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## MALICIOUS PROSECUTION IN FLORIDA

LEONARD M. RIVKIND \*

*Who steals my purse steals trash; 'tis something, nothing;  
'Twas mine, 'tis his, and has been slave to thousands;  
But he that filches from me my good name  
Robs me of that which not enriches him,  
And makes me poor indeed.\*\**

### INTRODUCTION

*Scope.* The emphasis in this article is on the Florida law regarding malicious prosecution. No attempt has been made to exhaust the field in general. Some reference is made to the law in other jurisdictions and to the scholars only to clarify or emphasize a point under discussion, or perhaps, just because the author believed the statement to be novel or interesting. This article is concerned with actions based upon criminal proceedings, not wrongful civil proceedings. Although generally governed by the same rules, there are some differences.<sup>1</sup>

*Distinguished.* Malicious prosecution should be distinguished from defamation, abuse of process, and false imprisonment.

Three reasons have been advanced why malicious prosecution was not included as a branch of the law of defamation.<sup>2</sup> First, malicious prosecution preceded defamation as a cause of action; second, the strict liability of defamation seemed too drastic; third, since malicious prosecution covers a broader field than mere harm to reputation, the interests protected are not identical.<sup>3</sup>

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\*\*WM. SHAKESPEARE, OTHELLO, THE MOOR OF VENICE, Act III, sc. III (1602).

1. PROSSER ON TORTS 97 (1941). See RESTATEMENT, TORTS 674 (C). For an action based upon wrongful civil proceedings see Tatum Bros. Real Estate & Inv. Co. v. Watson, 92 Fla. 278, 109 So. 623 (1926); Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927) (action based upon lunacy proceeding).

2. PROSSER ON TORTS 96 (1941)

3. *Ibid.*

Abuse of process occurs when one misuses process justified in itself for an end other than that which it was designed to accomplish. Probable cause and termination in the plaintiff's favor are not in issue as is the case in malicious prosecution.<sup>4</sup>

False imprisonment differs from malicious prosecution in that the former is concerned with the irregularity of legal process. If there is valid process, the arrest is not "false" and the action must be for malicious prosecution.<sup>5</sup>

In *Tobey v. Orr*,<sup>6</sup> the defendant had made an affidavit charging plaintiff with polluting water. The Florida Supreme Court said the action for malicious prosecution lies although it appears that no crime known to law is charged or even where the affidavit fails to allege facts constituting a crime. The rationale is that the action is for injury to reputation and expenses incurred in defense, and not for the danger of punishment to which a man is subjected.

The dissenting opinion<sup>7</sup> contended that false imprisonment was the proper remedy since the process on which the arrest was made was void.

*Policy Consideration.* Malicious prosecution suits do not curry favor with the courts while they appear to attract the sympathy of jurors. An awareness of underlying and conflicting policy is essential to justify the somewhat rigorous rules that place a heavy burden upon the plaintiff in a suit for malicious prosecution. The policy conflict is in the encouragement of enforcement of criminal laws versus the protection of individuals from oppression.<sup>8</sup>

Justice Hobson has stated:<sup>9</sup>

We are not unaware of the fact that suits bottomed upon malicious prosecution generally find little favor with the courts.

Earlier, Justice Terrell observed:<sup>10</sup>

... An action for malicious prosecution... should not be unduly restricted; at the same time it should be rigidly safeguarded and not be permitted, except when the circumstances meet the test. Otherwise the adjudication of controverted issues will fail of their purpose and degenerate into a series of reprisals and counter reprisals and the litigants, like the fabled Kilkenny cats, will have consumed each other.

4. PROSSER ON TORTS 98 (1941).

5. PROSSER ON TORTS 96 (1941). See *Kress v. Powell*, 132 Fla. 471, 180 So. 757 (1938). (The court pointed out that if imprisonment is under legal authority it may be malicious but it cannot be false; that void process will not constitute legal authority).

6. 92 Fla. 964, 111 So. 110 (1926).

7. *Id.* at 112

8. See RESTATEMENT, TORTS C. 29, *Introduction*.

9. *Glass v. Parrish*, 51 So.2d 717, 721 (Fla. 1951).

10. *Levy v. Adams*, 140 Fla. 515, 192 So. 177, 179 (1939).

A statement evidencing caution is found in *Jaffe v. Stone*,<sup>11</sup> a California case:

(The rule of public policy under which actions for malicious prosecution are treated with disfavor ought not to be pressed) to the extreme of practical nullification of the tort liability, and the consequent defeat of the other important policy which underlies it of protecting the individual from the damage caused by unjustifiable prosecution.

Which statement you would advance as the overriding policy depends, I suppose, upon which side of the fence you are on.

#### ELEMENTS

The following elements must *all* be present in order to give rise to a cause of action in malicious prosecution:<sup>12</sup>

- (1) The commencement or continuance of an original criminal proceeding.
- (2) Legal causation by the present defendant against plaintiff, who was defendant in the original proceedings.
- (3) A bona fide termination of the original criminal proceeding in favor of the present plaintiff.
- (4) The absence of probable cause for such proceedings.
- (5) The presence of malice therein.
- (6) Damages conforming to legal standards resulting to plaintiff.

The burden of proving the preceding elements in the malicious prosecution suit<sup>13</sup> is on the plaintiff.

*Commencement or Continuance.* Generally, a criminal proceeding has commenced upon the issuance of a warrant, indictment returned, or information filed.<sup>14</sup> A mere complaint to the authorities or presenting evidence to the grand jury which refuses to indict will not support the action.<sup>15</sup> A person is liable for influencing or inducing another, by pressure or false information known to be false, to commence the criminal proceeding, but not for merely giving advice.<sup>16</sup> Furthermore, if a person presses for a conviction after discovering a lack of probable cause, such person will be liable for harm caused by such a continuance, provided, of course, that the proceeding ultimately terminates in favor of the accused.<sup>17</sup>

In *Kress v. Powell*<sup>18</sup> the Florida Supreme Court held that the summoning of a policeman and informing him that plaintiff had attempted to pass a

11. *Jaffe v. Stone*, 18 Cal. 2d 146, 114 P.2d 335, 343 (1941).

12. *Glass v. Parrish*, 51 So.2d 717 (Fla. 1951); *Ward v. Allen*, 152 Fla. 82, 11 So.2d 193 (1943); *Duval Jewelry Co. v. Smith*, 102 Fla. 717, 136 So. 878 (1931).

13. *Duval Jewelry Co. v. Smith*, 102 Fla. 717, 136 So. 878 (1931).

14. *RESTATEMENT, TORTS* 654. See also, *PROSSER ON TORTS* 96 (1941).

15. *PROSSER ON TORTS* 96 (1941).

16. *RESTATEMENT, TORTS* C. 29, *Introduction*.

17. *RESTATEMENT, TORTS* 655.

18. 132 Fla. 471, 180 So. 757 (1938).

counterfeit bill was not the commencement of a judicial proceeding. This decision follows the general rule, *supra*.

*Termination.* In *Hower v. Lewton*<sup>19</sup> the defendant was sued for charging plaintiff with perjury. In the original proceeding the grand jury failed to return an indictment and plaintiff was discharged. The Florida Supreme Court correctly held that there was a termination in plaintiff's favor to support the present action. It should be noted in this regard that failure of the grand jury to indict which is not followed by discharge cannot serve as a foundation for the action.<sup>20</sup> Entry of a *nolle prosequi* is a favorable termination.<sup>21</sup> The same is true of a discharge on hearing.<sup>22</sup> It is enough that the proceeding is terminated so that it cannot be revived.<sup>23</sup>

The termination must be bona fide. Where the charges are withdrawn by reason of a compromise with the accused, there is no favorable termination to support the action.<sup>24</sup>

While the accused in the original criminal proceeding must be proven guilty beyond a reasonable doubt, it is generally held that the guilt of the accused may be retried in the malicious prosecution suit and shown by a preponderance of the evidence, in order to defeat recovery.<sup>25</sup>

*Probable Cause.* As has been stated previously, the plaintiff must prove, *inter alia*, the absence of probable cause. Although malice may be implied from want of probable cause, want of probable cause cannot be inferred from malice.<sup>26</sup> What is "probable cause" has been the subject of much litigation. Blandly stated, there is probable cause if a reasonable man would have believed and acted under the circumstances as the defendant did. The Supreme Court of Florida has stated it another way:<sup>27</sup>

Probable cause consists of such reasons as are sufficient to create a reasonable belief that a crime has been committed, and that the party charged was connected therewith.

These "reasonable man" definitions never seem to solve your particular problem. More useful and interesting, perhaps, would be an examination of the Florida and fifth circuit cases involving the question of probable cause.

*Anderson v. Bryson*<sup>28</sup> held that charging plaintiff with violation of the bogus check statute where he gave post-dated checks together with a promise to have funds to cover it in the future did not constitute probable cause.

In another case,<sup>29</sup> the plaintiff had purchased a ring from the defendant under a retain title contract. The first installment was not paid at maturity and plaintiff absconded. When apprehended, plaintiff was charged with dis-

19. 18 Fla. 328 (1881).

20. PROSSER ON TORTS 96 (1941).

21. *Tobey v. Orr*, 92 Fla. 964, 111 So. 110 (1926).

22. *Anderson v. Bryson*, 94 Fla. 1165, 115 So. 505 (1927).

23. PROSSER ON TORTS 96 (1941).

24. *Ibid.*

25. PROSSER ON TORTS 96 (1941); RESTATEMENT, TORTS 657.

26. *Ward v. Allen*, 152 Fla. 82, 11 So.2d 193 (1943); *Duval Jewelry Co. v. Smith*, 102 Fla. 717, 136 So. 878 (1931).

27. *Florida East Coast R. Co. v. Groves*, 55 Fla. 436, 46 So. 294, 296 (1908).

28. 94 Fla. 1165, 115 So. 505 (1927).

29. *Duval Jewelry Co. v. Smith*, 102 Fla. 717, 136 So. 878 (1931).

posing of the ring contrary to the retain title statute. He produced the ring in court and defendant had the charge dismissed. On these facts, the court said there was a complete failure to show lack of probable cause and the lower court erred in denying defendant's motion for a directed verdict. (The jury had awarded \$4,316.40 to plaintiff).

In a case<sup>30</sup> where a sheriff had filed an affidavit against plaintiff and and subsequently an information was filed against plaintiff by the state attorney, the court held that the fact two officials filed tended to show probable cause.

In *Good Holding Co. v. Boswell*<sup>31</sup> the defendant husband ran the bar in the defendant hotel for the defendant owner, his wife. The defendant husband believed employees of the bar were stealing from the receipts. Plaintiff was hired as a checker and subsequently charged with embezzlement. She was acquitted for failure of proof. The court determined that the fact defendant was reimbursed by an insurance company for loss from employee thefts does not preclude the jury from finding want of probable cause. (The verdict was for \$7,000).

There are an abundance of cases establishing that probable cause is shown where the defendant acted upon advice of competent counsel after a full and fair disclosure.<sup>32</sup> This defense has been well stated in *Duval Jewelry Co. v. Smith*:<sup>33</sup>

... Acting on the advice of counsel is complete defense . . . where it appears that the prosecution was instituted in reliance in good faith on such advice, given after a full and fair statement to the attorney of all the facts, and the fact that the attorney's advice was unsound or erroneous will not affect the result.

An attorney who initiates charges must rely on the advice of another attorney experienced in the field of criminal law in order to enter the plea of "advice of counsel."<sup>34</sup>

It is well to remember that probable cause is a mixed question of law and of fact. On undisputed facts, it is a question of law for the courts. Where the evidence is conflicting the court will instruct the jury as to what facts will constitute probable cause or want of it.<sup>35</sup>

According to one authority<sup>36</sup> a subsequent reversal does not show lack of probable cause and the original conviction is still conclusive on finding of probable cause.

30. *Ward v. Allen*, 152 Fla. 82, 11 So.2d 193 (1943).

31. 173 F.2d 395 (5th Cir.), cert. denied, 338 U.S. 815 (1949).

32. *Glass v. Parrish*, 51 So.2d 717 (Fla. 1951); *Seaboard Oil Co. v. Cunningham*, 51 F.2d 321 (5th Cir.) (holding advice of counsel is good defense whether there be probable cause or not), cert. denied, 284 U.S. 657 (1931); *Lewton v. Hower*, 35 Fla. 58, 16 So. 616 (1895); see *Atlantic Coast Line R. Co. v. Ward*, 92 Fla. 526, 109 So. 452 (1926).

33. 102 Fla. 717, 136 So. 878, 880 (1931).

34. *Bucki Lumber Co. v. Atlantic Lumber*, 121 Fed. 233 (5th Cir. 1903);

RESTATEMENT, TORTS 662.

35. *Seaboard Oil Co. v. Cunningham*, 51 F.2d 321 (5th Cir.), cert. denied, 284 U.S. 657 (1931).

36. RESTATEMENT, TORTS 667.

*Malice.* The plaintiff must prove the original proceedings were instituted maliciously.<sup>37</sup> Malice is determined by the jury<sup>38</sup> and may be inferred from want of probable cause.<sup>39</sup> Malice is usually found where the defendant's purpose in instituting the criminal proceeding was other than the social one of bringing the offender to justice;<sup>40</sup> for example, to coerce the payment of a civil debt.<sup>41</sup> The Restatement<sup>42</sup> says improper purpose is shown where there is a lack of belief in guilt; where hostility or ill will is the *primary* purpose; where private advantage is sought even though such advantage might have been obtained in civil proceedings.

In *Maiborne v. Kuntz*<sup>43</sup> the Florida Supreme Court said malice was shown where the defendant testified falsely in the original criminal proceeding.

*Damages.* In theory there can be no recovery without proof of actual damage but Prosser says that in practice this rule has been nullified by the "benevolent fiction" that certain damages necessarily follow from the wrongful prosecution and will be assumed by the law to exist without proof.<sup>44</sup>

Since malice is in issue in malicious prosecution suits, exemplary damages or "smart money" are recoverable.<sup>45</sup> The personal wealth of the defendant is admissible so that the jury may determine the amount of damages that should be awarded in order to sufficiently punish the defendant for his willful act.<sup>46</sup> An award of \$10,000 has been affirmed by the Florida Supreme Court where the evidence established the defendant's worth at \$250,000.<sup>47</sup>

Damages are recoverable for injury to reputation, inconvenience, humiliation, mental pain and suffering, loss of employment and expenses incurred in defending the wrongful prosecution.<sup>48</sup>

There is a difference of opinion as to whether plaintiff may show his good reputed character before it is attacked. Wigmore subscribes to the view that his reputation is assumed to be good, and that he has therefore no need to sustain it until it has been attacked.<sup>49</sup>

This interesting quote is found in Jones on Evidence:<sup>50</sup>

So far as the cause of action rests upon an injury to the character or an insult to the person, *compensatory* damages may be increased by proof of the wealth of plaintiff. This is upon the ground that wealth is an element which goes to make up his rank

37. See note 13 *supra*.

38. PROSSER ON TORTS 96 (1941).

39. See note 26 *supra*.

40. PROSSER ON TORTS 96 (1941).

41. *Glass v. Parrish*, 51 So.2d 717 (Fla. 1951).

42. RESTATEMENT, TORTS 668.

43. 56 So. 2d 720 (Fla. 1952).

44. PROSSER ON TORTS 96 (1941).

45. *Kress v. Powell*, 132 Fla. 471, 180 So. 757 (1938).

46. JONES ON EVIDENCE 159, 161 (4th ed.).

47. *Maiborne v. Kuntz*, 56 So.2d 720 (Fla. 1952).

48. RESTATEMENT, TORTS 670, 671; PROSSER ON TORTS 96 (1941).

49. WIGMORE ON EVIDENCE 76 (3rd Ed.) To like effect, see JONES ON EVIDENCE 157, 158 (4th Ed.).

50. At 160 (4th ed.).

and influence in society, and thereby renders the injury or insult resulting from wrongful acts the greater. (*Italics supplied*).

The preceding statement appears to be based upon sound reasoning and should be advanced to the courts in a suit for malicious prosecution.

In proving wealth of defendant for compensatory damages evidence should relate to *reputed* wealth and standing, while in seeking punitive damages the inquiry should be as to actual pecuniary ability.<sup>51</sup>

#### MISCELLANEOUS

*Attorney's Liability.* Prosecuting attorneys are generally protected by an absolute privilege,<sup>52</sup> while private attorneys will subject themselves to liability by joining in their client's improper purpose or by acting on their own behalf.<sup>53</sup>

A complete dissertation covering the private attorney's liability appears in *Staley v. Turner*,<sup>54</sup> a Missouri case:

If an attorney join with his client in prosecuting a criminal charge against another, not for the purpose of subserving public justice, but in order to effect some private purpose of the client, such a prosecution is malicious; and, proceeding upon such a motive, the attorney is bound equally with the client to see to it that there is probable cause for the prosecution.... From the standpoint of the law the position of the attorney is, in such a case, exactly the same as that of the client; from the standpoint of sound morals, it is infinitely worse, for he prostitutes the privileges which the state has conferred upon him of appearing in its courts, and a minister of justice.... He is learned in the law and knows the ground whereon he stands. His client confides in him and obeys his directions. He is the chief actor; and where, actuated by the corrupt motive of effecting some private purpose of his client, he institutes an unfounded criminal prosecution against an innocent person, without a belief in the guilt of that person founded upon reasonable evidence, public justice is not satisfied with holding the client liable and exonerating him.

#### CONCLUSION

It is hoped that this article may prove helpful to the practitioner who has not yet found it necessary to research the law regarding malicious prosecution but desires a cursory knowledge. At least the citations to authorities and reference to the Florida cases should aid the researcher when called

51. JONES ON EVIDENCE 162 (4th ed.).

52. *Anderson v. Rohrer*, 3 F. Supp. 367 (S.D. Fla. 1933); PROSSER ON TORTS 96 (1941).

53. *Ibid.* See RESTATEMENT, TORTS c. 29, *Introduction*.

54. 21 Mo. App. 244 (1886).



upon to examine further, some particular problem. There is an abundance of material on this subject and the researcher should not encounter any difficulty in finding a solution to his problem. Since the courts have been consistent with previous case decisions and little conflict exists among the various jurisdictions, the task of the researcher is lessened.

Because of the policy consideration and the rules of evidence applicable thereto, a malicious prosecution suit is not easily won. The most difficult element to prove appears to be a want of probable cause. Once proved, the jurors seem to grasp and apply the rule that permits an inference of malice.

Most of the cases examined reach a satisfactory result. A proper balance between the two conflicting policies has been maintained.

A number of malicious prosecution suits could probably be avoided if police officers abstained from searching for a law to cover the facts related by the complainant in order that the latter may swear out a warrant, and by suggesting that the irate citizen see an attorney. The citizen who acts without advice of competent counsel, and who lodges serious charges against his fellow man, and who fails in his proof, is deserving of the adverse verdict in a suit for malicious prosecution.