

PROFESSIONAL LIABILITY UPDATE

July 1, 2002

Issue No. 122

Jennifer A. Becker

David P. Borovsky

Shoshana Y. Chazan

Chip Cox

Edward F. Donohue, III

Kathleen M. Ewins

Kathleen A. Foley

Bruce N. Furukawa

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

William L. Jacobson

Farand C. Kan

Anna Kapetanakos

Joseph P. McMonigle

Douglas J. Melton

Robin M. Pearson

Jessica B. Rudin

Richard J. Sciaroni

Steven Sharafian

Jennifer W. Suzuki

Jeanette Traverso

Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Irene K. Yesowitch

MALICIOUS PROSECUTION

California Law

By William L. Jacobson

Probable cause must support even “superfluous” causes of action to avoid potential malicious prosecution liability.

Videotape Plus, Inc. v. Lyons (2001) 89 Cal.App.4th 156

Dubs, Inc. (“Dubs”) sued Videotape Plus, Inc., (“Videotape”) alleging a conspiracy with a Dubs’ supervisor to steal videotapes from Dubs’ warehouse. Dubs’ complaint asserted causes of action for conversion, fraud, and negligence. After Videotape obtained summary judgment, the appellate court reversed dismissal of the conversion action. Dubs’ complaint eventually was dismissed as a sanction for Dubs’ discovery abuses.

Videotape then filed a malicious prosecution action against Dubs, its owner, and its attorney alleging that the complaint lacked probable cause for the fraud and negligence claims. Videotape asserted that it never owed Dubs any duties of disclosure or care, and that Dubs alleged negligence only to get an insurer to contribute to a settlement.

In granting Dubs’ motion for judgment on the pleadings, the trial court agreed with Dubs’ argument that probable cause for the conversion claim was sufficient to insulate the entire lawsuit. The trial court viewed the fraud and negligence

claims as alternative theories of recovery that “added nothing” to the conversion claim and so were “superfluous counts.” The court reasoned that if conversion was shown, neither reasonable care nor honesty would have protected Videotape. Similarly, if the tapes were not stolen, Videotape would not have been liable under any theory.

The court of appeal reversed and reiterated the rule of *Crowley v. Katleman* (1994) 8 Cal.4th 666 that probable cause must support each cause of action. Although surviving summary judgment ordinarily means a cause of action was supported by probable cause, the court’s prior reversal of summary judgment on the conversion claim implied nothing about the fraud and negligence claims.

The appellate court also rejected defendants’ resort to the “primary right” theory that a properly pleaded cause of action premised on a single primary right may state multiple grounds of liability.

Comment: The opinion provides a useful reminder that even if there are tactical reasons for pleading marginal or questionable causes of action, the rule announced in *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, and reaffirmed by *Crowley*, cautions against the practice: Every cause of action and ground of liability asserted must be supported by probable cause.