

MALICIOUS PROSECUTION--PUNITIVE DAMAGES--ISSUE OF EXISTENCE OF ACTUAL MALICE.

NOTE WELL: Use this instruction in conjunction with all claims for relief arising prior to January 1, 1996. Claims for relief arising on or after January 1, 1996 are governed by N.G.S.S. §1D-1 et seq., effective January 1, 1996. For such cases, use N.C.P.I.--Civil 810.96.

This (state number) issue reads:

Was the defendant's malicious prosecution accompanied by actual malice?

You are to answer this issue only if you have answered the (state number) issue<sup>1</sup> "Yes" in favor of 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, that the defendant's malicious prosecution was accompanied by actual malice.<sup>2</sup> "Actual malice" exists when a person [institutes] [continues] a wrongful proceeding out of a motive of ill will, spite, grudge, revenge or oppression.<sup>3</sup> (Without one or more of these motives being present, a person's [institution] [continuation] of a wrongful

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<sup>1</sup>The prior issue should be either malicious prosecution arising out of a criminal proceeding (N.C.P.I.--Civil 801.00) or malicious prosecution arising out of a civil proceeding (N.C.P.I.--Civil 801.00).

<sup>2</sup>Punitive damages can only be awarded for actual malice. General or "legal" malice is insufficient to support an award of punitive damages. 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).

<sup>3</sup>Id.

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MALICE. (Continued).

proceeding, even if intentional and without excuse or just cause,<sup>4</sup> is not accompanied by "actual malice".)

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's malicious prosecution was accompanied by actual malice, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.<sup>5</sup>

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.

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<sup>4</sup>*Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 86-87, 249 S.E.2d 375, 378 (1978); *Dunn v. Harris*, 81 N.C. App. 137, 139, 344 S.E.2d 128 (1986).

<sup>5</sup>The Court should also give N.C.P.I.--Civil 810.01 (or if appropriate N.C.P.I. Civil--810.02) with regard to whether to make award and amount.