

801.00 MALICIOUS PROSECUTION - CRIMINAL PROCEEDING.

The (*state number*) issue reads:

"Did the defendant maliciously prosecute 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, three things:<sup>1</sup>

First, that the defendant [instituted a criminal proceeding] [caused a criminal proceeding to be continued]<sup>2</sup> against the plaintiff without probable cause. "Probable cause" would exist if there are facts and circumstances that would cause a reasonable person to believe that prosecution is justified.<sup>3</sup> 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.<sup>4</sup> "Malice" exists when a person commits a wrongful act intentionally and without excuse or just cause, or proceeds recklessly in disregard of the rights of others without probable cause.<sup>5</sup> ("Malice" also exists when a person's primary goal in [commencing] [continuing] the prosecution is to accomplish some collateral purpose or to advance some private interest.)<sup>6</sup> You are permitted, but are not required, to infer the existence of malice from a lack of probable cause.<sup>7</sup>

Third, that the proceeding ended in the plaintiff's favor. The plaintiff need not have won on the merits. (It is sufficient that the proceeding is dismissed because of the defendant's failure to appear and prosecute the action.)<sup>8</sup> (It is sufficient that the proceeding was dismissed by the [judge] [district attorney]).<sup>9</sup>

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.

---

1 *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984); *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 624 (1979).

2 *Allison 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).

*NOTE WELL: Where a private individual gives information he reasonably believes to be true to a public official of another's supposed criminal misconduct, if the public official then independently exercises his discretion whether to institute a criminal proceeding based upon that information, then the private individual is protected from liability, even if the information provided ultimately proves to be false. See N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 514, 742 S.E.2d 781, 787-88 (2013) (applying and adopting Comment (g) from Restatement (Second) Torts § 653).

3 *Best v. Duke Univ.*, 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).

4 See *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)).

5 *Pitts*, 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, 129 *disc. rev. den.*, 317 N.C. 702, 347 S.E.2d 40 (1986).

6 *Cook*, 267 N.C. at 170, 96 S.E.2d at 913.

7 *Allison*, 84 N.C. App. at 254, 352 S.E.2d at 257.

8 *Winkler v. Blowing Rock Lines*, 195 N.C. 673, 677, 143 S.E. 212, 214 (1928).

9 *Taylor*, 229 N.C. at 560, 50 S.E.2d at 308; *Jones v. Gwynne*, 312 N.C. 393, 402, 323 S.E.2d 9, 14 (1984). *But see Marcus v. Bernstein*, 117 N.C. 31, 33, 23 S.E. 38 (1895) in instances where the proceeding is terminated by the procurement or consent of the party being prosecuted.