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ILLINOIS LAW MANUAL

CHAPTER VII INTENTIONAL TORTS & DEFAMATION

C. MALICIOUS PROSECUTION

(a) Basic Law

A cause of action for malicious prosecution must allege facts establishing the following:

- (a) the defendant brought the underlying suit, either in a criminal or civil judicial proceeding against the claimant, maliciously and without probable cause;
- (b) the termination of the underlying judicial proceeding in favor of the claimant;
- (c) some "special injury" or special damage beyond the usual expense, time, or annoyance in defending the underlying suit.

Swick v. Liataud, 169 Ill. 2d 504 (1996). Citizens acting in good faith who have probable cause to believe crimes may have been committed are not liable. Allen v. Berger, 336 Ill. App. 3d 675 (2002).

(b) Analysis

An action for malicious prosecution of a civil proceeding cannot be maintained where the action was simply an ordinary civil case, instituted by summons, and not accompanied by the arrest of the person or the seizure of his property, or by some special injury uncommon to other civil

cases. Keefe v. Aluminum Co. of America, 166 Ill. App. 3d 316 (1988). To recover for malicious prosecution, the claimant must plead and prove special damages. Special damages are established by showing:

- (c) evidence of an arrest (where a malicious prosecution suit is based on the institution of criminal proceedings, a claimant need not make a showing of special damage);
- (d) the seizure of property (for example, the wrongful issuance of an injunction); or
- (e) some other special injury which exceeds the usual expense, annoyance, and inconvenience of defending a lawsuit.

Levin v. King, 271 Ill. App. 3d 728 (1995); Bank of Lyons v. Schultz, 78 Ill. 2d 235 (1980).

Mere anxiety, loss of time, attorney's fees, and necessity of defending one's reputation are insufficient to establish special damage. Further, claims of shame, humiliation, temporary loss of income, and lost credit rating are insufficient to establish special damage. Campbell v. White, 187 Ill. App. 3d 492 (1989).

An exception to the special damage requirement has been established for medical malpractice cases. See 735 ILCS 5/2-109. This section has eliminated the need to plead or prove special injury in a medical malpractice case. Malicious prosecution suits, however, continue to be disfavored in Illinois and the elements of proof are strictly construed. Rumer v. Zeigler Coal Co., 168 Ill. App. 3d 568 (1988). The second element required for a showing of malicious prosecution is that the underlying matter has been terminated in favor of the claimant alleging malicious prosecution. "A cause of action for malicious prosecution does not accrue until the criminal proceeding on which it is based has been terminated in the plaintiff's favor."

Ferguson v. City of Chicago, 213 Ill. 2d 94, 99 (Ill. 2004). In determining whether this requirement has been met, Illinois courts have adopted the Restatement approach. Under this approach, the inquiry is under what circumstances was the disposition obtained. Terminations that do not rise to the level of adjudication on the merits may satisfy the favorable termination requirement. Terminations obtained through summary judgment and involuntary or voluntary dismissals satisfy this requirement. Settlements do not satisfy this requirement. Cult Awareness Network v. Church of Scientology International, 177 Ill. 2d 267 (1997).

The party instituting the malicious prosecution claim must establish that the underlying cause of action was instituted without probable cause. Probable cause has been defined as "that set of facts that would lead a person of ordinary caution and prudence to believe he had a justifiable claim against the defendant." Keefe v. Aluminum Co. of America, 166 Ill. App. 3d 316 (1988).

Finally, the individual bringing the malicious prosecution claim must also establish malice (i.e., that the plaintiff in the underlying cause of action proceeded on the basis of an improper motive). Miller v. Rosenberg, 196 Ill. 2d 50 (2001). Merely showing willful and wanton misconduct is not sufficient to establish malice. There must be factual allegations in the complaint detailing the basis of the improper motive.