

**2600 MALICIOUS PROSECUTION: INSTITUTING A CRIMINAL PROCEEDING**

Question \_\_\_\_\_ asks did (defendant) maliciously prosecute (plaintiff).

To establish malicious prosecution, (plaintiff) must prove the following six elements:

- 1) A criminal proceeding was brought against (plaintiff).
- 2) (Defendant) was actively involved in instituting the criminal proceeding (prosecution) against (plaintiff).
- 3) The criminal proceeding was terminated in favor of (plaintiff).
- 4) (Defendant) acted with malice in instituting the criminal proceeding (prosecution).
- 5) The criminal charges were made without probable cause.
- 6) (Plaintiff) suffered damages as a result of the criminal proceeding (prosecution) on those charges.

The fourth element requires that (defendant) acted with malice in instituting the criminal proceeding (in causing the (prosecution)) (in causing charges to be brought). A person acts with malice when he or she has a hostile or vindictive motive, or acts primarily for a purpose other than bringing a guilty person to justice.

The fifth element relates to whether the charges made by (defendant) were without probable cause. This element is satisfied if, at the time (defendant) made the charges against (plaintiff), (defendant) knew or had reason to believe that (plaintiff) was not guilty of the charge(s). There is no probable cause if you are satisfied that (defendant) did not have sufficient facts concerning (plaintiff)'s conduct that would lead a person of ordinary caution and prudence to believe (plaintiff) had committed a criminal offense.

It is not enough that (plaintiff) establish that (defendant) acted with malice in instituting the criminal proceeding (in causing the prosecution); (plaintiff) must also prove that (defendant) had no probable cause to make the charges.

### **SPECIAL VERDICT**

Question 1: Did (defendant) maliciously prosecute (plaintiff)?

Answer: \_\_\_\_\_  
(Yes or No)

Question 2: What sum of money will compensate (plaintiff) for [insert damages]?

Answer: \$

### **COMMENT**

The instruction and comment were initially approved by the Committee in 1966. The instruction and comment were revised in 1986, 1991, 2014, and 2015.

**Elements.** The six essential elements in an action for malicious prosecution are:

- (1) a prior institution of judicial proceedings against the plaintiff;
- (2) such former proceedings must have been put in motion by or at the instance of the defendant in the malicious prosecution action;
- (3) such proceedings must have terminated in favor of the defendant in such criminal proceedings;
- (4) malice in instituting the former proceedings;
- (5) want of probable cause for instituting the former proceedings;
- (6) damage.

See Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983); Elmer v. Chicago & N.W. Ry., 257 Wis. 228, 43 N.W.2d 244 (1950).

The first three elements may be determined by the court. Ordinarily, the first three elements do not arise in a malicious prosecution action, as they are generally established beyond question by the records in the criminal proceedings. Therefore, no special instruction is necessary on these elements.

The fourth element, "malice in instituting the criminal proceedings," and the fifth element, lack of probable cause, are submitted in this instruction.

**Instigation of Prior Proceedings.** A party will be found to have instigated prior criminal proceedings against the present plaintiff if that party was instrumental in prosecuting the present plaintiff. Thus, the malicious swearing and signing of a criminal complaint can satisfy the instigation-of-prior-proceedings element for malicious prosecution. Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1952). But, no malicious prosecution action will lie where the defendant supplied the authorities with information and the prosecution was begun only after the authorities conducted their own independent investigation. Pollock v. Vilter Mfg. Corp., 23 Wis.2d 29, 126 N.W.2d 602 (1964).

**Termination of Prior Criminal Actions.** Dismissal of one count of a criminal complaint does not constitute favorable termination of the proceedings where the defendant in the prior action is convicted on another count arising out of the same incident. Heilgeist v. Chasser, 98 Wis.2d 97, 295 N.W.2d 26 (Ct. App. 1980).

**Malice.** The plaintiff must prove that the defendant acted "maliciously" in order to recover in a malicious prosecution suit. Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419 (1974). While the voluntary dismissal of the prior proceeding may be used to establish the lack of probable cause for the prior action, a voluntary dismissal may not be used to infer the existence of malice. Id.; Yelk v. Seefeldt, 35 Wis.2d 271, 151 N.W.2d 4 (1967). There must be some independent evidence of conduct from which improper motives can be inferred. Id. Malice may be proven by showing "malice in fact" or "malice in law." Meyer, supra.

"Malice in fact" involves situations where the defendant acted chiefly from motives of ill will. Id. A willful and wanton disregard for the facts or law may provide a basis for malice in fact but such willful and wanton conduct must be of such a nature and character as to evince a hostile or vindictive motive. Id.

"Malice in law" may exist even when the defendant cannot be shown to have acted from motives of actual ill will or vindictiveness. Malice in law exists if evidence is presented from which the jury might infer that the defendant instigated the former proceedings for an improper motive or purpose, that is, for a primary purpose other than bringing an offender to justice. Meyer, supra; Yelk, supra. An example of malice in law is where a criminal prosecution is instituted for the purpose of collecting a debt or compelling the delivery of property. See Peters, supra.

**Lack of Probable Cause for the Prior Proceedings.** Lack of probable cause is an essential element for an action for malicious prosecution. Krieg v. Dayton-Hudson Corp., 104 Wis.2d 455, 311 N.W.2d 641 (1981). Probable cause is an objective standard measured by the reasonably prudent person's belief in the cause of action in light of the facts known or reasonably ascertainable. Id. However, probable cause for the prior action is not necessarily lacking where the present defendant acted without knowledge of all of the facts or acted negligently. See Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966).

For prior criminal proceedings, the court should not apply the state of mind of a prosecutor in determining whether a private party had probable cause to believe that another person committed a crime. Rather, the court should decide whether there was a quantum of evidence that would lead an ordinary and reasonable layman in the circumstances to believe that the present plaintiff committed a crime. Hajec v. Novitzke, 46 Wis.2d 402, 175 N.W.2d 193 (1970). Discharge of the present plaintiff in the prior criminal proceeding is prima facie evidence of want of probable cause. Id.

**Advice of Counsel.** Advice of counsel is an affirmative defense. If the defense of advice of counsel is in the case, then the Committee suggests that the trial judge submit that question to the jury first. In Elmer, supra, the court held that advice of counsel is a complete defense. This was affirmed in Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1953).

If full disclosure of all facts within the knowledge of the defendant was made to the district attorney or his lawyer for the purpose of obtaining legal guidance and the disclosure results in advice which is honestly followed in commencing the criminal proceedings, such proof constitutes a complete defense. The result is that one of the essential elements of malicious prosecution, *i.e.*, want of probable cause, is negated and the entire malicious prosecution action fails. Also, in some instances, the determination of whether there has been such a full and fair disclosure is a matter of law and not properly for the jury. See Smith v. Federal Rubber Co., 170 Wis. 497, 175 N.W. 808 (1920).

**Differences Between Abuse of Process and Malicious Prosecution.** For a discussion of the differences between the tort of malicious prosecution and abuse of process, see Brownsell v. Klawitter, 102 Wis.2d 108, 306 N.W.2d 41 (1981), Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983), and Maniaci v. Marquette University, 50 Wis.2d 287, 184 N.W.2d 168 (1971).

**Burden of Proof.** The Committee believes the burden of proof to establish malicious prosecution is the middle burden. See Wis JI-Civil 205.