

PROFESSIONAL LIABILITY UPDATE

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MALICIOUS PROSECUTION

California Law

By Jessica Rudin

The California Supreme Court holds that an attorney may be liable for malicious prosecution if he or she commences an action with probable cause, but continues to pursue the action after discovering facts that negate probable cause.

Zamos v. Stroud (2004) 04 C.D.O.S. 3369

Zamos represented Brookes in litigation that was partially settled. Two years later Brooks hired Stroud to sue Zamos and his partner for alleged misrepresentations about circumstances surrounding the settlement. Upon receipt of the complaint Zamos sent Stroud transcripts from three hearings where Brookes made statements that directly contradicted the allegations in her complaint.

When Stroud continued to prosecute the action, Zamos filed a motion for summary judgment based on the transcripts. Stroud opposed the motion with the declarations of himself, Brookes, and two corroborating witnesses. The trial court denied the summary judgment “reluctantly.”

Stroud continued to prosecute the action for two more years. At trial the court found that no reasonable jury would believe Brookes’ claims and even if it did, Brookes was estopped from pursuing her claims by reason of her statements.

In Zamos’ subsequent malicious prosecution action against Stroud and Brookes the trial court granted Stroud’s special motion to strike the complaint. The court found that Stroud had probable cause to initiate and pursue the lawsuit based on his client’s and corroborating witnesses’ statements.

On appeal Zamos argued that even if Stroud had probable cause to file the action, once he obtained the transcripts that refuted Brookes’ claims he lacked probable cause to continue to prosecute the case. The Court of Appeal decided in favor of Zamos differing with decisions from other Divisions: *Swat-Fame v. Goldstein* (2002) 101 Cal.App.4th 613 [PL Update No. 136]; *Morrison v. Rudolph* (2002) 103 Cal.App.4th 506 [PL Update No. 143]; and, *VanZant v. Daimler-Chrysler* (2002) 96 Cal.App.4th 1283[PL Update No. 132].

The California Supreme Court agreed that the tort of malicious prosecution includes commencing and *continuing* an action that lacks probable cause. The

Restatement Second of Torts defines malicious prosecution as commencing an action without probable cause as well as continuing an action after learning it lacks probable cause. No other state has declined to adopt the Restatement view.

From a public policy perspective, the tort of malicious prosecution is designed to prevent harm to the individual and the court caused by baseless litigation. Continuing an action one discovers to be baseless is just as burdensome to the individual and the court as commencing an action that is baseless from the outset. Attorneys ought to be encouraged to dismiss causes of action or parties from litigation that lacks probable cause at the earliest stage possible. In doing so clients will avoid the cost of fruitless litigation and will minimize exposure to liability for malicious prosecution.

The Court summarily dismissed concerns that its holding would be “unworkable” and would impinge upon an attorney’s duty to zealously represent clients. Proving a lack of probable cause at any stage of litigation would continue to be governed by the difficult standard enunciated in *Sheldon-Appel v. Albert & Oliker* (1989) 47 Cal.3d 863. The Court doubted that this difficult standard would be any easier to meet when alleging the prosecution of a case was continued without probable cause.

Comment: *Zamos* is a warning to all practitioners that cases should be frequently reevaluated and causes of action not supported as facts develop or are discovered should be dismissed at the earliest possible stage.

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