingly adopted by the weight of authority,[2] that such torts committed in the course of judicial proceedings are not actionable. *Perl v. Omni International of Miami, Ltd.,* 439 So.2d 316 (Fla. 3d DCA 1983); *Sailboat Key, Inc. v. Gardner,* 378 So.2d 47 (Fla. 3d DCA 1979); *Bencomo v. Morgan,* 210 So.2d 236 (Fla. 3d DCA 1968); *State v. Tillett,* 111 So.2d 716 (Fla. 2d DCA 1959). Parties, witnesses and counsel are accorded absolute immunity as to civil liability with regard to what is said or written in the course of a lawsuit, providing the statements are relevant to the litigation.[3] The reason for the rule is that although it may bar recovery for bona fide injuries, the chilling effect on free testimony and access to the courts if such suits were allowed would severely hamper our adversary system.[4] Remedies for perjury, slander, and the like committed during judicial proceedings are left to the discipline of the courts, the bar association, and the state.[5]

2 70 C.J.S. *Perjury* § 92 (1951); Restatement (Second) of Torts §§ 586-88, 635 (1981).

3 16 Am.Jur.2d *Conspiracy* § 55 (1964).

4 W. Prosser, *Law of Torts,* § 114, (4th ed. 1971); *see S.A. Robertson v. Industrial Ins. Co.,* 75 So.2d 198 (Fla.1954); *Sussman v. Damian,* 355 So.2d 809 (Fla. 3d DCA 1977).

5 *Buchanan v. Miami Herald Publishing Co.,* 230 So.2d 9 (Fla.1969).

[4] [5] Since privilege bars Wright's causes of action against the Dormans, ***1165** Greene and Yurko for defamation, it follows that there can be no actionable conspiracy to commit the same acts. An actionable conspiracy requires an actionable underlying tort or wrong.[6] An act which does not constitute a basis for a cause of action against one person cannot be made the basis for a civil action for conspiracy. *Buchanan v. Miami Herald Publishing Company,* 230 So.2d 9 (Fla.1969); *Kent v. Kent,* 431 So.2d 279 (Fla. 5th DCA 1983); *Buckner v. Lower Florida Keys Hospital District,* 403 So.2d 1025 (Fla. 3d DCA 1981), *petition for review denied,* 412 So.2d 463 (Fla.1982). Therefore, the counts in both lawsuits which attempt to allege a cause of action in defamation and conspiracy to commit defamation and/or perjury are insufficient as a matter of law, and those causes of action were properly dismissed as to the Dormans, Greene, and Yurko. *See Bond v. Koscot Interplanetary, Inc.,* 246 So.2d 631 (Fla. 4th

DCA 1971).

6 10 Fla.Jur.2d *Conspiracy-Civil Aspects* § 1 (1979).

[6] The only private remedy in this context allowed or recognized is the ancient cause of action of malicious prosecution.[7] This tort has its own special elements and defenses. They are:

7 *Id.;* Prosser, *supra* note 4, at § 119; *see Bencomo v. Morgan,* 210 So.2d 236 (Fla. 3d DCA 1968); *Leach v. Feinberg,* 101 So.2d 52 (Fla. 3d DCA), *cert. denied,* 104 So.2d 596 (Fla.1958).

> (1) A criminal or civil judicial proceeding has been commenced against the plaintiff in the malicious prosecution action;
>
> (2) the proceeding was instigated by the defendant in the malicious prosecution action;
>
> (3) the proceeding has ended in favor of the plaintiff in the malicious prosecution action;
>
> (4) the proceeding was instigated with malice;
>
> (5) without probable cause and
>
> (6) resulted in damage to the plaintiff in the malicious prosecution action.

Kalt v. Dollar Rent-A-Car, 422 So.2d 1031, 1032 (Fla. 3d DCA 1982). If all of these elements of malicious prosecution are properly pleaded in a complaint, the suit must be allowed to proceed. *Hopke v. O'Byrne,* 148 So.2d 755 (Fla. 1st DCA 1963). On the other hand, if one element is not sufficiently pleaded, the complaint should be dismissed. *Napper v. Krentzman,* 102 So.2d 633 (Fla. 2d DCA 1958).

[7] We think that Wright pleaded all of the required elements of malicious prosecution against the Dormans and Greene, and therefore, the lower court improperly dismissed the amended complaint. Although verbose and stated in a conclusory fashion, *see Hopke,* Wright touched on each of the elements for malicious prosecution, as well as for conspiracy to commit malicious prosecution. He alleged that the malpractice suit was filed without probable cause and with malice and intent to injure him; it concluded in his favor; and it resulted in special and general damages to him. Wright further alleged that Greene conspired with the Dormans to bring the suit. Since the complaint stated a cause of action for malicious prosecution, the award of attorney's fees to Greene under section 57.105 was improper. *Vogel v. Allen,* 443 So.2d 368 (Fla. 5th DCA 1983).

[8] In the Yurko suit, similar pleadings were taken beyond bare allegations. Counsel for Yurko moved for summary judgment and attached an affidavit with exhibits seeking to show that Yurko researched and investigated the Dorman case and had a reasonable belief that Dorman had a tenable claim against Wright. In his affidavit, Yurko set forth the names and conclusions of four medical experts he consulted, the medical books and treatises he read, and a history of his consultations with Dorman. Wright failed to file any counter-affidavits in opposition to the summary judgment motion.

Attempting to create a fact issue which would preclude summary judgment and thereby avoid the consequences of failing ***1166** to file any counter-affidavits or depositions,[8] Wright argues that Yurko's affidavit should be disregarded because it fails to state it was made on the basis of Yurko's personal knowledge. In order to bar affidavits based on hearsay, Florida Rule of Civil Procedure 1.510(e) requires that affidavits supporting or opposing summary judgment shall be made on the basis of personal knowledge.

8 *Cf. Johnson v. City of Pompano Beach,* 406 So.2d 1257 (Fla. 4th DCA 1981).

In this case, although the preamble to Yurko's affidavit omitted the introductory statement that he was making it based on personal belief and knowledge, it is clear from the statements made in the body of the affidavit that they were based on his own knowledge. He listed his own conversations, research, and activities he took regarding his preparation for, and the filing of, the malpractice suit. Since there could be no other source for the statements other than his personal knowledge, we think Yurko's affidavit was in proper form.[9]

9 The comment to Florida Rule of Civil Procedure 1.510 states "the requirement that it [the affidavit] show affirmatively that the affiant is competent to testify to the matters stated therein is not satisfied by the statement that he has personal knowledge; there should be stated in detail the facts showing that he has personal knowledge."

[9] [10] The effect of Yurko's motion for summary judgment was to shift the burden to Wright to come forward and show with proper proofs that a material question of fact existed as to whether Yurko brought the suit without probable cause. *Noack v. B.L. Watters, Inc.,* 410 So.2d 1375 (Fla. 5th DCA 1982); *Hardcastle v. Mobley,* 143 So.2d 715 (Fla. 3d DCA 1962). Probable cause in the context of a civil suit is measured by a lesser standard than in a criminal suit.

> But obviously less in the way of grounds for belief will be required to justify a reasonable man in bringing a civil rather than a criminal suit.... [T]he instigator need not have the same degree of certainty as to the facts, or even the same belief in the soundness of his case, and that he is justified in bringing a civil suit when he reasonably believes that he has a good chance of establishing it to the satisfaction of the court or jury. He may, for example, reasonably submit a doubtful issue of law, where it is uncertain which view the court will take.

> [T]ermination of the proceeding in favor of the plaintiff against whom it is brought is no evidence that probable cause was lacking, since in a civil action there is no preliminary determination of the sufficiency of the evidence to justify the suit. [Footnotes omitted].

W. Prosser, *Law of Torts* § 120, at 854-855 (4th ed. 1971). To establish probable cause, it is not necessary to show that the instigator of a lawsuit was certain of the outcome of the proceeding,[10] but rather that he had a reasonable belief, based on facts and

circumstances known to him, in the validity of the claim.[11]

10 Goldstein v. Sabella, 88 So.2d 910 (Fla.1956).

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

In *Central Florida Machine Company, Inc. v. Williams,* 424 So.2d 201 (Fla. 2d DCA), *petition for review denied,* 434 So.2d 886 (Fla.1983), a similar case against an attorney was disposed of in his favor by summary judgment. As in the instant case, the plaintiff in *Williams* had filed nothing in opposition to a motion for summary judgment. The appellate court held that summary judgment was proper because the probable cause determination was, at that juncture, a question of law[12] and the affidavits were sufficient to show that the attorney conducted a reasonable investigation of the facts prior to filing suit, and had developed sufficient information to support "a reasonable honest belief in a tenable claim." *Id.* at 203. The court observed that if attorneys were required to meet too high a standard, it "could conceivably prohibit attorneys from pursuing and ***1167** establishing new causes of action and could hinder the development of new legal theories." *Id.* It suggested the same standard as that adopted to test frivolous lawsuits and the award of attorneys' fees pursuant to section 57.105 should govern whether suits are filed without probable cause in the context of malicious prosecution suits.

12 *City of Pensacola v. Owens,* 369 So.2d 328 (Fla.1979).

[11] We need not in this case adopt such a low standard. The affidavit here shows Yurko reasonably researched and investigated his case, and had a tenable theory to present to the court and jury. The fact that the case went to the jury and survived motions for summary judgment and directed verdict (which were most surely made), while not conclusively proving probable cause, is a strong indication of a substantial case. *Cf. Pinkerton v. Edwards,* 425 So.2d 147 (Fla. 1st DCA 1983); *K-Mart Corporation v. Sellars,* 387 So.2d 552 (Fla. 1st DCA 1980). Since one of the essential elements for malicious prosecution, filing without probable cause, was established as lacking in the suit against Yurko, summary judgment was properly entered in his favor. *Kalt.*

[12] We recognize that our determination that Yurko had probable cause to file the malpractice suit may have a binding effect in Wright's suit against the Dormans and Greene.[13] However, reliance on advice of counsel is not an absolute defense in a malicious prosecution case.[14] Further pleadings in the Dorman-Greene case will be required to raise this affirmative defense, and Wright may be able to challenge its application in his reply or facts raised in the record as that case progresses. Therefore, final disposition by us, on the basis of the amended complaint and motion to dismiss, would be premature in the Dorman-Greene case.

13 Collateral estoppel may be applicable. *See United*

States Fidelity and Guar. Co. v. Odoms, 444 So.2d 78 (Fla. 5th DCA 1984).

14 [A]dvice of counsel is a defense to an action predicated upon malicious prosecution only in [the] event there has been a full and complete disclosure made to the attorney before his advice is given and followed.
Glass v. Parrish, 51 So.2d 717, 721 (Fla.1951); *see Paulk v. Buczynski,* 106 So.2d 100 (Fla. 2d DCA 1958); Prosser, *supra.* note 4, at § 119.

AFFIRMED AS TO APPEAL NUMBER 82-1438; REVERSED AS TO APPEAL NUMBER 82-1497; AND REMANDED.

COWART, J., concurs.

DAUKSCH, J., concurs in part; dissents in part, with opinion.

DAUKSCH, Judge, concurs in part; dissents in part:

I would affirm the trial court in all respects.

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573 So.2d 1007
District Court of Appeal of Florida,
Fourth District.

GRAHAM-ECKES PALM BEACH ACADEMY, INC., a Florida corporation, Appellant,
v.
Warren D. JOHNSON, Jr., Appellee.

No. 90-0026. | Jan. 30, 1991.

In litigation relating to real property, defendants filed counterclaim for intentional interference with contract for sale of land and slander of title. The Circuit Court, Palm Beach County, Edward A. Garrison, J., entered judgment on pleadings against defendant on counterclaim, and defendant appealed. The District Court of Appeal held that absolute privilege normally accorded to pleadings applies even if complaint is wholly frivolous and filed to interfere with performance of contract for sale of property.

Affirmed.

West Headnotes (1)

[1] **Libel and Slander**
⇐Defenses
Malicious Prosecution
⇐Civil Actions
Torts
⇐Contracts in General

Absolute privilege normally accorded to pleadings applied even if complaint was wholly frivolous and filed to interfere with performance of contract for sale of property; instead of counterclaims for intentional interference with contract for sale of land and slander of title, proper cause of action for filing complaint was one for malicious prosecution.

Attorneys and Law Firms

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Michael B. Davis of Davis Hoy Carroll & Isaacs, P.A., West Palm Beach, for appellee.

Opinion

PER CURIAM.

Graham-Eckes Palm Beach Academy, Inc., appeals from the entry of a final judgment on the pleadings on its counterclaim for intentional interference with a contract for the sale of land and slander of title. We affirm.

Appellant contends that the absolute privilege normally accorded to pleadings should not apply where the complaint is wholly frivolous and filed to interfere with the performance of a contract for the sale of property. While appellant's argument is persuasive, we hold that its proper cause of action would have been one for malicious prosecution and affirm on the authority of *Procacci v. Zacco*, 402 So.2d 425 (Fla. 4th DCA 1981).

AFFIRMED.

DELL, STONE and WARNER, JJ., concur.

Parallel Citations

16 Fla. L. Weekly 329

End of Document

Restatement (Second) of Torts § 676 (1977)

Restatement of the Law - Torts

Database updated October 2013
Restatement (Second) of Torts

Division 7. Unjustifiable Litigation

Chapter 30. Wrongful Use of Civil Proceedings

§ 676 Propriety of Purpose

To subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based.

Comment:

a. The rule stated in this Section is applicable to determine the liability of one who procures the initiation of civil proceedings as well as to determine the liability of a person who initiates them. On continuation of civil proceedings, see § 674, Comment *c*. The purpose for which the proceedings are initiated or continued becomes material only when it is found that they were initiated without probable cause. (See § 674).

b. The impropriety of purpose dealt with in this Section is only one of the elements necessary to a cause of action for wrongful civil proceeding. In this action, the plaintiff must also prove that the proceedings terminated in his favor, on which see Comment *j* to § 674, and that they were initiated without probable cause, on which see § 675.

c. There are numerous situations in which the civil proceedings are initiated primarily for an improper purpose. Some of them have been established as patterns and may be described in some detail. The following are illustrative:

The first situation arises when the person bringing the civil proceedings is aware that his claim is not meritorious. Just as instituting a criminal proceeding when one does not believe the accused to be guilty is not acting for the proper purpose of bringing an offender to justice (see § 668, Comment *b*), so instituting a civil proceeding when one does not believe his claim to be meritorious is not acting for the purpose of securing the proper adjudication of his claim. One may believe that his claim is meritorious even though he knows that the decisions in the state do not sustain it if he believes that the law is potentially subject to modification and that this case may be a suitable vehicle for producing further development or change. He may believe that his claim is meritorious if he believes that the actual facts warrant the claim but recognizes that his chances of proving the facts are meager. He cannot believe that the claim is meritorious, however, if he knows that it is a false one based upon manufactured or perjured testimony, or if he realizes that the adjudication will not be in his favor unless the court or jury is misled in some way. He is then abusing the general purpose of bringing civil proceedings and is not seeking a proper adjudication of the claim on which the civil proceeding is based.

A25

APPENDIX C

The second situation arises when the proceedings are begun primarily because of hostility or ill will. This is "malice" in the literal sense of the term, which is frequently expanded beyond that sense to cover any improper purpose. Thus, if the purpose of the civil proceeding is solely to harass the defendant, it is frequently said that this amounts to malice. But it is not necessary to prove that the harassment was itself motivated by ill will.

A third situation arises when the proceedings are initiated solely for the purpose of depriving the person against whom they are brought of a beneficial use of his property. An instance of this type occurs when the proceedings attacking the title to the land owned by the defendant are for the purpose not of adjudicating the title but of preventing the owner from selling his land. (See Illustration 1).

A fourth situation arises when the proceedings are initiated for the purpose of forcing a settlement that has no relation to the merits of the claim. This occurs, for example when a plaintiff, knowing that there is no real chance of successful prosecution of a claim, brings a "nuisance suit" upon it for the purpose of forcing the defendant to pay a sum of money in order to avoid the financial and other burdens that a defense against it would put upon him. A further instance occurs when the proceedings are based upon alleged facts so discreditable as to induce the defendant to pay a sum of money to avoid the notoriety of a public trial.

A fifth type of situation arises when a defendant files a counterclaim, not for the purpose of obtaining proper adjudication of the merits of that claim, but solely for the purpose of delaying expeditious treatment of the original cause of action.

In all of these situations, if the proceedings are also found to have been initiated without probable cause, the person bringing them may be subject to liability for use of wrongful civil proceedings.

Illustration:
Illustration:

1. A has purchased Blackacre at a sheriff's sale, subject to a statutory right of redemption in B, the original owner of Blackacre. B is negotiating a mortgage on Whiteacre in order to put himself in funds in order to exercise his right of redemption. A brings an action against B attacking B's title to Whiteacre in order to prevent the redemption of Blackacre. The purpose for which the action is brought is improper.

d. Ancillary proceedings. Ancillary proceedings are improperly brought if they are brought for a purpose that would make the bringing of the principal proceedings improper. Attachment may also be improperly obtained if it is intentionally so obtained as to prevent the defendant from releasing his goods by the method provided by law for that purpose.

Illustrations:
Illustrations:

2. A brings an action against the B Theatrical Company to recover a disputed debt. The theatrical properties of the company are attached at a time intentionally selected by A to make it impossible to obtain their release by filing a bond. A also knows that the theatrical company must have immediate possession of its properties in order to fill its scheduled engagements. The attachment is obtained for an improper purpose.
3. In order to prevent B from selling a lot of land to X and thus to force B to sell the land to him, A causes the attachment of the land in question. The attachment is obtained for an improper purpose.

Reporter's Note

See, as to motives of ill will, or lack of belief in any possible success of the action: Southwestern R. Co. v. Mitchell, 80 Ga. 438, 5 S.E. 490 (1888); Nyer v. Carter, 367 A.2d 1375 (Me.1977); Wills v. Noyes, 29 Mass. (12 Pick.) 324 (1832); Pangburn v. Bull, 1 Wend. (N.Y.) 345 (1828); Yelk v. Seefeldt, 35 Wis.2d 271, 151 N.W.2d 4 (1967); cf. Robinson v. Goudchaux's, 307 So.2d 287 (La.1975) (negligence amounting to reckless indifference).

As to ulterior purposes, see Southwestern R. Co. v. Mitchell, 80 Ga. 438, 5 S.E. 490 (1888); Commercial Credit Corp. v. Ensley, 148 Ind.App. 151, 264 N.E.2d 80 (1970); Malone v. Belcher, 216 Mass. 209, 103 N.E. 637 (1913); Burhans v. Sanford & Brown, 19 Wend. (N.Y.) 417 (1838).

"Malice" may be inferred from lack of probable cause. Stewart v. Sonneborn, 98 U.S. 187, 25 L.Ed. 116 (1878); National Surety Co. v. Page, 58 F.2d 145 (4 Cir.1932), rehearing denied, 59 F.2d 370; Cole v. Neaf, 334 F.2d 326 (8 Cir.1964); Dillon v. Nix, 55 Ala.App. 11, 318 So.2d 308 (1975); Hooke v. Equitable Credit Corp., 42 Md.App. 610, 402 A.2d 110 (1979); Krzyszke v. Kamin, 163 Mich. 290, 128 N.W. 190 (1910); Henderson v. Cape Trading Co., 316 Mo. 384, 289 S.W. 332 (1926); Crouter v. United Adjusters, Inc., 266 Or. 6, 510 P.2d 1328 (1973); Nagy v. McBurney, __ R.I. __, 392 A.2d 365 (1978).

Case Citations - by Jurisdiction

U.S.

U.S.1991. Cit. in diss. op. After finding that there was no basis in fact for the copyright infringement action and request for a temporary restraining order (TRO) filed by a publisher of business directories, through its counsel, against a competitor, the district court imposed monetary sanctions under Federal Rule of Civil Procedure 11 against the publisher on the ground that it had failed to make a reasonable inquiry before its president signed the TRO application. The court of appeals affirmed in part. Affirming, this court held, in part, that Rule 11 applied to represented parties and that the certification standard for a party was an objective one of reasonableness under the circumstances. The dissent argued that it was an abuse of discretion to sanction a represented litigant who acted in good faith but erred as to the facts and that, under the majority's interpretation, Rule 11 placed on those represented parties who signed papers subject to the Rule duties far exceeding those imposed by state tort law, which required a plaintiff to prove malice or improper purpose to recover for malicious prosecution or abuse of process. Business Guides v. Chromatic Communications Ent., 498 U.S. 533, 566, 111 S.Ct. 922, 941, 112 L.Ed.2d 1140.

C.A.2

C.A.2, 1993. Quot. in case cit. in disc. Dissatisfied homeowners who refused to pay for home repairs challenged the constitutionality of a state statute that permitted the contractors to obtain an ex parte prejudgment attachment of their home. On remand, the district court upheld the statute as applied. Affirming, this court held, inter alia, that the statute's failure to require the contractors to post a security bond was not constitutionally defective because the homeowners could have brought a counterclaim for damages under the state's vexatious litigation statute. Shaumyan v. O'Neill, 987 F.2d 122, 128.

C.A.8

C.A.8, 2011. Quot. in sup., cit. in case quot. in ftn., com. (c) cit. and quot. in sup. Guarantor of borrower's notes brought a malicious-prosecution action against lender, after a state court found guarantor not liable in lender's suit against him on the debt, because the payments that borrower had tendered to lender had been sufficient to pay off the underlying guaranteed notes, but had been misapplied by lender to pay off a different, unguaranteed debt owed by borrower to a financial institution related to lender. The district court granted summary judgment for lender. Reversing and remanding, this court held, inter alia, that a genuine issue of material fact existed as to whether lender brought its suit on the guaranty against guarantor for an improper purpose, and thus with malice, for purposes of guarantor's malicious-prosecution claim; pursuing a lawsuit for the purpose of forcing a settlement unrelated to the claim's underlying merits was improper. Stokes v. Southern States Co-op., Inc., 651 F.3d 911, 918, 921, 922.

C.A.10

C.A.10, 2009. Com. (c) cit. in disc. War veterans brought a claim for wrongful use of civil proceedings (WUCP), inter alia, against officer of the California Department of the Veterans of Foreign Wars of the United States, whose underlying defamation suit against them was voluntarily dismissed with prejudice. The district court dismissed veterans' complaint. Affirming in part, this court held, inter alia, that the WUCP claim failed for lack of a plausible allegation of an improper purpose outside the resolution of the defamation claim; there were no factual references or allegations that the officer's earlier defamation suit was filed for a purpose "not commensurate with the proper adjudication of the complaint," and, instead, the accusations veterans made that officer was using the case to try to get them to stop saying the things they were saying about him were precisely the kinds of things a plaintiff in the officer's shoes would do in the regular course of, and entirely consistent with, a defamation claim. Rusakiewicz v. Lowe, 556 F.3d 1095, 1105.

S.D.Ind.

S.D.Ind.2000. Cit. and quot. in case quot. in disc. Gas company sued county and county officials for violations of 42 U.S.C. § 1983, alleging, among other things, that defendants' decision to issue subpoenas in an attempt to determine whether plaintiff charged county for unnecessary work amounted to an abuse of process. Entering summary judgment for defendants

on this count, the court held, in part, that plaintiff's inability to establish that defendants initiated legal proceedings for an end other than that which they were designed to accomplish was fatal to its claim. Chandler Natural Gas Corp. v. Barr, 110 F.Supp.2d 859, 877.

D.Kan.

D.Kan.1995. Com. (c) cit. but dist. Son who was entrusted with his mother's power of attorney and who wrongfully secured mortgage on her property sued mortgagee's assignee for, inter alia, malicious prosecution after mortgagee's fraud action against him was dismissed. Assignee moved for summary judgment. Granting the motion, the court held that son failed to prove mortgagee's lack of probable cause for instituting the fraud action, failed to prove malice, and could not assert that the proceedings terminated in his favor where they were dismissed as time-barred. Elaborating on the malice requirement, the court noted that there was no evidence mortgagee went forward out of ill will, knew its claim was not meritorious, intended to deprive son of the beneficial use of his property, or proceeded solely for purposes of delay. Smith v. St. Paul Fire and Marine Ins. Co., 905 F.Supp. 909, 918-919.

S.D.N.Y.

S.D.N.Y.1993. Cit. in ftn. Patentee sued a corporation for patent infringement of a carton intended to enclose and protect plastic juice containers. The court granted defendant's motion to transfer the case to the District of Massachusetts on the ground of convenience. Stating that plaintiff took affirmative steps to seek to halt defendant's business activities in Massachusetts by writing to defendant's customers threatening dire consequences if they continued to distribute defendant's competing product, the court noted that issues of litigation misuse might be presented when threats of lawsuits, including threats of suits for enforcement of intellectual property rights, were made in bad faith with anticompetitive purpose or effect. Big Baby Co. v. Schecter, 812 F.Supp. 442, 444.

E.D.Pa.

E.D.Pa.2009. Com. (c) quot. in case cit. in sup. Website administrator sued two law students, their lawyers, and lawyers' law firms for, among other things, wrongful use of civil proceedings, after he was dismissed from a prior action filed by students in connection with sexually explicit messages that were posted about them on the website. Denying in part defendants' motion to dismiss, this court held, inter alia, that plaintiff sufficiently pled that defendants acted for an improper purpose when they filed the prior action against plaintiff for the purpose of coercing the settlement of unrelated claims against website and its owner, despite knowing that plaintiff was not responsible for the messages; joining a party over whom there was no probable cause in order to obtain concessions from a nonparty constituted an improper purpose. Ciolli v. Iravani, 625 F.Supp.2d 276, 295.

Ariz.

Ariz.1988. Quot. in sup., com. (c) cit. and quot. in disc. An automobile insurer brought a wrongful-death action against a deputy sheriff who was involved in an accident in which the insured was killed. Following settlement of that suit, the sheriff sued the insurer for malicious prosecution and abuse of process. The trial court granted summary judgment for the insurer on the abuse-of-process claim and the jury found for the plaintiff on the malicious-prosecution claim. The intermediate appellate court reversed. This court vacated and affirmed the trial court's decision, holding that the facts of the case did not permit the appellate court to rule as a matter of law that the insurer had probable cause to initiate the wrongful-death action, where the evidence permitted an inference by a jury that the case was filed, not because the insurer believed it might be found meritorious, but in order to intimidate the plaintiff and coerce him into settling for less than the insured's policy limits. Bradshaw v. State Farm Mut. Auto. Ins., 157 Ariz. 411, 758 P.2d 1313, 1320, 1321.

Cal.

Cal.1979. Cit. in ftn. The defendant commenced a medical malpractice action against the plaintiff and others. The court dismissed the complaint as to the plaintiff because it had not been filed within the applicable limitations period. The plaintiff then brought this action for malicious prosecution and the defendant moved for summary judgment. The trial court granted the defendant's motion on the ground that the bar created by the statute in the underlying action did not satisfy the requirement, in an action for malicious prosecution, that there must have been a termination favorable to the defendant in the first action, the plaintiff herein. The appellate court affirmed and held that where the defendant herein had not prosecuted the underlying action for medical malpractice knowing that the term of the applicable statute of limitations had run, the termination in the underlying action was done on technical and not substantive grounds and could not support an action for malicious prosecution. Lackner v. LaCroix, 25 Cal.3d 747, 159 Cal.Rptr. 693, 696, 602 P.2d 393.

Cal.App.

Cal.App.1998. Com. (b) quot. in case quot. in disc. Doctor who was denied hospital staff privileges sued hospital for, inter alia, malicious prosecution, alleging that defendant's executive committee recommended to its board of directors that plaintiff's application be denied, and that a subsequent administrative proceeding initiated against plaintiff was initiated with malice. The trial court dismissed the complaint. Reversing and remanding, this court held that defendant initiated a formal hearing when it sent plaintiff a letter informing him of its decision, that the existence of probable cause could not be determined at this stage of the litigation, and that plaintiff's allegations were sufficient to establish the element of malice. Axline v. St. John's Hosp. & Health Cen., 63 Cal.App.4th 907, 74 Cal.Rptr.2d 385, 391.

Cal.App.1987. Com. (c) quot. in sup. After an insurance adjuster intentionally withheld evidence that proved that a tenant was not responsible for a fire in a building, the building owner's insurer filed a subrogation claim against the tenant. When it was later learned that the adjuster had withheld the information, the tenant sued him for malicious prosecution. The trial court entered judgment on a verdict awarding the plaintiff damages. Affirming, this court held that the defendant had exhibited malice, because he lacked probable cause to claim that the tenant had caused the fire. The court said that the adjuster knew that the action against the tenant was not meritorious, because he realized that the insurer would not prevail unless the court or jury was misled. Interiors v. Petrak, 188 Cal.App.3d 1363, 234 Cal.Rptr. 44, 49.

Cal.App.1986. Cit. in ftn. A physician sued an attorney for malicious prosecution and intentional infliction of emotional distress after the attorney sued the physician for medical malpractice. In the malpractice action, the attorney represented a woman whose mother had hung herself while she was in a hospital and under the physician's care, and a jury found for the physician. In the present action, the trial court granted the attorney's motion for summary judgment. Reversing in part, the court of appeals held that because the attorney filed suit based on inadequate investigations, he had lacked probable cause to pursue the malpractice claim, as judged by the objective standard of whether a prudent attorney would have considered the action to be tenable. The court noted that in malicious prosecution cases it was the court's function to determine whether the defendant had probable cause, not a jury's function. The court also affirmed in part, holding that the intentional infliction of emotional distress claim was properly dismissed, because the attorney had an absolute privilege to make statements during judicial proceedings that the physician committed medical malpractice. Williams v. Coombs, 179 Cal.App.3d 626, 224 Cal.Rptr. 865, 874.

Conn.

Conn.1994. Cit. in sup. A town's director of the department of public works was arrested pursuant to warrants prepared by two police detectives on charges stemming from department's lubrication services contract with a lubrication service. After being tried and acquitted, director sued detectives for malicious prosecution and federal civil rights violations. Jury found for

director, but trial court granted defendants judgment n.o.v. Reversing and remanding, this court held, inter alia, that trial court incorrectly determined that the doctrine of qualified immunity applicable to § 1983 claims shielded defendants from liability as to director's malicious-prosecution claims. It stated that because jury found in director's favor on his malicious-prosecution claims, it necessarily found that defendants acted with malice, and that this finding of malice was sufficient to defeat the qualified immunity defense. Mulligan v. Rioux, 229 Conn. 716, 643 A.2d 1226, 1235.

Conn.1991. Cit. in ftn. The former chairman of a municipal parking authority commission sued the city and its mayor for vexatious suit, inter alia, alleging that the mayor first instituted and then abandoned removal proceedings against him after he blocked adoption of revised parking authority bylaws and accused city and authority personnel of wrongful acts. The trial court entered judgment on a jury verdict for the plaintiff. Affirming in part, reversing in part, and remanding, this court held, inter alia, that there was probable cause for the mayor to initiate some, but not all, of the charges and, since the charges were logically severable, the jury was free to impose liability against the mayor for the damages the invalid charges caused the plaintiff. DeLaurentis v. City of New Haven, 220 Conn. 225, 597 A.2d 807, 822.

Hawaii App.

Hawaii App.1984. Com. (c) cit. in sup. The plaintiff sued the sublessee of the plaintiff's property, who had allowed three men to operate a business on the premises and had failed to pay rent. The plaintiff later settled with one of the men. When the other two men refused to cooperate, the plaintiff sued, and they counterclaimed and filed for bankruptcy. The plaintiff then sued the defendants and their lawyer for malicious prosecution, abuse of process, and deceptive trade practices. This court affirmed the entry of summary judgment in favor of the defendants. It held that their prosecution was not malicious, since the plaintiff had failed to prove that the defendants' proceedings had been initiated with malice, and filing a counterclaim and filing for bankruptcy were not abuses of process in the absence of evidence that the proceedings had been initiated for any purpose other than that which they were designed to accomplish. Myers v. Cohen, 5 Hawaii App. 232, 687 P.2d 6, 11, judgment reversed 67 Hawaii 389, 688 P.2d 1145 (1984).

Ind.

Ind.1997. Cit. in disc., cit. and quot. in case quot. in disc. Lawyers for personal injury plaintiff filed lis pendens notice against real estate owned by defendants. Lawyers then filed a second lis pendens notice, despite a trial court ruling that they were not entitled to do so. Alleging that the existence of the second notice caused the sale of the property to fall through, defendants' lender sued lawyers for, inter alia, abuse of process. The trial court entered summary judgment for lawyers and the intermediate appellate court affirmed. Reversing and remanding, this court held, in part, that summary judgment was inappropriate where material factual issues existed as to lawyers' motivation in filing the second lis pendens notice. National City Bank, Indiana v. Shortridge, 689 N.E.2d 1248, 1253, supplemented 691 N.E.2d 1210 (Ind.1998).

Ind.App.

Ind.App.1981. Cit. and quot. in part in disc. and com. (c) cit. in disc. A physician filed a malicious prosecution action against an attorney who instituted a malpractice action against the physician on behalf of his client. The trial court set aside the jury's verdict in favor of the physician, and the physician appealed. The court stated that the plaintiff in an action for malicious prosecution has the burden of proving that the defendant instituted, or caused to be instituted, prosecution against the plaintiff, that the defendant acted maliciously in doing so, that the prosecution was instituted without probable cause, and that the prosecution terminated in the plaintiff's favor. The court noted that any standard of probable cause for purposes of a malicious prosecution action must insure that the attorney's duty to his client to present his case vigorously and in a manner as favorable to the client as 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 malicious prosecution for bringing of the suit. The court held that where the physician failed to meet his burden of proving lack of probable cause, the evidence was uncontroverted that the attorney

believed he had a potential claim against the physician for his involvement in the client's injuries, and the attorney's belief that the client's claim was tenable was a reasonable one, the trial court's setting aside of the verdict in favor of the physician on the ground that there was probable cause to bring the suit for medical malpractice was proper. Accordingly, the trial court's judgment was affirmed. Wong v. Tabor, 422 N.E.2d 1279, 1287.

Iowa

Iowa, 1990. Cit. and quot. in disc., com. (c) cit. in disc. Two physicians sued an attorney for malicious prosecution and abuse of process following the dismissal of a medical malpractice suit that the attorney had brought against the physicians on behalf of his client. The trial court dismissed the physicians' petition. Affirming, this court held that the attorney was not liable for malicious prosecution because he had had probable cause in initiating and continuing the malpractice suit and he had not acted with malice or an improper purpose in doing so. Wilson v. Hayes, 464 N.W.2d 250, 260.

Kan.

Kan.1980. Cit. in sup. and com. (c) and Illus. thereto quot. in sup. Plaintiff physician, against whom a medical malpractice action had been dismissed without prejudice, brought suit against his former adversaries' attorneys for damages based upon two theories. The first claim was based upon malicious prosecution of a civil action, and the second claim was based upon simple negligence. Counsel for plaintiff commenced the discovery process in the action by filing requests for admissions, interrogatories and requests for production of documents. All of this discovery was opposed by defendant attorneys and never answered. Thereafter, all the defendant attorneys filed motions to dismiss. The lower court sustained the motions to dismiss, and plaintiff appealed. The supreme court held that the district court was correct in dismissing the plaintiff's second cause of action based upon a theory of professional negligence because the established law is that an attorney cannot be held liable for the consequence of his professional negligence to his client's adversary. The remedy provided a third-party adversary is solely through an action for malicious prosecution of a civil action. The court reversed the judgment of the lower court as to the dismissal of the plaintiff's claim based upon a theory of malicious prosecution of a civil action. The case was remanded to the trial court to permit the parties to proceed with discovery so that the facts could be developed and the rights of the parties determined. The court held that plaintiff's claim had properly stated the elements of a cause of action for malicious prosecution. The court's opinion reviewed and applied the general principles of law to be followed in determining liability in an action for wrongful use of civil proceedings, commonly known as malicious prosecution, relying largely on the relevant sections of the Restatement. The court held: (1) an attorney may be held liable in damages for wrongful use of civil proceedings where he initiates or continues an action for his client without probable cause and primarily for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based; and (2) in determining probable cause in a malicious prosecution action brought against an attorney, a jury may properly consider not only those facts disclosed to counsel by the client, but also those facts which could have been learned by a diligent effort on the attorney's part. Nelson v. Miller, 227 Kan. 271, 607 P.2d 438, 444, appeal after remand 233 Kan. 122, 660 P.2d 1361 (1983).

Ky.

Ky.1997. Cit. in conc. op. Insureds sued insurer for bad-faith dealing and violations of the Unfair Claims Settlement Practices Act after insurer defended them against a wrongful-death claim but simultaneously sought a declaratory judgment to determine coverage. The trial court granted insurer summary judgment, holding that the legal questions of reformation and agency raised by insurer in filing the declaratory judgment action were fairly debatable. The court of appeals reversed, holding that insureds were entitled to pursue the bad-faith action. This court reversed and reinstated the trial court's order, holding that the insurer's conduct did not rise to the level required to sustain an action for bad faith. The insurer provided a defense for insureds, and the claim proceeded without delay. Simultaneously with the lawsuit, the insurer chose to maintain an independent action to determine its coverage liability, thus properly electing to explore its legal remedy. A concurrence argued that the factual allegations in this case did not state a cause of action under any common law or statutory theory. Although insureds claimed that the insurer lacked probable cause to bring the declaratory judgment action, they made no

claim that it was commenced for any purpose other than to adjudicate whether the insurer owed a defense and liability coverage for the claims arising out of the accident. Guaranty Nat. Ins. Co. v. George, 953 S.W.2d 946, 951.

Ky.1989. Quot. in disc., §§ 674-676 cit. in case quot. in disc. Social workers who had been sued by a mother whose child was taken from her covertly and without notice sued the mother and her attorney for malicious prosecution. The attorney had been advised that no legal orders had been issued regarding the taking of the child. The trial court awarded judgment on a jury verdict against the attorney. This court reversed, holding that the trial court, after erroneously submitting the issue of probable cause to the jury, erroneously made a separate post-trial judicial finding that the attorney lacked probable cause to file the underlying lawsuit. The court stated that the attorney had made a reasonable effort to investigate the basis of the mother's claim where he had been denied access to court files and was told that no court order was ever issued against the mother. Prewitt v. Sexton, 777 S.W.2d 891, 894.

Ky.1988. Quot. in disc., cit. in disc. §§ 674-676. A credit union obtained a judgment against a man on a note that he had signed, but it mistakenly executed the judgment upon a property owned by the man's father. The father sued the credit union and its attorney for, inter alia, wrongful execution and negligence. The trial court entered a directed verdict on all claims, except for the wrongful-execution action, which went to trial and resulted in a jury verdict for the defendants. The court of appeals reversed and remanded to have the trial court reconsider the issue of negligence. This court affirmed the court of appeals in part, but reversed the portion of the opinion that remanded for examination of the negligence issue. It held that the standards of wrongful execution, rather than the ordinary elements of negligence, applied in cases involving suits by opposing litigants or nonparties against the attorney in that suit. It also concluded that any error as to jury instructions was not preserved in that the plaintiff did not object to instructions that required a finding of malice. Mapother and Mapother, P.S.C. v. Douglas, 750 S.W.2d 430, 431, cert. denied 488 U.S. 854, 109 S.Ct. 142, 102 L.Ed.2d 114 (1988).

Ky.App.

Ky.App.1988. Cit. in disc. §§ 674-676. A police officer who was sued for civil rights violations by an arrestee sued the arrestee's attorneys for malicious prosecution. The trial court granted the attorneys' motion for summary judgment on the grounds that the officer had failed to file a response to the motion and that the civil rights suit had not been terminated on the merits in the officer's favor. Affirming, this court held that the dismissal of the arrestee's claim against the officer on statute-of-limitations grounds was not a termination of the proceedings in the officer's favor. Alcorn v. Gordon, 762 S.W.2d 809, 811.

Mass.

Mass.2007. Cit. in case quot. in diss. op. Former CFO of company brought claim for interference with advantageous future relations against company director, alleging that director interfered with the prospect of his continued employment beyond the expiration of his contract by threatening, in a conversation with company's CEO, to physically attack him, thereby making him too afraid to return to company. The trial court denied defendant's request for an instruction on actual malice and entered judgment on a jury verdict for plaintiff. Reversing and remanding, this court held, inter alia, that plaintiff had to prove the "improper motive or means" element of the tort by showing that defendant acted with actual malice unrelated to a legitimate corporate interest. The dissent argued that application of the actual-malice standard to this tort was unhelpful and confusing, and noted that this court had recently rejected the use of "malice" as an element of the tort of malicious prosecution. Blackstone v. Cashman, 448 Mass. 255, 276, 860 N.E.2d 7, 24.

Mass.2006. Cit. and quot. in sup. and adopted, com. (b) cit. in sup., com. (c) cit. and quot. in sup. After insurer paid a substantial workers' compensation settlement to an injured worker and then brought medical-malpractice subrogation action against worker's neurologist, alleging that neurologist failed to warn worker of certain dangers, neurologist sued insurer and its attorney for, in part, malicious prosecution. The trial court granted summary judgment for defendants. The appeals court

affirmed. This court reversed and remanded, holding, inter alia, that plaintiff raised issues of fact in regard to the "improper purpose" element of his malicious-prosecution claim, which the court derived from the Restatement and adopted in place of the element of "malice"; the court pointed to numerous facts in the record that suggested that insurer knew its claim was not meritorious, including its own expert neurologists' opinions that worker was at fault for the accident. Chervin v. Travelers Ins. Co., 448 Mass. 95, 107-110, 858 N.E.2d 746, 756-758.

Mass.App.

Mass.App.2006. Com. (c) cit. in diss. op. After insurer paid a substantial workers' compensation settlement to an injured worker and then brought medical-malpractice subrogation action against worker's neurologist, alleging neurologist failed to warn worker of certain dangers, neurologist sued insurer and its attorney, asserting a claim for, inter alia, malicious prosecution. The trial court granted summary judgment for defendants. This court affirmed based on plaintiff's failure to show the required element of malice. The dissent argued that plaintiff presented sufficient evidence on the question of malice because a factfinder could conclude that commencement of insurer's action, with knowledge that a necessary component, namely, worker's cooperation, would not be forthcoming, was intended to force a settlement by professional embarrassment of a medical doctor. Chervin v. Travelers Ins. Co., 65 Mass.App.Ct. 394, 407, 840 N.E.2d 983, 993, reversed in part 65 Mass.App.Ct. 394, 840 N.E.2d 983. See case above.

Mass.App.1993. Com. (c) cit. in disc. Vendors and prospective purchasers of land sued an adjoining landowner for tortious interference with the purchase agreement after the adjoining landowner claimed ownership of the land by adverse possession, causing the purchasers to lose their financing; the adjoining landowner counterclaimed to establish ownership by adverse possession. Affirming a judgment for the plaintiffs, the appeals court held, inter alia, that the trial court's conclusion that the adjoining landowner lacked any reasonable belief in the validity of his adverse possession claim and that his assertion of it was a tactical means of hindering plaintiffs' transaction, constituting tortious interference with contract, was not clearly erroneous. Peck v. Bigelow, 34 Mass.App.Ct. 551, 558, 613 N.E.2d 134, 139.

Mich.

Mich.1981. Cit. in ftn., cit. in ftn. in conc. op. The plaintiff, a physician, brought an action against the defendant attorneys, alleging that the defendants, in filing and pursuing a medical malpractice suit against the physician that resulted in a directed verdict of no cause of action, were guilty of negligence, abuse of process and malicious prosecution. The trial court entered judgment for the defendant lawyers; the intermediate court affirmed in part and reversed and remanded the malicious prosecution claim. Both parties appealed, and this court held that the defendants were not guilty of negligence because a lawyer has no duty in favor of the adversary of his client; to create such a duty would create an unacceptable conflict of interest. The court also found for the defendants with respect to the abuse of process claim and the malicious prosecution claim. The court reasoned that malicious prosecution was not appropriate because the physician had failed to plead any special injury, which was required to maintain that action. Accordingly, the court reversed the intermediate court's denial of summary judgment for the defendants on the malicious prosecution claim. Several justices filed dissenting opinions with regard to the malicious prosecution argument. They asserted that the special injury requirement was outdated and suggested that a malicious prosecution suit should be available when the elements of malice and lack of probable cause for a successful suit exist. Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585, 603, 609.

Mo.

Mo.1986. Quot. in sup. After the plaintiff had entered into a contract with the defendant for services, a dispute arose between the parties. The plaintiff sued, charging malicious prosecution after prevailing in a suit brought by the defendant. The trial court held for the plaintiff and awarded actual and punitive damages. The intermediate appellate court affirmed. Reversing, this court stated that malice in law, as defined by statute, rather than the higher standard of legal malice, which required proof

of mental state, satisfied the element of malice required to sustain a civil malicious prosecution action. Further, an award of punitive damages in a malicious prosecution action required a finding that the defendant acted with an improper motive. Proctor v. Stevens Employment Services, Inc., 712 S.W.2d 684, 687.

Mo.1977. Quot. in part. A broker brought an action against two insurance companies for the wrongful initiation of a civil action against him, based on allegations that he had conspired with an insurer's employee to use confidential information gained in relation to the insurers' business in order to divert business to other companies. After the trial court entered judgment for the broker, awarding actual and punitive damages, the insurers appealed on the grounds that there was insufficient evidence to support the verdict, and that the verdict was excessive. The court affirmed, holding that the evidence, when viewed in the light most favorable to plaintiff, supported the jury's finding that the defendants lacked probable cause, defined as the reasonable belief in the truth of the facts alleged and the reasonable belief in the legal validity of the claim asserted, to bring the action. The court stated that, under the circumstances, where the defendants inadequately investigated plaintiff's conduct before initiating action, a submissible case on malice was made out and the awards of actual and punitive damages were not excessive. The dissent argued that the majority failed to distinguish between the quantum of proof of probable cause required to defend the initiation of a civil, as opposed to a criminal, prosecution from a charge of malicious prosecution and would remand for retrial because plaintiff had failed to make a case against the defendants of lack of probable cause. Haswell v. Liberty Mut. Ins. Co., 557 S.W.2d 628, 636.

Mo.App.

Mo.App.1985. Com. (c) cit. generally in disc. In a prior action, real estate purchasers sued the seller, alleging that he had misrepresented the acreage of the estate and had failed to make repairs. After the court found for the seller, the purchasers filed numerous pleadings accusing the seller of perjury and other crimes. In the seller's subsequent suit for malicious prosecution, the trial court awarded the seller actual and punitive damages. The court of appeals affirmed, holding that there was sufficient evidence to conclude that the purchasers had neither reason to believe they asserted a valid claim against the seller, nor probable cause to charge the seller with perjury or fraud and that because a lack of probable cause was shown, the jury could infer malice. The court noted that it had previously declined to adopt the Restatement definition of malice in civil suits, and held that the instruction given on malice in law authorizing a punitive damages award was correct. Mullen v. Dayringer, 705 S.W.2d 531, 535.

N.H.

N.H.1993. Cit. in disc. §§ 674-676. A company sued its salesman and his attorney in separate actions for malicious prosecution. This court affirmed in part and reversed in part dismissals on the ground of collateral estoppel, holding, inter alia, that the action against the attorney was properly dismissed under the doctrine of res judicata, as the dismissal of an earlier suit by the company's president against the attorney for failure to state a cause of action was a dismissal on the merits. The court also held, however, that the company was not collaterally estopped from suing the salesman, as an action for malicious prosecution against an attorney had different legal standards than a similar action against a client. ERG, Inc. v. Barnes, 137 N.H. 186, 189, 624 A.2d 555, 559.

N.J.Super.

N.J.Super.1987. Cit. in disc. A wife sued for malicious prosecution the individual and corporate defendants who named her as a party to a suit against her husband for embezzlement, alleging that the defendants were liable for wrongful use of civil proceedings. The trial court granted the defendants' motions for summary judgment. Affirming, this court held that the wife's arguments were without merit because the defendants had adequate probable cause on the facts to bring the lawsuit and the plaintiff failed to establish actual malice on the part of the defendants; she did not prove that they initiated the suit against her primarily for a purpose other than that of securing the proper adjudication of the claim on which it was based. Westhoff v.

Kerr S.S. Co., Inc., 219 N.J.Super. 316, 530 A.2d 352, 356, certification 109 N.J. 503, 537 A.2d 1292 (1987).

N.M.

N.M.1997. Quot. in case quot. in disc., cit. in disc., com. (c) cit. in disc. Former convenience-store manager sued store's operator for abuse of process and malicious prosecution after defendant dismissed a tort action it had previously filed against plaintiff. The trial court entered summary judgment for defendant and the intermediate appellate court affirmed. Reversing and remanding, this court held that, because of the many similarities and tremendous overlap between the torts of abuse of process and malicious prosecution, they would be consolidated into one tort known as malicious abuse of process; that, under the new tort, a plaintiff was required to establish both a misuse of the power of the judiciary, which could be proven by showing that the defendant filed a complaint without reasonable cause or engaged in some sort of conduct, such as fraud or extortion, that would formerly have been actionable under the tort of abuse of process, and a malicious motive; that proof of special damages was not required; and that material factual issues existed as to whether defendant acted maliciously here. DeVaney v. Thriftway Marketing Corp., 1998 NMSC 001, 124 N.M. 512, 953 P.2d 277, 283, 287, cert. denied 524 U.S. 915, 118 S.Ct. 2296, 141 L.Ed.2d 157 (1998).

Or.App.

Or.App.1992. Com. (c) cit. in disc. Plaintiff sued defendant for wrongful initiation of a civil proceeding following dismissal of defendant's libel action against plaintiff. The trial court granted defendant's motion for a directed verdict. Reversing and remanding, this court held that the trial court erred in directing a verdict because a jury could find that defendant commenced and prosecuted his libel action for a primary purpose other than adjudication of his claim. The court stated that there was evidence that defendant's continuation of the action was without probable cause, since once plaintiff's counsel informed defendant that the letter plaintiff had sent defendant calling him a liar had not been published, a question of fact was raised whether defendant should have investigated before continuing with the action. Wroten v. Lenske, 114 Or.App. 305, 835 P.2d 931, 933.

Pa.

Pa.1992. Com. (c) quot. in appendix to per curiam op. A common pleas court judge filed a formal complaint against a state supreme court justice, asserting, inter alia, misconduct by the justice in allegedly pursuing an appeal from the grant of variances to a developer to coerce an excessive settlement from the developer rather than to enforce the zoning laws. The Judicial Inquiry and Review Board recommended to this court that the justice receive a public reprimand on the basis of an ex parte communication with the lower court judge relating to a matter pending before her and that the charge relating to the justice's pursuit of the zoning appeal be dismissed. The court accepted the Board's recommendations and report, which found, inter alia, that the justice's zoning appeal did not constitute abuse of process, because the justice had the right and standing to appeal and every expectation of success. Matter of Larsen, 532 Pa. 326, 616 A.2d 529, 593, cert. denied 510 U.S. 815, 114 S.Ct. 65, 126 L.Ed.2d 34 (1993).

Pa.Super.

Pa.Super.1984. Com. (c) quot. in sup. The plaintiff appealed from a judgment for an attorney in this action for malicious use of process. The judgment was based on preliminary objections in the nature of a demurrer. This court reversed. The defendant allegedly filed a caveat to the probate of a will, later voluntarily dismissed, to extract an unwarranted settlement from the executor and principal beneficiary. Allegedly, the defendant acted maliciously and without probable cause, knowing that those on whose behalf he acted had no standing to contest the probate. This court held that because the plaintiff alleged that the defendant without probable cause instituted a civil suit in order to extort a settlement, which suit terminated in the plaintiff's favor, the plaintiff stated a cause of action for malicious use of process. Shaffer v. Stewart, 326 Pa.Super. 135, 473

A.2d 1017, 1021.

Utah App.

Utah App.1998. Cit. in ftn. §§ 674-676. Prospective lessee sued lessor to specifically enforce, as a commercial lease agreement, a document containing "basic lease provisions" or, in the alternative, to recover damages for breach of contract. Lessor counterclaimed for abuse of process. Affirming the trial court's dismissal of lessor's counterclaim, this court agreed with lessee's contention that the counterclaim was for malicious prosecution or wrongful bringing of civil prosecution, rather than for abuse of process, and held, inter alia, that lessee's legal position did not exhibit a lack of probable cause or a purpose other than securing a proper adjudication of its claims. Brown's Shoe Fit Co. v. Olch, 955 P.2d 357, 367.

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