

To: Cadmium Q. Eaglefeather
From: Trixie Argon
Date: 10 September 2010
Re: Elements of malicious prosecution

Malicious prosecution has three elements that must be pleaded and proven: 1) the defendant commenced a judicial proceeding against the plaintiff; 2) the original proceeding was “initiated with malice” and “without probable cause”; and 3) the proceeding was “pursued to a legal termination in [the plaintiff’s] favor.” *Bertero v. National General Corp.*, 13 Cal. 3d 43, 50 (1974).

A. Commencement of judicial proceeding

Any civil proceeding where the plaintiff seeks affirmative relief may be the basis of a malicious prosecution claim. The original plaintiff does not need to personally sign the complaint; if he is “actively instrumental” or the “proximate and efficient cause” of the action, he may be liable. *Jacques Interiors v. Petrak*, 188 Cal. App. 3d 1363, 1372 (1987).

B. Initiated without probable cause and with malice

The malicious prosecution plaintiff must establish both malice and lack of probable cause by the defendant in the underlying action.

In a malicious prosecution action against an attorney in a civil suit, the standard for probable cause is whether a reasonable attorney would have thought the underlying claim was tenable at the time the original complaint was filed. See *Sheldon Appel Co. v. Albert & Olier*, 47 Cal. 3d 863, 885-86 (1989). An attorney may be liable for continuing to prosecute a claim after she discovers the action lacks probable cause, even if there was probable cause at the outset. See *Zamos v. Stroud*, 32 Cal. 4th 958, 970 (2004).