

MALICIOUS PROSECUTION--CIVIL PROCEEDING.

The (state number) issue reads:

"Did the defendant maliciously [institute] [continue] a civil proceeding against the plaintiff?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, four things:¹

First, that the defendant [instituted a civil proceeding] [caused a civil proceeding to be continued]² against the plaintiff without probable cause. "Probable cause" exists if there are facts and circumstances which would cause a reasonable person to believe that the proceeding is justified.³ You should consider only the facts and circumstances that the defendant knew or should have known at the time the proceeding was [instituted] [continued].

Second, that the defendant [instituted] [continued] the proceeding against the plaintiff with malice. "Malice" exists when a person acts out of a motive of ill will, spite, grudge, revenge or oppression.⁴ "Malice" exists when a person commits a

¹Stanback v. Stanback, 297 N.C. 181, 203, 254 S.E.2d 611, 625 (1979).

²Allison v. Food Lion, Inc., 84 N.C. App. 251, 254, 352 S.E.2d 256, 257 (1987) (continuation of a prosecution after probable cause is known not to exist may be a basis for a malicious prosecution action).

³Best v. Duke University, 337 N.C. 742, 750, 448 S.E.2d 506, 510 (1994); Pitts v. Village Inn Pizza, Inc., 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978).

⁴See Cook v. Lanier, 267 N.C. 166, 171, 147 S.E.2d 910, 915 (1966), citing with approval Brown v. Martin, 176 N.C. 31, 33, 96 S.E.2d 642, 643 (1918).

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wrongful act intentionally and without excuse or just cause, or proceeds recklessly in disregard of the rights of others without probable cause.⁵ ("Malice" also exists when a person's primary goal in [commencing] [continuing] the prosecution is to accomplish some collateral purpose.)⁶ You are permitted, but are not required, to infer the existence of malice from a lack of probable cause.⁷

Third, that the proceeding ended in the plaintiff's favor. The plaintiff need not have won on the merits.⁸ (It is sufficient that the proceeding is dismissed because of the defendant's failure to appear and proceed with the action.)⁹ (It is sufficient that the proceeding was dismissed by the [defendant] [judge], with or without the plaintiff's consent.)¹⁰

Fourth, that as a result of the defendant's [institution] [continuation] of the civil proceeding, the plaintiff experienced some type of special damage. "Special damage" results from

⁵Pitts, 296 N.C. at 86-87, 249 S.E.2d at 378 (1978); Taylor v. Hodge, 229 N.C. 558, 560, 50 S.E.2d 307, 308 (1948); Dunn v. Harris, 81 N.C. App. 137, 139, 344 S.E.2d 128, disc. rev. den., 317 N.C. 702, 347 S.E.2d 40 (1986).

⁶Cook v. Lanier, 267 N.C. 166, 170, 96 S.E.2d 910, 913 (1966).

⁷Allison v. Food Lion, Inc., *supra*, 84 N.C. App. at 254, 352 S.E.2d at 257.

⁸Stanback, 297 N.C. at 203, 254 S.E.2d at 626.

⁹See, e.g., G.S. § 1A-1, Rule 41(b) regarding dismissals for failure to prosecute and Winkler v. Blowing Rock Lines, Inc., 195 N.C. 673, 677, 143 S.E. 213, 214 (1928).

¹⁰Taylor v. Hodge, *supra*; Jones v. Gwynne, 312 N.C. 393, 402, 323 S.E.2d 9, 14 (1984).

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substantial interference with the plaintiff's person or property.¹¹

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant maliciously prosecuted the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

¹¹Special damage resulting from the prior proceeding is a separate, substantive element of a malicious prosecution action rising from a civil proceeding. Stanback, 297 N.C. at 202-3, 254 S.E.2d at 625-626. Examples of such special damages include causing an injunction to issue prohibiting plaintiff's use of his property in a certain way, causing a receiver to be appointed to take control of plaintiff's assets, causing plaintiff's property to be attached, causing plaintiff to be wrongfully committed to a mental institution, or bringing an administrative proceeding to take away plaintiff's license to do business. Id. (See cases cited therein.)

