

801.01 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:<sup>1</sup>

First, that the defendant [instituted a civil proceeding][caused a civil proceeding to be continued]<sup>2</sup> 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.<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.)<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.<sup>8</sup> (It is sufficient that the proceeding is dismissed because of the defendant's failure to appear and

proceed with the action.)<sup>9</sup> (It is sufficient that the proceeding was dismissed by the [defendant] [judge], with or without the plaintiff's consent.)<sup>10</sup>

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 substantial interference with the plaintiff's person or property.<sup>11</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.

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

3. *Best 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).

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

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

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

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

N.C.P.I.-Civil. 801.01  
MALICIOUS PROSECUTION-Civil. PROCEEDING.  
GENERAL CIVIL VOLUME  
JANUARY 1995  
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9. See, e.g., N.C. Gen. Stat. § 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).

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