

§IV. 1:00 MALICIOUS PROSECUTION

§1:10 DEFINITION

To establish a cause of action for malicious prosecution of either a criminal or civil proceeding, a plaintiff must demonstrate that the prior action was commenced by or at the direction of the defendant, was pursued to a legal termination in plaintiff's favor, was brought without probable cause, and was initiated with malice. *Crowley v. Katleman*, 8 Cal. 4th 666, 676, 34 Cal. Rptr. 2d 386, 390 (1994); *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 872, 254 Cal. Rptr. 336, 340 (1989). The commission of the tort of malicious prosecution requires a showing of an unsuccessful prosecution of a criminal or civil action, which any reasonable attorney would regard as totally and completely without merit, for the intentionally wrongful purpose of injuring another person. *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478, 499, 78 Cal. Rptr. 2d 142 (1998).

§1:20 ELEMENTS

§1:21 Prior Action

Malicious prosecution requires the initiation of a full-blown action. Subsidiary procedural actions within a lawsuit, such as an application for a restraining order or for a lien, will not support a claim for malicious prosecution. *Adams v. Superior Court*, 2 Cal. App. 4th 521, 528, 3 Cal. Rptr. 2d 49, 51 (1992).

§1:22 Commenced By or At Direction of Defendant

In a civil action, the plaintiff must prove that the prior action was commenced by or at the direction of the defendant. *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 872, 254 Cal. Rptr. 336, 340 (1989). In criminal cases against private persons, malicious prosecution consists of initiating or procuring the arrest and prosecution of another. *Cedars-Sinai Medical Ctr. v. Superior Court*, 206 Cal. App. 3d 414, 417, 253 Cal. Rptr. 561, 563 (1988) (citing *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 720, 117 Cal. Rptr. 241 (1974)).

§1:23 Favorable Termination

The prior action must have terminated in the plaintiff's favor. *Crowley v. Katleman*, 8 Cal. 4th 666, 686, 34 Cal. Rptr. 2d 386, 397 (1994).

§1:24 No Probable Cause

If a trial court determines that the prior action was objectively reasonable, plaintiff has failed to meet the threshold requirement of demonstrating an absence of probable cause. *Bixler v. Goulding*, 45 Cal. App. 4th 1179, 1188, 53 Cal. Rptr. 2d 246, 252 (1996).

§1:25 Malice

Malice means actual ill will or some improper purpose, whether express or implied, ranging anywhere from open hostility to indifference. *Grindle v. Lorbeer*, 196 Cal. App. 3d 1461, 1465, 242 Cal. Rptr. 562, 565 (1987); see also *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 884, 6 Cal. Rptr. 2d 151, 166 (1992).

§1:30 AUTHORITIES

§1:31 Prior Action

A private, contractual arbitration was an insufficient prior action, and thus did not support a malicious prosecution action. *Saganowsky v. More*, 64 Cal. App. 4th 122, 134, 75 Cal. Rptr. 2d 118 (1998).

Neither a motion for reconsideration nor an application for a writ of sale may give rise to a claim for malicious prosecution, as both are continuations of existing proceedings rather than independent actions. *Merlet v. Rizzo*, 64 Cal. App. 4th 53, 63-64, 75 Cal. Rptr. 2d 83 (1998).

A cause of action for malicious prosecution existed where predicated on a claim for affirmative relief asserted in a cross-pleading. *Bixler v. Goulding*, 45 Cal. App. 4th 1179, 1187, 53 Cal. Rptr. 2d 246, 251 (1996); *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 53, 118 Cal. Rptr. 184 (1974).

A will contest was a sufficient prior action to support a malicious prosecution claim. *Crowley v. Katleman*, 8 Cal. 4th 666, 693, 34 Cal. Rptr. 2d 386, 401 (1994).

Filing a motion to disqualify opposing counsel did not constitute a separate proceeding upon which a suit for malicious prosecution could be premised. *Silver v. Gold*, 211 Cal. App. 3d 17, 24, 259 Cal. Rptr. 185, 188 (1989).

Withdrawing an order to show cause regarding contempt from the calendar in a marital dissolution action did not constitute a basis for a malicious prosecution action against the attorney for the moving party. *Green v. Uccelli*, 207 Cal. App. 3d 1112, 1116, 255 Cal. Rptr. 315 (1989).

Making motions for reconsideration in a criminal case were not independent actions and could not constitute the initiation of a lawsuit for purposes of a malicious prosecution claim. *Adams v. Superior Court*, 2 Cal. App. 4th 521, 528, 3 Cal. Rptr. 2d 49, 52 (1992).

§1:32 Commenced By or At Direction of Defendant

The defendant must have been actively instrumental in causing the prosecution. *Cedars-Sinai Medical Center v. Superior Court*, 206 Cal. App. 3d 414, 417, 253 Cal. Rptr. 561, 563 (1988) (citing *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 720, 117 Cal. Rptr. 241 (1974)).

This element may be satisfied where the defendant sought out the police or prosecutorial authorities and falsely reported facts to them indicating that the plaintiff had committed a crime. *Cedars-Sinai Medical Center v. Superior Court*, 206 Cal. App. 3d 414, 417, 253 Cal. Rptr. 561, 563 (1988) (citing *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 720, 117 Cal. Rptr. 241 (1974)).

A person who had no part in the commencement of the action, but who participated in it at a later time, may be held liable for malicious prosecution. *Paramount General Hosp. Co. v. Jay*, 213 Cal. App. 3d 360, 366, 261 Cal. Rptr. 723, 725-26 (1989).

Hospital employees who misidentified the voice of a suspected arsonist on an audio tape were not liable for malicious prosecution because they neither instigated the prosecution, nor were they actively instrumental in causing the prosecution of the plaintiff. *Cedars-Sinai Medical Center v. Superior Court*, 206 Cal. App. 3d 414, 417, 253 Cal. Rptr. 561, 563 (1988).

A defendant may be civilly liable for malicious prosecution without personally signing the complaint initiating the proceeding. *Jacques Interiors v. Petrak*, 188 Cal. App. 3d 1363, 1371-72, 234 Cal. Rptr. 44, 49 (1987).

A defendant is responsible for initiating legal proceedings if he or she advises or assists another to begin an action against a plaintiff, ratifies it when it is begun on his or her behalf, or takes any active part in directing or ratifying the conduct of the case. *Williams*

v. Hartford Ins. Co., 147 Cal. App. 3d 893, 898, 195 Cal. Rptr. 448, 451 (1983) (knowingly giving false information to police constituted advising or assisting another to begin proceedings).

A person who alerts law enforcement to a possible crime or criminal ordinarily is not liable if law enforcement, on its own, after independent investigation, decides to prosecute. *Williams v. Hartford Ins. Co.*, 147 Cal. App. 3d 893, 898, 195 Cal. Rptr. 448, 451 (1983).

§1:33 Favorable Termination

A favorable termination may be accomplished at the appellate level or in the trial court. *Ray v. First Fed. Bank*, 61 Cal. App. 4th 315, 321, 71 Cal. Rptr. 2d 436 (1998).

A termination is favorable when it reflects the opinion of either the trial court or the prosecuting party that the action lacked merit or, if pursued, would result in a decision in favor of the defendant. *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 881, 6 Cal. Rptr. 2d 151, 164 (1992).

Mere dismissal of the proceeding is insufficient. The termination must demonstrate the innocence of the accused. *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 881, 6 Cal. Rptr. 2d 151, 164 (1992).

A dismissal resulting from a settlement generally does not constitute a favorable termination. However, a voluntary dismissal, even one without prejudice, may be a favorable termination sufficient to support a malicious prosecution action. *Fuentes v. Berry*, 38 Cal. App. 4th 1800, 1808, 45 Cal. Rptr. 2d 848, 852-53 (1995).

A dismissal for lack of jurisdiction does not involve the merits and cannot constitute a favorable legal termination. *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 882, 6 Cal. Rptr. 2d 151, 165 (1992).

Termination of a prior action by a successful statute of limitations defense is not a favorable termination. *Warren v. Wasserman, Comden & Casselman*, 220 Cal. App. 3d 1297, 1302, 271 Cal. Rptr. 579, 582 (1990).

Favorable termination cannot be based on the dismissal of criminal charges remaining after the defendant has entered a plea of *nolo contendere* to one or more of the charges pursuant to a plea bargain. *Cote v. Henderson*, 218 Cal. App. 3d 796, 804, 267 Cal. Rptr. 274, 278 (1990).

Generally, an action for malicious prosecution will not lie while an appeal in the underlying action is pending. *Friedman v. Stadum*, 171 Cal. App. 3d 775, 778, 217 Cal. Rptr. 585, 587 (1985).

Terminations of criminal proceedings consistent with guilt, such as dismissals purely on technical or procedural grounds, are not sufficient. *Scannell v. Riverside County*, 152 Cal. App. 3d 596, 611, 199 Cal. Rptr. 644, 652 (1984).

§1:34 No Probable Cause

Where there is no dispute as to the facts upon which an attorney acted in filing the prior action, the question of whether there was probable cause to institute that action is purely a legal question. That legal question is to be determined by the trial court on the basis of whether, as an objective matter, the prior action was legally tenable or not. *Sheldon Appel Co. v. Albert & Olike*, 47 Cal. 3d 863, 868, 254 Cal. Rptr. 336 (1989).

Probable cause depends on an objective evaluation of legal tenability based on either (1) the facts known to the attorney at the time he or she brought the prior action, or (2) subsequent events in the litigation which demonstrate, as a matter of law, that the prior action was objectively tenable. *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478, 498, 78 Cal. Rptr. 2d 142 (1998); *Nicholson v. Lucas*, 21 Cal. App. 4th 1657, 1665-1666, 26 Cal. Rptr. 2d 778 (1994); *Hufstedler, Kaus & Ettinger v. Superior Court*, 42 Cal. App. 4th 55, 62, 64-66, 49 Cal. Rptr. 2d 551 (1996).

The subjective beliefs of the defendant attorney as to the legal tenability of the action are not relevant to the question of probable cause. *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478, 496, 78 Cal. Rptr. 2d 142 (1998).

The fact that there may be some disputed facts relevant to the merits of the underlying action does not by itself defeat a motion for summary judgment in a malicious prosecution action. If undisputed facts in the record do establish an objectively reasonable basis for bringing the underlying action, the existence of other, allegedly disputed facts is immaterial. *Sangster v. Paetkau*, 68 Cal. App. 4th 151, 167, 80 Cal. Rptr. 2d 66 (1998) (citing *Hufstedler, Kaus & Ettinger v. Superior Court*, 42 Cal. App. 4th 55, 62, 49 Cal. Rptr. 2d 551 (1996)).

Probable cause requires evidence sufficient to prevail in the action or at least information reasonably warranting an inference there is such evidence. *Puryear v. Golden Bear Ins. Co.*, 66 Cal. App. 4th 1188, 1197, 78 Cal. Rptr. 2d 507 (1998).

The presence or lack of probable cause is to be determined as a matter of law and by an objective standard; the test is whether any reasonable attorney would have thought the claim tenable. *Copenbarger v.*

Int'l Ins. Co., 46 Cal. App. 4th 961, 964, 54 Cal. Rptr. 2d 1, 2 (1996).

A suit for malicious prosecution lay where an action charged multiple grounds of liability and some but not all of those grounds were asserted without probable cause. *Crowley v. Katleman*, 8 Cal. 4th 666, 671, 34 Cal. Rptr. 2d 386 (1994).

In a malicious prosecution action against an attorney, the nature and extent of the attorney's knowledge at the time the underlying action was filed was irrelevant to determining probable cause for filing the action where the actual facts established that the underlying action was tenable. *Hufstedler, Kaus & Ettinger v. Superior Court*, 42 Cal. App. 4th 55, 62, 49 Cal. Rptr. 2d 551, 556 (1996).

Lack of probable cause cannot be inferred from a showing of malice. *Leonardini v. Shell Oil Co.*, 216 Cal. App. 3d 547, 567, 264 Cal. Rptr. 883, 895 (1989).

An insurer had probable cause to report a homeowner to the police for violation of the Insurance Code where the insurer honestly believed that the homeowner had knowingly made material misrepresentations on claim forms. *Cummings v. Farmers Ins. Exchange*, 202 Cal. App. 3d 1407, 1421, 249 Cal. Rptr. 568, 576 (1988).

Acquittal of an embezzlement charge was not evidence of lack of probable cause. *Williams v. Taylor*, 129 Cal. App. 3d 745, 755, 181 Cal. Rptr. 423, 428 (1982).

Reliance on the advice of counsel, in good faith and after full disclosure of the facts, customarily establishes probable cause. *Sosinsky v. Grant*, 6 Cal. App. 4th 1548, 1556, 8 Cal. Rptr. 2d 552, 556 (1992).

A title insurance company acted with probable cause when it commenced a fraud action after fully disclosing all facts to an attorney and then acting on the attorney's advice in initiating the action. *De Rosa v. Transamerica Title Ins. Co.*, 213 Cal. App. 3d 1390, 1398, 262 Cal. Rptr. 370, 375 (1989).

If the person initiating the lawsuit acts in bad faith or withholds facts from counsel that would defeat the cause of action, that person cannot defend against malicious prosecution on the grounds that he or she relied on attorney's advice. *Lucchesi v. Giannini & Uniack*, 158 Cal. App. 3d 777, 788, 205 Cal. Rptr. 62, 68 (1984).

§1:35 Malice

"Malice" relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 874, 254 Cal. Rptr. 336 (1989).

Malice may not be inferred from an absence of probable cause but must be established by proof of either actual hostility or ill will on the part of the defendant or a subjective intent to deliberately misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant. *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478, 498-499, 78 Cal. Rptr. 2d 142 (1998).

Allegation that a hospital knew the information upon which it acted was inaccurate, was sufficient allegation of malice to support malicious prosecution action based on the hospital's denial of a physician's application to become a member of the hospital's medical staff. *Axline v. Saint John's Hosp. & Health Ctr.*, 63 Cal. App. 4th 907, 918, 74 Cal. Rptr. 2d 385 (1998).

The words "malice" and "malicious" mean a wish to vex, annoy or injure another person. Malice means that attitude or state of mind which actuates the doing of an action for an improper or wrongful motive or purpose. Malice does not necessarily require that the defendant be angry or vindictive or bear any actual hostility or ill will toward the plaintiff. *See, e.g., Albertson v. Raboff*, 46 Cal. 2d 375, 295 P.2d 405 (1956); *Grindle v. Lorbeer*, 196 Cal. App. 3d 1461, 242 Cal. Rptr. 562 (1987); *see also* BAJI 7.34.

A malicious prosecution plaintiff must show that his or her interest was the target of the defendant's improper purpose. *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 884, 6 Cal. Rptr. 2d 151, 167 (1992).

In a malicious prosecution action against an attorney, evidence that the attorney had not subjectively believed the prior action was tenable was relevant to the question of malice, if the trial court concluded that the underlying action was not objectively tenable. *Hufstedler, Kaus & Ettinger v. Superior Court*, 42 Cal. App. 4th 55, 63, 49 Cal. Rptr. 2d 551, 557 (1996).

§1:40 REMEDIES

- Compensatory Damages (CAL. CIV. CODE §3333 (potentially recoverable damages include out of pocket expenses, business losses, general harm to reputation, social standing and credit, as well as mental and bodily harm); *see also Babb v. Superior Court*, 3 Cal. 3d 841, 848 n.4, 92 Cal. Rptr. 179, 183 (1971)).

- Punitive Damages (CAL. CIV. CODE §3294; *Babb v. Superior Court*, 3 Cal. 3d 841, 848, 92 Cal. Rptr. 179, 183 (1971)).
- Attorneys' Fees (CAL. CIV. PROC. CODE §§1021 *et seq.*; *Babb v. Superior Court*, 3 Cal. 3d 841, 848 n.4, 92 Cal. Rptr. 179, 183 (1971)).

§1:50 STATUTE OF LIMITATIONS

The statute of limitations is one year. CAL. CIV. PROC. CODE §340(3). The cause of action accrues on the date that the proceedings in the prior action were dismissed or terminated. *Babb v. Superior Court*, 3 Cal. 3d 841, 846, 92 Cal. Rptr. 179, 181 (1971).

§1:60 AFFIRMATIVE DEFENSES

- Statute of Limitations (*see above*).
- Preemption (*Del Rio v. Jetton*, 55 Cal. App. 4th 30, 63 Cal. Rptr. 2d 712 (1997); *Idell v. Goodman*, 224 Cal. App. 3d 262, 271, 273 Cal. Rptr. 605, 610 (1990)).
- Unclean Hands (*Pond v. Ins. Co. of N. America*, 151 Cal. App. 3d 280, 289-92, 198 Cal. Rptr. 517, 521-23 (1984)).
- Waiver (CAL. CIV. PROC. CODE §1038(c)).
- Reliance on Advice of Counsel (*Mabie v. Hyatt*, 61 Cal. App. 4th 581, 597-598, 71 Cal. Rptr. 2d 657 (1998); *Pond v. Ins. Co. of N. America*, 151 Cal. App. 3d 280, 289-92, 198 Cal. Rptr. 517, 521-23 (1984)).
- Public Employee Immunity (CAL. GOV'T CODE §821.6).
- Public Entity Immunity (CAL. GOV'T CODE §815.2(b); *Scannell v. City of Riverside*, 152 Cal. App. 3d 596, 604, 199 Cal. Rptr. 644, 648 (1984)).
- Independent Agency Investigation (*Stanwyck v. Horne*, 146 Cal. App. 3d 450, 457-59, 194 Cal. Rptr. 228, 231-33 (1983)).
- *See generally* Appendix A.

§1:70 RELATED CAUSES OF ACTION

- Abuse of Process (§IV.2:00).
- False Imprisonment and/or False Arrest (§III.4:00).
- Libel (§XII.1:00).
- Slander (§XII.2:00).
- False Light (§XII.8:00).
- Trade Libel (§XII.3:00).