

**2605 MALICIOUS PROSECUTION: INSTITUTING A CIVIL PROCEEDING**

Question \_\_\_\_\_ asks: did (plaintiff) maliciously prosecute (defendant) [by instituting a civil proceeding].

To establish a malicious prosecution based on instituting a civil proceeding, (plaintiff) must prove the following six elements:

- 1) A judicial proceeding was (brought) (continued) against (plaintiff). [Insert type of civil proceeding] is a judicial proceeding.
- 2) The proceeding was (brought) (continued) by, or at the instance of, (defendant).
- 3) The proceeding was terminated in favor of (plaintiff).
- 4) (Defendant) acted with malice in instituting the proceedings.
- 5) The proceeding was instituted without probable cause.
- 6) (Plaintiff) suffered damages as a result of the proceeding.

The fourth element requires that (defendant) acted with malice in instituting the proceeding. A proceeding is maliciously instituted when a person who brings the proceeding has a hostile or vindictive motive or when the person's primary purpose was something other than succeeding on the merits of the claim.

The fifth element relates to whether the proceeding instituted by (defendant) was without probable cause. This element is satisfied if, at the time (defendant) initiated the proceeding against (plaintiff), (defendant) knew or had reason to believe that (plaintiff)

was not [insert facts necessary to establish probable cause]. There is no probable cause if you are satisfied (defendant) did not have sufficient facts concerning (plaintiff)’s conduct that would lead a person of ordinary caution and prudence to believe (plaintiff) [insert facts establishing a claim.]

### **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**

This instruction and comment were approved in 2015. This revision was approved by the Committee in September 2021; it removed language following the elements of the instruction and added to the comment.

See also, the Comment to Wis JI-Civil 2600.

**Institution of a Prior Civil Action.** In Wisconsin, the unjustified institution of a prior criminal or civil action may provide a valid claim for malicious prosecution as long as the other five elements of malicious prosecution are present. Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983); Maniaci v. Marquette Univ., 50 Wis.2d 287, 184 N.W.2d 168 (1970).

**Element 3; Termination of Prior Action in Present Plaintiff’s Favor.** The prior civil action is terminated in the present plaintiff’s favor when the prior action results in a defense verdict or dismissal on the merits with prejudice. However, the voluntary compromise and settlement of a prior civil suit does not satisfy the “favorable termination” element and, thus, bars a subsequent malicious prosecution suit. Thompson v. Beecham, 72 Wis. 2d 356 (1976); Tower Special Facilities, Inc. v. Investment Club, Inc., 104

Wis.2d 221 (Ct. App. 1981); Lechner v. Ebenreiter, 235 Wis. 244, 292 N.W. 913 (1940). Similarly, termination of the prior proceeding by some act, trick, or device of the present defendant does not constitute a “favorable termination.” See Bristol v. Eckhardt, 254 Wis. 297 (1948); Schwartz v. Schwartz, 206 Wis. 420 (1932) (no bar to malicious prosecution suit where settlement of prior action induced by duress).

In Monroe v. Chase, 2021 WI 66, ¶3, 397 Wis.2d 805, 961 N.W.2d 50, the Wisconsin Supreme Court clarified that a withdrawal of a prior proceeding may satisfy the favorable-termination element of a malicious prosecution action. The Court came to this conclusion after adopting the approach of the Restatement (Second) of Torts §674 cmt. J., which “focuses on the circumstances of the termination to determine whether it was favorable.” Id. at ¶20. The Restatement (Second) of Torts §674 cmt. J, provides as follows:

Termination in favor of the person against whom civil proceedings are brought. Civil proceedings may be terminated in favor of the person against whom they are brought . . . by (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his [or her] failure to prosecute them . . . Whether a withdrawal or abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought, and whether the withdrawal is evidence of a lack of probable cause for the initiation, depends upon the circumstances under which the proceedings are withdrawn.

Whether or not a withdrawal of a prior proceeding constitutes a favorable termination is a question for a fact-finder. Monroe, supra, at ¶26.

**Element 4; Malice.** The plaintiff must prove that the defendant acted “maliciously” 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, the 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 v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1953).

**Element 5; Lack of Probable Cause for the Prior Civil 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).

Probable cause may be lacking with respect to prior civil proceedings where the party initiating the prior proceedings acted without a reasonable belief in the existence of the facts underlying the claim or did not reasonably believe that such facts state a valid claim. Neumann, supra. Generally, for purposes of a malicious prosecution action, no inference of want of probable cause arises from the dismissal of the prior civil proceeding. Novick v. Becker, 4 Wis.2d 432, 90 N.W.2d 620 (1958). However, the dismissal of an involuntary bankruptcy petition or insanity proceeding is prima facie evidence of lack of probable cause because these actions "stand in the same class as a criminal case." Neumann, supra.

**Advice of Counsel.** See Wis JI-Civil 2611.

**Element 6; Damages.** For malicious prosecution suits involving prior civil proceedings, Wisconsin adheres to the minority "English" rule that the plaintiff must plead and prove special damages. Krieg, supra; Schier v. Denny, 9 Wis.2d 340 (1960); Johnson v. Calado, 159 Wis.2d 446; 464 N.W.2d 647 (1991). "Special damages" are injuries in the nature of an interference with the person or property of the present plaintiff by the prior action. See Schier, supra, Myhre v. Hessey, 242 Wis. 638, 9 N.W.2d 106 (1943). Special damages are present where the present plaintiff has been subjected to a wrongfully brought garnishment action (Novick, supra) or a wrongful winding up of a partnership which interfered with the plaintiff's possession and use of property (Luby v. Bennett, 111 Wis. 613 (1901)).

An allegation that the present plaintiff incurred expenses in defending himself against the prior proceeding fails to allege special damages. See Myhre, supra. In Schier, supra, the Wisconsin Supreme Court concluded that the plaintiff's claims of business reputation damage, mental anguish, public ridicule, humiliation, embarrassment, and attorney fees failed to allege such interference with the plaintiff's person or property as to amount to special damages.

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