IN THE SUPREME COURT OF FLORIDA

In the matter of Standard Jury Instructions (Civil),

Committee Report Number 09-06

Probable Cause Instructions (False Imprisonment and Malicious Prosecution)

_____/

REPORT (NO. 09-06) OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

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Honorable James M. Barton, II
Florida Bar Number 189239
Vice-Chair, Supreme Court Committee
on Standard Jury Instructions (Civil)
Hillsborough County Courthouse Annex
800 East Twiggs, Room 512
Tampa, Florida 33602
(813) 272-6994
(813) 276-2725 (fax)

To the Chief Justice and Justices of the Supreme Court of Florida:

The Committee on Standard Jury Instructions in Civil Cases recommends that this Court approve for publication and use revised Florida Standard Jury Instructions (Civil) for the definition of Probable Cause as contained in the civil jury instructions for Malicious Prosecution and False Imprisonment, as set forth below. This Report is filed pursuant to article V, section 2(a), of the Florida Constitution.

I. INTRODUCTION AND PROCEDURAL NOTE

The Committee has submitted simultaneously herewith a proposal for reorganization of the Standard Jury Instructions in Civil Cases, which includes a renumbering of the instructions. The "book reorganization" proposal was separately filed as this Committee's report number 09-01.

This report, number 09-06, proposes a revised instruction for the "probable cause" element in malicious prosecution and false imprisonment cases. For ease of reference, this report uses the new proposed numbering system. Additionally, the appendix to report number 09-01 includes this proposed instruction as it would appear in the reorganized book if adopted by the Court.

The instruction proposed herein is a stand-alone instruction that can be adopted prior to a ruling on the book reorganization. Should this Court elect to

rule on this proposal first, the Committee would simply use its current numbering system for the new instruction.

II. PROPOSED INSTRUCTIONS

In reviewing the instructions, the Committee noted that the term "probable cause" was defined differently in malicious prosecution cases as opposed to false imprisonment cases. Additionally, in the case of malicious prosecution claims, the current instruction is phrased in the negative, a "lack of" definition, instead of a positive statement of the law.

As part of its effort to harmonize and clarify the instructions, and to use "plain English" wherever possible, the Committee therefore proposes changes for the instructions for *Probable Cause* in a malicious prosecution claim (currently MI 5.1b) and the definition of *Probable Cause* as contained in the defense issues for false imprisonment (currently MI 6.1g).

The Committee did not make, nor intend to make, any substantive changes to these instructions. These changes are intended to make the instructions the same and to present them in a more plain-English form.

The proposed revisions are as follows:

406 MALICIOUS PROSECUTION

406.4 PROBABLE CAUSE

Probable cause means that at the time of [instituting] [or] [continuing] a [criminal] [civil] proceeding against another, the facts and circumstances

known to [(defendant)] [(other person)] were sufficiently strong to support a reasonable belief that (claimant) **[had committed a criminal offense] [the [claim] [proceeding] was supported by existing facts].**

407 FALSE IMPRISONMENT

407.8 DEFENSE ISSUES

On the [first] defense, the issue you must decide is whether [(defendant)] [(defendant's employee)] **had probable cause to believe that goods held for sale by** (defendant) **had been unlawfully taken by** (claimant) **and could be recovered by restraining** (claimant) **for a reasonable time and in a reasonable manner.**

"Probable cause" means that at the time of the [incident] [restraint] [arrest] the facts and circumstances known to (defendant) (other person) **were sufficiently strong to support a reasonable belief that** (claimant) **had committed a criminal offense.**

III. APPENDICES

The following appendices are attached to this Report:

Appendix A:	Proposed instructions
Appendix B:	April 15, 2008 Florida Bar News notice
Appendix C:	Comments received by the Committee
Appendix D:	Relevant excerpts from the Committee's minutes
Appendix E:	Committee materials on this topic

IV. DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee. The Committee unanimously recommends that the Court approve these instructions for publication and use.

V. COMMENTS RECEIVED

The proposed new instructions were published for comment and three comments were received. Two comments related to instruction 406.4. One objected to the proposed change on the grounds that it would create a subjective standard. The proposed instruction, however, uses a "reasonably cautious person" standard, which is an objective standard. The Committee proposes no change in response to this comment.

The other comment recommended adding "person" after the word "another" to clarify the instruction. The Committee agreed with this suggestion, and has added the word "person" to the proposed instruction.

One comment was received concerning 407.8. It suggested that the word "issue" in the first line should be singular. The Committee agreed, and this change is reflected in the proposal.

The Committee now submits the revised Probable Cause instructions to the Court.

VI. CONCLUSION

WHEREFORE, for the above reasons, the Committee respectfully requests that the Court approved these instructions as stated above and set forth in Appendix A for publication and use as new standard jury instructions for civil cases.

Respectfully submitted,

James Richard Caldwell, Jr.
Florida Bar Number 131265
Subcommittee Chair,
False Imprisonment and
Malicious Prosecution Subcommittee
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Tampa, Florida 33602
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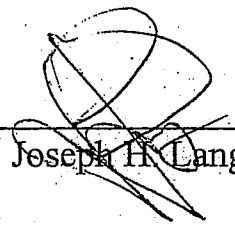
(813) 276-2725 (fax)

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this report complies with the font standards set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

By: 
Joseph H. Lang, Jr.

TAB A

APPENDIX A

406 MALICIOUS PROSECUTION

406.4 PROBABLE CAUSE

Probable cause means that at the time of [instituting] [or] [continuing] a [criminal] [civil] proceeding against another, the facts and circumstances known to [(**defendant**)] [**(other person)**] were sufficiently strong to support a reasonable belief that **(claimant)** [had committed a criminal offense] [the [claim] [proceeding] was supported by existing facts].

407 FALSE IMPRISONMENT

407.8 DEFENSE ISSUES

On the [first] defense, the issue you must decide is whether [(defendant)] [(defendant's employee)] **had probable cause to believe that goods held for sale by** (defendant) **had been unlawfully taken by** (claimant) **and could be recovered by restraining** (claimant) **for a reasonable time and in a reasonable manner.**

"Probable cause" means that at the time of the [incident] [restraint] [arrest] the facts and circumstances known to **(defendant) (other person)** were sufficiently strong to support a reasonable belief that **(claimant)** had committed a criminal offense.

TAB B

Notice

Proposed changes to civil jury instructions concerning the definition of 'probable cause'

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes to amend the definition of "probable cause" as it applies to Malicious Prosecution and False Imprisonment cases (currently MI 5.1b and MI 6.1g).

These are "Plain English" changes that are not intended to affect the substantive meaning of the instructions, but which the committee believes will improve juror understanding of the term. The proposed changes make the term consistent in the two instructions. The term is now stated in the positive, defining what is, rather than what is not, probable cause.

These proposed changes are part of the overall reorganization of the jury instructions for civil cases. The proposed amendments are shown below, along with the current instructions for comparison.

Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court.

Send all comments concerning these changes to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, P.A., 501 East Kennedy Blvd. Suite 1700, Tampa 33602. You can e-mail your comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 15, to ensure that they are considered by the committee.

CURRENT INSTRUCTION
MI 5.1b

Lack of probable cause:

One acts without probable cause in [instituting] [or] [continuing] a [criminal] [civil] proceeding against another if the circumstances are not sufficient to cause a reasonably cautious person to believe that [the person accused is guilty of the offense charged] [the claim is justified].

PROPOSED INSTRUCTION
406.4 PROBABLE CAUSE

Probable cause means that at the time of [instituting] [or] [continuing] a [criminal] [civil] proceeding against another, the facts and circumstances known to [(Defendant)] [(other person)] were sufficiently strong to support a reasonable belief that (Claimant) [had committed a criminal offense] [the [claim] [proceeding] was supported by existing facts].

CURRENT INSTRUCTION
MI 6.1g

Merchant's defense (§ 812.015(3), F.S.)

On the defense, the issues for your determination are whether (name), a [merchant] [merchant's employee], had probable cause to believe that goods held for sale by the merchant were unlawfully taken by (claimant) and could be recovered by restraining (claimant); and whether (name) restrained (claimant) only in a reasonable manner and for a reasonable time. One has probable cause to believe something when, under all the circumstances, a reasonably cautious person would believe it.

PROPOSED INSTRUCTION
407.8 DEFENSE ISSUES

On the [first] defense, the issue[s] you must decide are whether (Defendant) (Defendant's employee) had probable cause to believe that goods held for sale by (Defendant) had been unlawfully taken by (Claimant) and could be recovered by restraining (Claimant) for a reasonable time and in a reasonable manner.

"Probable cause" means that at the time of the [incident] [restraint] [arrest] the facts and circumstances known to (Defendant) (other person) were sufficiently strong to support a reasonable belief that (Claimant) had committed a criminal offense.

The Florida Bar Continuing Legal Education Committee and the Tax Section present

Tax Planning to Increase the Inheritance

THE FLORIDA BAR CLE

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: May 16, 2008 • The Diplomat Golf Resort & Spa
501 Diplomat Parkway • Hallandale Beach, FL 33009 • (888) 627-7218

Course No. 0656R

SEMINAR TOPICS:

8:00 a.m. – 8:30 a.m. Late Registration
Opening Remarks
Estate Planning Hot Topics and Current Developments
Update on Use of FLPs and Discount Planning
A Comparison of Freeze Techniques and Super-Charging the Estate Plan
What Every Estate Tax Advisor Needs to Know About Hedge Funds
International Estate Planning
The New Florida Trust Act
Asset Protection in Estate Planning
4:00 p.m. – 4:50 p.m. Ethics Panel: Who Do You Represent and Who Should Sign the Engagement Letter

CLER PROGRAM
(Max. Credit: 7.5 hours)
General: 7.5 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 7.5 hours)
Tax Law: 7.5 hours

LOCATIONS / DATES:

Hallandale Beach, FL* May 16, 2008 (318) Diplomat Golf Resort & Spa

* Live

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The Florida Bar Continuing Legal Education Committee and the Admiralty Law Committee and the Trial Lawyers Section present

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THE FLORIDA BAR CLE

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

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Ft. Lauderdale, FL 33301 • (954) 467-0671

Course No. 0644R

8:00 a.m. – 8:30 a.m.
Late Registration

8:30 a.m. – 9:20 a.m.
Arbitration of Maritime Claims and Judicial Review
John H. Thomas, Miami

9:20 a.m. – 9:30 a.m.
Break

9:30 a.m. – 10:40 a.m.
Cruise Ship Passenger Injury Claims Update & Practice Tips
Jacob J. Munch, Tampa
Darren W. Friedman, Miami

10:40 a.m. – 10:50 a.m.
Break

10:50 a.m. – 12:00 noon
Ship Crew Injury Claims Update & Practice Tips
Tonya J. Maister, Miami
David J. Horr, Miami

12:00 noon – 1:30 p.m.
Lunch (included in registration fee)
Judicial Perspective on Maritime Law
Honorable William P. Dimitrouleas, Ft. Lauderdale

1:30 p.m. – 2:20 p.m.
Maritime Practice in Federal Bankruptcy Court; Legal and Ethical Issues for the Maritime Practitioner
Honorable John S. Dalis, Brunswick, GA

2:20 p.m. – 3:10 p.m.
Gambling Debts at Sea
Robert M. Jarvis, Ft. Lauderdale

3:10 p.m. – 3:20 p.m.
Break

3:20 p.m. – 4:10 p.m.
Exxon Valdez - 20 Years Later in the U.S. Supreme Court
Allan R. Kelley, Miami

4:10 p.m. – 5:00 p.m.
Law of the Sea Treaty - Effect on Maritime Law
Speaker TBA

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(Max. Credit: 9.5 hours)
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Ethics: 1.0 hour

CERTIFICATION PROGRAM
(Max. Credit: 7.0 hours)
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TAB C

From: Gregory K. Mausser [mailto:gregmausser@bellsouth.net]
Sent: Tue 4/15/2008 8:31 PM
To: Gunn, Tracy
Subject: Proposed Jury Instruction Change to Probable Cause Instruction MI 5.1b

Dear Ms. Gunn:

I have reviewed the proposed Jury Instruction change to MI 5.1b and do not like the new instruction because it seems to make the determination of probable cause subjective to the defendant, whereas the current rule uses a "reasonably cautious person" standard. Further, as I am currently suing a corporate defendant for malicious prosecution, I believe this particular jury charge will be problematic.

Thank you for considering my thoughts on this.

Sincerely,

Gregory K. Mausser

The Law Office of Gregory K. Mausser
5224 West State Road 46
PMB #343
Sanford, Florida 32771
Telephone (407) 330-9976
Facsimile (407) 323-5543

From: Jay Thomas [mailto:jay_thomas@verizon.net]
Sent: Wednesday, May 14,\2008 8:52 AM
To: tgunn@gunnappeals.com
Subject: FW: Proposed civil jury instructions in April 15 Fla Bar News

From: Jay Thomas [mailto:jay_thomas@verizon.net]
Sent: Wednesday, May 14, 2008 8:25 AM
To: 'tgunn@fowlerwhite.com'
Subject: Proposed civil jury instructions in April 15 Fla Bar News

Tracy:

Here are a few suggestions on the proposed instructions printed in the April 15 Florida Bar News.

§ 401.3 Greater Weight of the Evidence

(1) Is the following basic instruction (or something like it) provided anywhere in the Instructions? Should it be? I would think it would be helpful as the first sentence of the Greater Weight of the Evidence instruction, to orient the jurors as to what they're supposed to be doing.

> In this lawsuit, the [plaintiff] [defendant] must prove [his] [her] [claim[s]] [defense[s]] by the greater weight of the evidence. "Greater weight of the evidence" means . . . <<*continue as drafted*>>

(2) In my interpretation, the second sentence ("To prove a claim . . .") does not get across the idea of "the quantum of evidence that, at the least, tips the scales just over 50%". I think the problem is that people likely have varying interpretations of what "probably" means. If someone said to me, "That's probably true," and if I were asked to assign a percent or probability value to that statement, I would say it means maybe 75% or better. Cf. the definition of "probable" given in Random House Webster's College Dictionary, (1997 ed.): "in all likelihood; very likely." If something were just slightly more true than not, I would not use the term "probably" to describe the situation. I would suggest the following:

> To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is more likely true than not.

(3) As an organizational point, it appears that the Greater Weight of the Evidence instruction is repeated in each major section of the Proposed Instructions. Would it be more efficient to present it once (in Section 700?), so that it doesn't have to be amended in multiple places if an amendment becomes necessary?

§ 700 Closing Instructions

(4) Paragraphs 9 and 15 ("When you go to the jury room . . ."; "Your verdict[s] must be unanimous"): After the term is defined, use either "presiding juror" or "foreperson", but not both back and forth. Since the term "presiding juror" is the one being defined, I would use that term in paragraph 15 as well.

(5) Miscellaneous punctuation suggestions:

- ¶5: Add series comma (as used elsewhere in the instructions): ". . . public opinion, or any other sentiment . . ."
- ¶6: Add comma to separate two clauses with different subjects: "I cannot participate in any way, and you should not . . ."
- ¶7: Comma before subordinate(?) clause and for ease in reading orally: "Pay careful attention to all the instructions that I gave you, for that is the law . . ."
- ¶7: Add commas to separate two clauses with different subjects: "All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree . . ."

§ 406.4 Probable Cause

(6) "Another" is somewhat abstract. You might have to think a second before you realize it means "a person". Suggestion:

> Probable cause means that at the time of [instituting] . . . a . . . proceeding against <u>a person</u>, . . .
>
> OR
>
> Probable cause means that at the time of [instituting] . . . a . . . proceeding against <u>(Claimant)</u>, . . .

§ 407.8 Defense Issues

(7) Why is there a choice between "issue" and "issues", as reflected in the expression "issue[s]"? There are no options for adding or removing clauses later in the sentence. If "issue[s]" is to be retained, the verb should be changed from "are" to "[is] [are]".

Thank you.

Jay Thomas
Law Clerk
2d DCA

TAB D

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Stetson University College of Law
Tampa

February 17-18, 2005
February 17, 2005 (1:00 p.m. to 5:00 p.m.)
February 17 (8:30 a.m. to noon)

7. **FALSE IMPRISONMENT AND MALICIOUS PROSECUTION** (Tab 5).

Caldwell reported that the subcommittee benefitted from legal research assistance from Stetson law students on this issue. The subcommittee determined that although the cases cited in the committee notes are quite old, there has not been a substantive change in the law requiring a revision to the instructions. However, the subcommittee recommends revisions to clarify the instructions. Stewart agreed that there is significant room for clarifying the instructions, which are difficult to understand.

The common element of these instructions is probable cause. In malicious prosecution actions, instruction MI 5.1b requires plaintiffs to prove the absence of probable cause. In false arrest cases, instruction 6.1 makes probable cause an affirmative defense.

Lewis questioned whether the instruction should be named abuse of process. Barton stated that malicious prosecution and abuse of process are not the same cause of action. Altenbernd added that abuse of process can apply to a subpoena. Berman explained that while abuse of process is a counterclaim, malicious prosecution can be brought only as a separate cause of action after winning a civil lawsuit.

The committee also discussed whether the double negative in the definition of probable cause could be eliminated. Altenbernd stated that he thinks that probable cause may be affirmative defense in civil cases, while it is an element in criminal cases of false arrest.

Lewis added that in criminal cases, probable cause is almost a question of law. There is a huge body of law defining "probable cause" in the criminal context.

Altenbernd observed that it may be difficult to draft an instruction for malicious prosecution actions where the suit was not "malicious" at the inception of the lawsuit. Parties have a continuing obligation to have a basis for the prosecution. As a result, a suit may become "malicious" if a party does not drop the action when there is no longer a basis for maintaining the suit.

Caldwell pointed out that the subjective intent of the actor is not relevant and asked whether that should be part of the instructions. Graham responded that it probably should be included.

Graham stated that the false arrest instruction seems to only apply to law enforcement cases. Caldwell responded that the instruction is not intended to be so narrow. It often applies to stores that have detained a person.

Berman voiced his concern that he remained unclear regarding the scope of the causes of action and the possibility of significant differences in the civil and criminal actions. It would assist attorneys if the instructions distinguished between the different types of actions and determined whether separate charges are needed.

Makar pointed out that a new Second District opinion recently addressed these issues. **Makar directed the subcommittee to study these issues further and: (1) refine the different types of claims at issue; (2) consider whether a separate instruction is needed for abuse of process; (3) reword the "probable cause" instruction to clarify it and use plain English; (4) try to state an affirmative defense of probable cause; (5) look at objective circumstances; (6) review the new Second District case; (7) examine instructions from other states, using the assistance of Stetson law students if necessary; (8) consider drafting a civil assault and battery instruction because this claim is often brought with false arrest claims; and (9) review the criminal probable cause instruction. Makar added Austin to the subcommittee.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
The Breakers
West Palm Beach, Florida

July 14-15, 2005
July 14, 2005 (1:00 p.m. to 5:00 p.m.)
July 15, 2005 (8:30 a.m. to noon)

9. FALSE IMPRISONMENT AND MALICIOUS PROSECUTION (Tab 5)

The committee then discussed the definition of probable cause. Caldwell explained that the current instructions do not define probable cause and fail to inform jurors that the focus is what the defendant knew at the time. The subcommittee attempted to draft one definition of probable cause that could be used in both the malicious prosecution and false imprisonment instructions. The subcommittee also tried to phrase the definition of probable cause in the positive rather than in the negative.

Brown agreed that probable cause is about reasonableness and the facts and circumstances that would have been known by a reasonably cautious person.

Altenbernd expressed concern about language that suggests the jurors should stand in the shoes of the defendant, which attorneys might misuse to make a golden rule argument. Brown felt that this language is necessary because the training and experience of a police officer is assumed.

Artigliere asked whether the instruction should refer to whether the accused committed the crime, rather than whether the accused was guilty.

The committee also discussed the use of the term "reasonably cautious" in the probable cause instruction. Caldwell explained that

the current instruction uses this term, although some cases use the term "prudent" instead.

Altenbernd explained that there is no such thing as a negligent arrest. If the defendant is a citizen, probable cause is not a defense and the cause of action is strict liability. If the defendant is a police officer, probable cause is an affirmative defense.

Griffin raised the question of whether a police officer has probable cause if any crime was committed, or if the officer has to have probable cause that the crime charged was committed. Altenbernd stated that, typically, the officer will need to have probable cause to believe a felony has been committed. This is because police officers cannot arrest suspects for committing misdemeanors, except those specifically listed by statute. Kahn observed that this will typically be a legal question for the court. **Gunn directed the subcommittee to further research this issue.**

The committee also discussed whether the probable cause instruction should state that the claim was "justified," "valid," or "meritorious." The instruction currently uses the term "justified." Artigliere cautioned that the term "meritorious" may not accurately reflect the level of proof required. **Gunn directed the subcommittee to further research this issue.**

The committee revised the instruction on probable cause as follows.

****

"Probable cause" means that the facts and circumstances known to [(defendant)] [(name of other person whose knowledge is at issue)] [in existence] at the time [of the incident] were sufficient to cause a reasonably cautious [officer] [person] to believe that [the accused committed a crime] [the claim was justified/valid/meritorious].

****

Gunn directed the subcommittee to consider additional revisions after researching the issues discussed at the meeting.

Berman observed that the current instruction on malicious prosecution creates an inference of malice. Berman questioned whether the draft instruction changes the law regarding an inference of malice. **Gunn directed the subcommittee to further research this issue.**

The committee then discussed whether they should draft a separate instruction for abuse of process actions. Caldwell explained that at least one state (California) has separate instructions for malicious prosecution and abuse of process. Altenbernd warned that it will be difficult to spell out the elements of abuse of process in an instruction.

The committee then discussed the draft false imprisonment instruction. Griffin suggested that a different structure would make the instruction easier to read. Caldwell responded that the draft tracks the structure of the current instruction.

Artigliere suggested defining the term restraint first, because it is a term of art, then address whether it is intentional and what causes it.

Griffin countered that the instruction could begin by telling jurors that the first issue for their determination is "whether the plaintiff was completely restrained," and then explain "a person is completely restrained when ...." Gunn agreed that this type of plain English approach would be more understandable. Berman agreed that the revisions should put the instruction in plain English. Lewis suggested that the plain English subcommittee comment on the revised draft.

Lewis asked whether it is necessary to define complete restraint because there is no such thing as a partial restraint.

Gunn directed the subcommittee to revise the instructions after researching several issues, including:

1. **Whether the officer/person is required to have a reasonable belief that the plaintiff committed the crime charged, or whether the officer only had to have a reasonable belief that any crime was committed.**
2. **Whether the probable cause instruction should say that the claim was justified, the claim had merit, or the claim was valid.**

3. The current instruction on malicious prosecution creates an inference of malice--does the draft change the law regarding an inference of malice?

The subcommittee will also attempt to draft an abuse of process instruction.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Supreme Court of Florida
Tallahassee, Florida

November 3-4, 2005
November 3, 2005 (1:00 p.m. to 5:00 p.m.)
November 4, 2005 (8:30 a.m. to noon)

3. FALSE IMPRISONMENT AND MALICIOUS PROSECUTION (Tab 5)

Caldwell reported that the subcommittee focused on revising the definition of probable cause, taking into account the comments at the last meeting. Brown submitted the draft probable cause instruction found on page 5-120.

The revised definition of probable cause uses language from case law: "reasonable ground of suspicion" and "perspective of the [officer] [accuser]." At the last meeting, some committee members disliked the language instructing jurors to determine probable cause by "standing in the shoes of" the officer. Brown, however, continues to prefer the "standing in the shoes of" language. This phrase is found in cases and uses simple language easily understood by jurors.

The committee also discussed whether the instruction of probable cause used plain English and whether the terms "facts and circumstances" is redundant. Stewart commented that the draft is too wordy and suggested revising it to state, "Probable cause exists when the circumstances raise a reasonable suspicion that a crime has been committed. Probable cause is determined from the perspective of the officer at the time it occurred." Caldwell responded that the definition should include "reasonably cautious person," which is used in all the cases. Lewis added that the instruction needs the "at the time" language, because probable cause is not determined in hindsight.

Caldwell pointed out that there is a plain English definition of probable cause in the current instruction 6.1(g), which sets forth the

merchant's defense. However, that version does not state that probable cause has to be determined based on what the officer knew at the time of the incident. Mitchell agreed that the merchant's defense instruction provides a plain English definition of probable cause.

Mitchell questioned whether the definition should use the term "reasonable person" rather than "reasonably cautious person." Caldwell responded that the cases use the term reasonably cautious. Terry Lewis explained that the term "reasonably cautious" implies the special skills of the officer. Makar added that the merchant's defense instruction parallels the opinion in Daniel v. Village of Royal Palm Beach, 889 So. 2d 988 (Fla. 4th DCA 2004) (pages 5-125 to 5-127), which uses the term "reasonably cautious."

Caldwell agreed to redraft the definition of probable cause in accord with the consensus of the committee. The subcommittee will use the definition found in the merchant's defense instruction, 6.1(g), and add language that probable cause must be determined based on what was known at the time of the incident. Terry Lewis and Farmer remarked that the entire instruction needs to be revised and put in plain English.

The committee then discussed whether the jury should be instructed on the fellow officer rule, as set forth on pages 5-122 to 5-123. Brown explained that an officer's knowledge does not have to be first hand and can be based on information supplied by other officers. Wells added that under the most recent Florida Supreme Court opinion, the issue is not what a reasonable officer would know, but what the specific officer who made the arrest knew.

Farmer suggested that the issue is not always for the jury and may be more appropriately addressed in a note on use. The fellow officer rule merely means that an officer who heard a BOLO knows the facts set forth in the BOLO. Caldwell stated that the subcommittee will redraft the instruction so that the fellow officer rule is in a note on use.

Caldwell explained that the subcommittee also considered whether the officer had to have probable cause for the specific crime charged. Brown called the subcommittee's attention to a recent criminal case where it was sufficient that the officer had probable cause for the arrest, even though a

different crime was ultimately charged. Makar observed that this is consistent with Daniel, 889 So. 2d at 991 (pages 5-126 to 5-127).

The committee discussed whether this rule applies to malicious prosecution cases. Mitchell stated that it is counter-intuitive to apply the rule in the civil context. For example, an action for malicious prosecution of an intentional tort would be defeated on the grounds that the party had probable cause to bring a negligence action. Berman responded that the inquiry is what the party knew at the time of filing suit and whether the party was successful on the merits. Caldwell will rewrite the instruction and only address the issue of whether probable cause can be based on an uncharged crime in a note on use.

The subcommittee will redraft the false imprisonment and malicious prosecution instructions. The revised drafts will be formatted as MI instructions. When revising the probable cause instruction, the subcommittee will use language from the existing merchant's defense instruction, MI 6.1(g), and the opinion in Daniel v. Village of Royal Palm Beach, 889 So. 2d 988 (Fla. 4th DCA 2004). The subcommittee will include the fellow officer rule and the issue of whether probable cause can be based on uncharged crimes in notes on use, rather than in the instruction itself.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Stetson Law School
Tampa, Florida

February 23-24, 2006
February 23, 2006 (1:00 p.m. to 5:00 p.m.)
February 24, 2006 (8:30 a.m. to noon)

9. FALSE IMPRISONMENT AND MALICIOUS PROSECUTION (Tab 5):

Caldwell directed the committee's attention to the revised false imprisonment instruction on pages 5-190 to 5-193 and the revised malicious prosecution instruction on pages 5-196 to 5-198. Caldwell asked the committee for guidance on whether the introductory paragraphs for both instructions is written in sufficiently plain English.

Campo suggested using the introductory language the committee now uses for most instructions--"the issues you must decide are..." Lewis responded that these instructions call for a change from the committee's standard language.

Stewart questioned whether the burden of proof language should be moved. There may be a problem with linking the definitional terms explaining what the plaintiff has to prove with the burden of proof. Lewis agreed that the elements of the cause of action must be defined as soon as possible.

Makar asked whether the false imprisonment instruction should separately address the contexts for shopkeepers and police officers. Caldwell explained that the draft attempts to include both contexts.

Caldwell explained that the subcommittee struggled to define "without lawful authority" without using a circular definition. The subcommittee also had difficulty defining "complete restraint." In the shopkeeper context, a threat constitutes a complete restraint even without physical confinement. Farmer pointed out that criminal cases frequently

address whether the defendant should have know that he was free to leave. While police officers often tell people that they are not free to leave, a threat in the shopkeeper context may not be that direct. This could be resolved by summary judgment.

Makar asked whether the subcommittee considered City of St. Petersburg v. Austrino, 898 So. 2d 955 (Fla. 2d DCA), review denied, 911 So. 2d 97 (Fla. 2005). That case involved a police officer who had been told by a pharmacist that the plaintiff committed prescription fraud. Caldwell responded that the subcommittee considered the case and reviewed the instructions submitted by both sides.

Caldwell added that the subcommittee decided against including a specific instruction on two issues: (1) the fact that an officer may have imputed knowledge after learning information from other officers, such as hearing a BOLO on the radio; and (2) the officer does not need probable cause for the precise crime charged. The subcommittee feels that the law is already clear in both of these areas and no instruction is needed.

The committee then discussed the draft abuse of process instruction on pages 5-194 to 5-195. Caldwell explained that this cause of action requires both misuse of legal procedure and an ulterior motive. Typically, these cases also involve coercion.

Gunn asked why the instruction uses brackets asking for the specific improper purpose and ulterior motive, which is much more specific than negligence instructions. Caldwell responded that the standard instructions in California give the jury a case-specific explanation. Lewis added that the complaint will allege a specific ulterior motive, which will be proved at trial.

Farmer and Lewis commented that this tort arises rarely. Typically, the action is resolved at the summary judgment stage and never becomes a jury issue. Both questioned whether there is any need for an instruction on abuse of process, which may create issues where none exist. Makar followed the consensus of the committee and tabled further consideration of an abuse of process instruction.

The subcommittee will work with Campo on revising the introductory paragraphs of the false imprisonment and malicious prosecution instructions to use plain English. The subcommittee will finalize these

instructions and post them on the committee website before the July 2006 meeting. Makar tabled further consideration of an abuse of process instruction.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Supreme Court Building
Tallahassee, Florida

November 2-3, 2006
Thursday, November 2, 2006 (1:00 p.m. to 5:00 p.m.)
Friday, November 3, 2006 (8:30 a.m. to noon)

9. FALSE IMPRISONMENT AND MALICIOUS PROSECUTION (Tab 5). Makar noted that this subcommittee needs a chair and new members. **Makar asked the subcommittee to give a report at the next meeting updating the committee on the status of pending projects.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Tampa, Florida

DATES
Thursday, February 15, 2007 (1:00 p.m. to 5:00 p.m.)
Friday, February 16, 2007 (8:30 a.m. to noon)

3. FALSE IMPRISONMENT AND MALICIOUS PROSECUTION (Tab 5):

Caldwell informed the committee that there is nothing new or pending with this sub-committee and moved to make the sub-committee inactive.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
[February 21-22, 2008]
Tampa, Florida

February 21, 2008 (1:00 p.m. to 5:00 p.m.)
February 22, 2008 (8:30 a.m. to noon)

5. FALSE IMPRISONMENT AND MALICIOUS PROSECUTION (Tab 5):

Caldwell reminded the Committee that the subcommittee was asked to harmonize the probable cause portions of the malicious prosecution and false imprisonment instructions.

The subcommittee drafted two options for instruction 406.4, "Lack of Probable Cause." The second option avoids the use of negative language. Either way, instruction 406.4 will be proceeded by instruction 406.2, which instructs the jury that lack of probable cause is an element in the proceeding.

Caldwell asked the Committee to review both versions of instruction 406.4 and to select the preferred option. Farmer urged the Committee to select the option that eliminates the negative language. Farmer then suggested the plain English subcommittee review the instruction.

Gunn directed the plain English subcommittee to work with the false imprisonment and malicious prosecution subcommittee on the new probable cause instruction. If a proposed instruction is quickly drafted and sent to the Committee as a whole for approval, the proposed instruction could be included in the reorganized book. Otherwise, the new instruction will be on a parallel track with book reorganization.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
[July 10-11, 2008]
The Breakers, West Palm Beach, Florida

July 10, 2008 (12:00 p.m. to 5:00 p.m.)
July 11, 2008 (8:00 a.m. to 1:00 p.m.)

Probable Cause Comments:

- The first of two comments to the probable cause instruction 406.4 suggested the proposed instruction improperly creates a subjective standard. **The subcommittee recommended no change because the "reasonably cautious person" is an objective standard. The committee agreed.**
- Another comment recommended adding the word "person" after the word "another," because the word "another" alone is too abstract. **The subcommittee recommended adding the word "person" after "another," and the committee agreed.**
- **Pursuant to another comment, the subcommittee recommended making the word "issues" singular in instruction 407.8. The committee agreed.**

TAB E

"Judge Chris Alt nbernd" <altenbec@flcourts.org>
12/07/2004 05:12 PM

To "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com>, "Lucy Chernow BROWN" <LCBROWN@co.palm-beach.fl.us>, <tgunn@fowlerwhite.com>, "Judge Terry P. Lewis" <terryle@mail.co.leon.fl.us>
cc <grose@flabar.org>, "Hall, Carie" <chall@rumberger.com>
bcc
Subject RE: Malicious Prosecution/False Imprisonment instructions

I gave no specific marching orders. They are very old (1978 to 1980). I had received two letters from people applying for the committee that generally complained about them. I can probably find the names of those people.

Even in the 1970s, I was not fond of these instructions. In the typical law enforcement case, you try false arrest, assault/battery, and malicious prosecution, with a possible dose of 42 USC 1983. Our instructions don't fit a mix of that sort well. In a shoplifting case you often try the first three theories with a shopkeeper's or merchant's probable cause defense. Again, I don't know that our instructions do that. I typically took the battery instructions from criminal.

From: Caldwell, Jr. , Dick [mailto:dcaldwell@rumberger.com]
Sent: Tuesday, December 07, 2004 5:00 PM
To: Lucy Chernow BROWN; tgunn@fowlerwhite.com; Judge Terry P. Lewis
Cc: grose@flabar.org; Judge Chris Altenbernd; Hall, Carie
Subject: RE: Malicious Prosecution/False Imprisonment instructions

That's my recollection as well. I don't recall Judge Alterbernd mentioning anything real specific, just that there was some perception that they needed some updating. Let's see what we come up with in the way of case law, and that will probably point the way.

-----Original Message-----
From: Lucy Chernow BROWN [mailto:LCBROWN@co.palm-beach.fl.us]
Sent: Tuesday, December 07, 2004 4:55 PM
To: tgunn@fowlerwhite.com; TerryLe@mail.co.leon.fl.us; Caldwell, Jr. , Dick
Cc: grose@flabar.org; altenbec@flcourts.org; Hall, Carie
Subject: RE: Malicious Prosecution/False Imprisonment instructions
As to why we are looking at it, it has been a while, but my recollection is that several attorneys made it known to Chris that they think the jury instructions are not adequate. I do not recall ever being told why they think that.

>>> "Terry Lewis" <TerryLe@mail.co.leon.fl.us> 12/7/2004 4:49:25 PM >>>

Okay. Do we have some direction from the committee as to why we are looking at it?

>>> "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com> 12/7/2004 4:47:26 PM >>>
I'll do it. I don't know whether she'll find enough to do any sort of memo ,but whatever I get I'll pass along. It's frankly been long enough
since I've handled one of these cases that I don't recall whether

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"Caldwell, Jr. , Dick"
<dcaldwell@rumberger.com>

02/07/2005 09:57 AM

To "Lucy Chernow BROWN" <LCBROWN@co.palm-beach.fl.us>, <tgunn@fowlerwhite.com>, <terryle@mail.co.leon.fl.us>
cc <grose@flabar.org>, <altenbec@flcourts.org>, "Hall, Carie" <chall@rumberger.com>
bcc
Subject RE: Malicious Prosecution/False Arrest instructions

Here is what I'd recommend we report to the committee:
I. MI 5.1 - Malicious Prosecution
Add to 5.1b. the phrase, "...at the time of the event..." to clarify the time element involved. Section 5.1b. would read:

"One acts without probable cause in [instituting] [or] [continuing] a [criminal] [civil] proceeding agaginst another if there is not a reasonable ground of suspicion supported by circumstances sufficiently strong at the time of the event to cause a reasonably cautious person to believe that [the person accused is guilty of the offense charged] [the claim is justified].

I still think this is very awkward, but it folds in the Dockery language, and Tracy is correct that it is almost reqired to be in the negative. Maybe some plain English could straighten it out.

II. MI 6.1 - False Arrest. Actually, contrary to my earlier reading, there is a type of probable cause instruction buried in 6.1g, but it needs to be beefed up. I would add a new 6.1g dealing with probable cause and the Merchants' Defense thusly:

"g. Defenses. If the greater weight of the evidence does not support the claim of (claimant), then your verdict should be for (defendant). If however, the greater weight of the evidence does support the claim of (claimant), then you shall consider the defens[s] raised by (defendant].
i. On the [first] defense, the issue for your determination is whether (defendant)'s had probable cause to act as [he] [she] [it] did. Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged [suspected]. The existence of probable cause must be judged by the facts and legal state of affairs which existed at the time of the [arrest] [detention], rather than by the subjective intent of (defendant) or by events which odccur after the [arrest] [detention]."

Again, this folds in the Dockery/Mailly language. Then we could keep the "Merchant's Defense," currently 6.1g., as 6.1g.ii.

"ii. On the [second] defense, the issues for your determination are whether (name), a [merchant] [merchant's employee] had probable cause to believe that goods held for sale by the merchant were unlawfully taken by (claimant) and could be recovered by restraining (claimant); and whether (name) restrained (claimant) only in a reasonable

5-2

manner and for a reasonable time."

Tracy, since I'm going to be out of pocket for a few days, could I task you with putting all of the subcommittee's comments to the above suggestions into some sort of coherent submission to the Committee's agenda for the upcoming meeting? I appreciate the help. Thx. to everyone, and sorry again for the last-minute rush on this, which I swore was not going to occur.

-----Original Message-----
From: Lucy Chernow BROWN [mailto:LCBROWN@co.palm-beach.fl.us]
Sent: Monday, February 07, 2005 8:40 AM
To: tgunn@fowlerwhite.com; terryle@mail.co.leon.fl.us; Caldwell, Jr. , Dick
Cc: grose@flabar.org; altenbec@flcourts.org; Hall, Carie
Subject: RE: Malicious Prosecution/False Arrest instructions

Dick,
My sympathy to you for your loss. I do think it sounds like you are on the right track here re:probable cause.

>>> "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com> 2/6/2005 12:36:50 PM >>>

I'm sure that's precisely the reason the probable cause part of 5.1 is phrased the way it is. It just seemed to me to be very awkwardly phrased and difficult to understand.
Probably what we'd need to do on the "hindsight" issue is to say that the jury must consider the facts/circumstances as they existed at the time of the event, rather than what may have developed or come to light later on. If it's phrased the right way, it should avoid seeming to tell them what not to consider, but focus on their proper considerations. Same thing for the "subjective intent issue" in MI 6.1.
One "limiting" instruction which comes immediately to mind is the one that says if you find for defendant, you will not consider the issue of damages, but if you find for plaintiff, you shall consider the following elements.... There are probably others.
I actually did a small anount of "plain English" editing on the dockery definition of probable cause, but you're absolutely correct, that it's still not the "preferred" plain English wording of the type we've discussed so much in the meetings.
I've had a death in the family, and will be on the road and out of pocket for most of next week, unfortunately. I'll try to put something together about these sections, though, and circulate it to our subcommittee. That way, perhaps at least the Committee will have something to look at and talk about. This will help them give us some concrete feedback.

-----Original Message-----
From: Gunn, Tracy [mailto:tgunn@fowlerwhite.com]

Sent: Fri 2/4/2005 5:17 PM
To: Caldwell, Jr. , Dick; Judge Terry P. Lewis; Lucy Chernow BROWN
Cc: Judge Chris Altenbernd; grose@flabar.org; Hall, Carie
Subject: RE: Malicious Prosecution/False Arrest instructions
Dick:

My two-cents are as follows.

I think the reason that the probable cause instruction in the malicious prosecution section is couched in the negative is that the plaintiff has to prove the "absence" of it, so the element itself is negative. I agree that it needs rewriting, but we need to be careful to keep the meaning the same. I don't think the title matters at all since it's not read to the jury.

As for the hindsight instruction, I like it but do we ever really instruct the jury on what they cannot consider? It seems a little strange, and I'd like to look for another example of that type of "limiting" instruction in our standards. Would these events be inadmissible udner that case authority in any event?

On MI 6.1, I do agree that the probable caue affirmative defense should be included. I see no reason to depart from the supreme court's definition in Dockery & Mailly, and I always feel it's safest and most correct to use language from the caselaw or statute, but I'm sure we're going to hear that it's not Plain English.

As for the subjective intent issue, I again question whether we should instruct the jury on what they should not consider. Again, I think we should look for other examples of instructions telling the jury what not to consider.

Thanks,
Tracy
Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker PA
Tampa, Florida
(813) 228-7411

From: Caldwell, Jr. , Dick [mailto:dcaldwell@rumberger.com]
Sent: Fri 2/4/2005 10:16 AM
To: Judge Terry P. Lewis; Lucy Chernow BROWN; Gunn, Tracy
Cc: Judge Chris Altenbernd; grose@flabar.org; Hall, Carie
Subject: Malicious Prosecution/False Arrest instructions

Just as I feared, the holiday crush buried all of my good intentions of getting somethnig

5-4

circulated to the subcommittee. However, set forth below is a belated attempt to get a report together for discussion at thge upcoming meeting. I've attached for convenience the pages covering SJI MI 5.1 and 5.2 (Malicious Prosecution) and MI 6.1 (False arrest). A survey of the case law does not reflect any really major changes in substantive law since the 1978 revisions to these instructions. However, there are some changes which should be considered for the sake of clarity and to reflect some refinements in the case law.
"Probable cause" is a thread which runs through both instructions. In a malicious prosecution action, plaintiff must establish an absence of probable cause as as element of the tort; in a false arrest case. the existence of probable cause is an affirmative defense. Daniel v. Village of Royal Palm Beach, ___ So.2d ___, 30 FLW D2 (Fla. 4th DCA 2004).

I. MI 5.1
5.1(b), "Lack of Probable Cause" needs work. This instruction is couched in the negative, and is not a model of clarity. The Supreme Court defined "probable cause" as "...a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged." Fla. Game & Freshwater Fish Comm'n v. Dockery, 676 So.2d 471, 474 (Fla. 1991), cited in Mailly v. Jenne, 867 So.2d 1250 (Fla. 4th DCA 2004).
Would it make more sense to simply entitle this part "Probable Cause," and use the definition above, rather than talk about "Lack of Probable Cause?"
We need to add another sentence to 5.1(b), to make it clear that probable cause is to be determined as of the time of the event. How about adding a 5.1 (b)(ii) as follows:

"The existence of probable cause is to be judged by the facts and legal state of affairs which existed at the time of the arrest. Hindsight should not be used to determine whether a prior arrest was made with probable cause. In other words, events which occur after the arrest cannot remove the probable cause which existed at the time of the arrest." Mailly v. Jenne, supra at 1251; Dockery, supra, at 474.

The whole instruction, particularly 5.1(d), could use a "plain English" review, which I don't think we have time to complete in time to submit to the Committee.

II. MI 6.1
One issue here is that probable cause is not mentioned as a defense in 6.1, even though it clearly is available to the defendant. Daniel v. Village of Royal Palm Beach, supra. Do we want to incorporate the definition set forth in Dockery & Mailly above?
A connected issue is that the cases say that the jury must use the "reasonably cautious person" standard objectively - i.e., the subjective belief or intent of the arresting authority is not relevant to the determination of probable cause. Rankin v. Evans, 133 F.3d 1425 (11th Cir. 1998) (standard for probable cause is the same under both federal and Florida law). Should we add a sentence to this effect to 6.1 (and 5.1, too, for that matter)?

Are there other problems with these instructions which we should discuss? Do we need a conference call on this? Let me know your thoughts. Sorry about the tardiness of this e-mail. The best laid plans, and all that....

5-5

"Terry Lewis"
<TerryLe@mail.co.leon.fl.us>

02/07/2005 11:19 AM

To <LCBROWN@co.palm-beach.fl.us>, <tgunn@fowlerwhite.com>, <underwood@law.stetson.edu>, <dcaldwell@rumberger.com>

cc <grose@flabar.org>, <altenbec@flcourts.org>, <chall@rumberger.com>

bcc

Subject RE: Malicious Prosecution/False Arrest instructions

Sorry to be late to the discussion. I am forwarding this to Jim Underwood who has had some students researching the law and would like some direction.

If, in fact, the law has not changed since the instruction was written, and it accurately states the law, then I agree that the only changes would be to clarify and make less confusing. They are a mess from a plain English perspective. Lot of good comments about the probable cause issue and Dick's suggestion to insert "at the time of the event" is a good way of handling the issue of not considering pc in hindsight.

I suspect that the committee would want to see a wholesale revision, or at least a glimpse of some possibilities, rather than a few minor changes. If we are going to suggest changes, we might as well do it up right.
Time is running out for sure but I suggest that we all take a stab at some alternative language and approaches, then get together as a subcommittee before the general meeting to see what we can come up with. With a computer and a screen, we can play with different versions. We won't have a finished product, perhaps but something more substantial for discussion.
On the other hand, perhaps the feeling of the committee is that we not go further if it's only a question of plain English revision, if the instruction is still an accurate statement of the law. I can go either way, but just for the fun of it, I'm going to play around with the language.
Jim, did your students see any problem with the instruction accurately stating the law?
Terry

>>> "Gunn, Tracy" <tgunn@fowlerwhite.com> 2/7/2005 9:59:07 AM >>>
Dick:

I will take care of the "clean-up," no problem. Thanks for doing the bulk of the work on this. Best wishes to your family.

Tracy

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker PA
Tampa, Florida
(813) 228-7411

From: Caldwell, Jr. , Dick [mailto:dcaldwell@rumberger.com]
Sent: Mon 2/7/2005 9:57 AM
To: Lucy Chernow BROWN; Gunn, Tracy; terryle@mail.co.leon.fl.us
Cc: grose@flabar.org; altenbec@flcourts.org; Hall, Carie

5-6

there
were any jury instruction issues or not.

-----Original Message-----

From: Terry Lewis [mailto:TerryLe@mail.co.leon.fl.us]
Sent: Tuesday, December 07, 2004 4:45 PM
To: lcbrown@co.palm-beach.fl.us; tgunn@fowlerwhite.com; Caldwell, Jr.
,
Dick
Cc: grose@flabar.org; altenbec@flcourts.org; Hall, Carie
Subject: Re: Malicious Prosecution/False Imprisonment instructions

Thanks for getting on this. If you have an associate who will survey
the
law, I'd like to have that before making any suggestions. I don't have
a
particular slant at this time.

>>> "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com> 12/7/2004 2:28:23
PM >>>
At the October meeting, we were tasked as a new Sub-committee to look
at
coming up with appropriate modifications to MI 5.1, 5.2 and 6.1. I'd
like to try to get this project started and try to come up with some
drafts for review and discussion at the next meeting. One of my
associates is conducting a survey of significant decisions since these
instructions were promulgated, and I'll pass along the results of that
effort. In the meantime, does anyone have any suggestions up front as
to
directions in which we ought to start looking? The holiday season is
of
course a tough time to try and get anything done, but if we can at
least
get some preliminary thoughts put together, we can get something ready
for submission in a timely fashion.
Best wishes to all!

5-8

"Caldwell, Jr. , Dick" <dcaldwell@rumberger.com>
03/07/2005 03:48 PM

To <LCBROWN@co.palm-beach.fl.us>, <tgunn@fowlerwhite.com>, "Terry Lewis" <TerryLe@mail.co.leon.fl.us>, <reajr@robertaustin.com>
cc <smakar@coj.net>, <grose@flabar.org>, "Oxley, Jeannie" <joxley@rumberger.com>
bcc
Subject False Arrest/Malicious Prosecution subcommittee projects

First, welcome to Bob Austin.
My notes reflect that we got the following guidance from the full committee at the last meeting:
(1) look at separating "Abuse of Process" from "Malicious Prosecution," possibly requiring separate instructions. This seems to be a two-level inquiry: (a) are "abuse of process" and "malicious prosecution" really separate causes of action, one arising from civil actions and the other from a criminal context; and (b) if so, what should an "Abuse of Process" instruction say?
(2) re-word the definition of "probable cause," (a) to put it in plain English, (b) along with this to look at criminal cases for clearer expressions of the principle, and (c) finally, to figure out a way to fold whatever we come up with into MI 5.1 (concerning the absence of probable cause) so that it's as clear as possible.
(3) come up with language for the principle that the jury must determine the existence of probable cause based on the objective facts/situation at the time, rather than the subjective intent of the detainor and/or things which may have been learned later (see Tracy's memo and the last several e-mails on this).
(4) look at instructions from other jurisdictions to see how they handle these issues, possibly with the aid of Professor Underwood's students. I recall that opinion was not unanimous concerning the student assistance, but I've always been willing to take help wherever I can find it. Does anyone have strong feelings that we should not ask Jim's help on this?
(5) I have another note that I can't read (you know you're really losing it when you can't read your own handwriting!), something about A & B (assault and battery?) relative to ____ instructions, and the 3d Restatement. Can anyone help me with this?
Finally, my notes also have a reference to a new 2d DCA case (Green?) with a dissent by Judge Canady. I've looked through the table of cases in the Digest and the FLW and couldn't find a reference to anything close to this topic. Again, does anyone have any notes which may be of some assistance?
Please let me know everyone's thoughts on (1) - (5) above. After having let this slide too long last time, I really would like to get something timely to the Committee so they can discuss and vote on it in July.
Thanks to everyone for the help.

"Lucy Chernow BROWN" <lcbrown@co.palm-beach.fl.us>
03/21/2005 09:11 PM

To <tgunn@fowlerwhite.com>, <TerryLe@mail.co.leon.fl.us>, <reajr@robertaustin.com>, <dcaldwell@rumberger.com>
cc <smakar@coj.net>, <grose@flabar.org>, <joxley@rumberger.com>
bcc
Subject Re: False Arrest/Malicious Prosecution subcommittee projects

Greetings everyone,
As promised, here is my Plain English view and proposal for defining probable cause for the MI 5.1 instruction.
In my view, the Plain English perspective dictates a straight-forward definition.
Since MI 5.1(a) makes it very clear that Plaintiff must prove Defendant acted WITHOUT probable cause, I would offer the following as 5.1(b):

Probable Cause
Probable cause means facts and circumstances existed at the time of the incident, sufficient to warrant a reasonably cautious person, standing in the shoes of [the arresting officer] [the accuser] to believe that [the accused was guilty of the crime charged] [the claim made was justified].

At least this might be a starting point. Dick, if you are working on setting up a phone conf. next week, my J.A. will be in on Tuesday and Wednesday only this week, and I will not be in the courthouse at all until Mon. 3/28.

Judge Lucy Chernow Brown
Fifteenth Judicial Circuit
Palm Beach County Courthouse
West Palm Beach, FL, 33401
(561) 355-4866

>>> "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com> 03/07/05 3:48 PM >>>
First, welcome to Bob Austin.
My notes reflect that we got the following guidance from the full committee at the last meeting:
(1) look at separating "Abuse of Process" from "Malicious Prosecution," possibly requiring separate instructions. This seems to be a two-level inquiry: (a) are "abuse of process" and "malicious prosecution" really separate causes of action, one arising from civil actions and the other from a criminal context: and (b) if so, what should an "Abuse of Process" instruction say?
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(3) come up with language for the principle that the jury must determine the existence of probable cause based on the objective facts/situation at the time, rather than the subjective intent of the detainor and/or things which may have been learned later (see Tracy's memo and the last several e-mails on this).
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Please let me know everyone's thoughts on (1) - (5) above. After having let this slide too long last time, I really would like to get something timely to the Committee so they can discuss and vote on it in July.
Thanks to everyone for the help.

"Scott Makar"
<SMakar@coj.net>
04/06/2005 12:47 PM

To <LCBROWN@co.palm-beach.fl.us>, <tgunn@fowlerwhite.com>, <TerryLe@mail.co.leon.fl.us>, <reajr@robertaustinlaw.com>, <dcaldwell@rumberger.com>
cc <grose@flabar.org>
bcc
Subject Re: Malicious Prosecution instruction - conference call

Attached is Liabos v. Harman case we discussed in conf. call. Also, the Second District recently discussed the lack of probable cause in City Of St. Petersburg v. Austrino 2005 WL 291948, *2 (Fla.App. 2 Dist.,2005). The court notes that "Probable cause is a fluid concept". I wonder if the jury instructions in this false arrest case can be obtained (easily)? There was a dissent and motions for rehearing, etc. are pending according to docket. Amazingly, the case was appealed to the Second District in December 2002.

Scott D. Makar
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Appellate Division
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>>> "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com> 04/06/05 11:41 AM >>>
Hopefully everyone got the information for today's conference call at noon. The number is (877) 394-0659, pass code 453912#. This is the Bar's conference call number.
Lucy Brown had come up with the following language for a Probable Cause instruction:

"'Probable cause' means facts and circumstances [which] existed at the time of the incident, sufficuent to warrant a reasonably cautious person, standing in the shoes of [the arresting officer] [teh accuser] to believe that [the accused was guilty of the crime charged] [the claim made was justified]."

We need to discuss this language, as well as talk about the other topics listed in my Mar. 7 e-mail (at least as time allows):
(a) is "abuse of process " a separate cause of action, or comprehended within these instructions?
(b) researching out-of-state instructions and decisions on those. I didn't hear any adverse comment on using Jim Underwod's people to help us with this, so I'll get thatv started.
(c) this other mysterious topic referenced in my illegible note from the last meeting.

In addition, please delete the erroneously received message from any device/media where the message is stored.

****

[attachment "Liabos case.rtf" deleted by Gerry Rose/The Florida Bar]

"Oxley, Jeannie" <joxley@rumberger.com>
05/31/2005 09:56 AM

To <smakar@coj.net>, "Lucy Chernow BROWN" <lcbrown@co.palm-beach.fl.us>, <tgunn@fowlerwhite.com>, <TerryLe@mail.co.leon.fl.us>,
cc
bcc
Subject Malicious Prosecution Instruction

Attached please find a copy the City of St. Peterburg's proposed jury instructions in the *City of St. Petersburg v. Donald Austrino and Maria Austrino* case.

Please let me know if you were unable to view these documents.

Thank you.

Jeannie Oxley
Secretary to J. Richard Caldwell, Jr.
and Marcus S. Lawrence, Jr.
Rumberger, Kirk & Caldwell
100 N. Tampa Street, Ste 2000
Tampa, Florida 33602
(813) 223-4253 - main
(813) 472-7521 - direct
(813) 221-4752 - fax
joxley@rumberger.com

[attachment "DOC338.TIF" deleted by Gerry Rose/The Florida Bar]

CITY OF ST. PETERSBURG

OFFICE OF THE CITY ATTORNEY

May 19, 2005

J. Richard Caldwell, Esquire
Rumsberger, Kirk and Caldwell
P.O. Box 3390
Tampa, FL 33601

RE: City of St. Petersburg v. Donald Austrino and Maria Austrino
Appeal No. 2D02-5802

Dear Mr. Caldwell:

Per your request, I have enclosed a copy of the City's proposed jury instructions. Please advise.

Sincerely,

Deborah Glover-Pearcey
Assistant City Attorney

DGP/jlt
encl.

July 14/15 2005
5 -15

POST OFFICE BOX 2842, ST. PETERSBURG, FLORIDA 33731-2842 TELEPHONE: 727 893-7401 FAX: 727 892-5262 ONE FOURTH STREET NORTH, ST. PETERSBURG, FL 33701

PRELIMINARY INSTRUCTION

You have now been sworn as the jury to try this case. This is a civil case involving a disputed claim or claims between the parties. Those claims and other matters will be explained to you later. By your verdict, you will decide the disputed issues of fact. I will decide the questions of law that arise during the trial, and before you retire to deliberate at the close of the trial, I will instruct you on the law that you are to follow and apply in reaching your verdict. In other words, it is your responsibility to determine the facts and to apply the law to those facts. Thus, the function of the jury and the function of the judge are well defined, and they do not overlap. This is one of the fundamental principles of our system of justice.

Steps in trial.

Before proceeding further, it will be helpful for you to understand how a trial is conducted. In a few moments, the attorneys for the parties will have the opportunity to make opening statements, in which they may explain to you the issues in the case and summarize the facts that they expect the evidence will show. Following the opening statements, witnesses will be called to testify under oath. They will be examined and cross-examined by the attorneys. Documents and other exhibits also may be received as evidence.

After all the evidence has been received, the attorneys will again have an opportunity to address you and to make their final arguments. The statements that the attorneys now make and the arguments that they later make are not to be considered

by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and arguments are intended to help you properly understand the issues, the evidence, and the applicable law, so you should give them your close attention.

Following the final arguments by the attorneys, I will instruct you on the law.

Things to be avoided.

You should give careful attention to the testimony and other evidence as it is received and presented for your consideration, but you should not form or express any opinion about the case until you have received all the evidence, the arguments of the attorneys and the instructions on the law from me. In other words, you should not form or express any opinion about the case until you are retired to the jury room to consider your verdict, after having heard all of these matters.

The case must be tried or heard by you only on the evidence presented during the trial in your presence, and in the presence of the attorneys and myself. You must not conduct any investigation of your own. Accordingly, you must not visit any of the places described in the evidence, or the scene of the occurrence that is the subject of the trial, unless I direct you to view the scene. Also, you must avoid reading newspaper headlines and articles relating to this case and trial. You must also avoid seeing or hearing television and radio comments or accounts of this trial while it is in progress.

Recesses and Objections and Judge's Conferences with Attorneys

During the trial we will take recesses. During these recesses you shall not

discuss the case among yourselves or with anyone else, nor permit anyone to say anything to you or in your presence about the case. Further, you must not talk with the attorneys, the witnesses, or any of the parties about anything, until your deliberations are finished. In this way, any appearance of something improper can be avoided.

If during a recess you see one of the attorneys and he or she does not speak to you, or even seem to pay attention to you, please understand that the attorney is not being discourteous but is only avoiding the appearance of some improper contact with you. If anyone tries to say something to you or in your presence about this case, tell that person that you are on the jury trying the case, and ask that person to stop. If he or she keeps on, leave at once and immediately report this to the bailiff or court deputy, who will advise me.

(Explain to the jury the anticipated schedule of recesses and adjournments. The court at this point may, if appropriate, introduce the various court officials such as the clerk, bailiff or court deputy, and court reporter, explaining their duties.)

Introduction of attorneys for opening statements.

At this time, the attorneys for the parties will have an opportunity to make their opening statements, in which they may explain to you the issues in the case and give you a summary of the facts they expect the evidence to show.

(Florida Standard Jury Instruction 1.1)

Member of the jury, the sworn testimony of _____

_____, given before trial, will now be read to you. You are to consider and weigh this testimony as though the witness had testified here in person.

(Florida Standard Jury Instruction No.: 1.3)

INTRODUCTORY INSTRUCTION

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict[s]. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law, on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, and all facts that may be admitted or agreed to by the parties, and any fact of which the court has taken judicial notice.

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

(Florida Standard Jury Instruction No. 2.1)

BELIEVABILITY OF WITNESSES

a. In determining the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

You have heard opinion testimony on certain subjects from persons referred to a expert witnesses. Some of the testimony before you was in the form of opinions about certain technical subjects.

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all other evidence in the case.

(Florida Standard Jury Instruction No. 2.2)

The Court instructs you, as matter of law that Walgreens Company is responsible for the negligence and actions of its employee, Jean Fernandez Angelrath, at the time and place of the arrest in this lawsuit. The Court instructs you, as a matter of law, that the CITY OF ST. PETERSBURG would be responsible for any false arrest by its employee, police officer John Douglas, at the time and place of the arrest in this lawsuit.

(Based upon Florida Standard Jury Instruction No.: 3.1(b))

The issue for your determination on the negligence of Walgreens Co. is:

Whether Walgreens was negligent or contributory negligent in its investigation of the prescription fraud and reporting it to the City police and, if so, whether such negligence was a legal cause of loss, injury or damage sustained by Donald Austrino. If the greater weight of the evidence does not support the claim that Walgreens was negligent, then your verdict on that claim, should be for Walgreens.

Similarly, the issues for your determination on the claim of City of St. Petersburg against Walgreens are whether Walgreens was negligent by the contributory actions of its employee and, if so, whether such negligence was a legal cause of loss, injury or damage sustained by City. If the greater weight of the evidence does not support the claim of City, then your verdict on that claim should be for Walgreens.

If the greater weight of the evidence supports the claim and shows that the negligence of Walgreens was a legal cause of [loss] [injury] [or] [damage] sustained by Donald Austrino, your verdict should be against Walgreens in the total amount of Donald Austrino's damages.

(Based upon Florida Standard Jury Instruction No.: 3.5)

Negligence is the failure to use reasonable care. Reasonable care on the part of a pharmacist is that degree of care which a reasonably careful pharmacist would use under like circumstances. Negligence may consist either in doing something that a reasonably careful pharmacist would not do under like circumstances or in failing to do something that a reasonably careful pharmacist would do under like circumstances.

(Based upon Florida Standard Jury Instruction No.: 4.2c)

Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.

In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].

(Based upon Florida Standard Jury Instruction No.: 5.1(a)(b))

If you find for defendant[s] you will not consider the matter of damages. But if you find for Donald Austrino you should award Donald Austrino an amount of money that the greater weight of the evidence shows will fairly and adequately compensate him for such [loss] [injury] [or] [damage]. You shall consider the following elements:

(1) mental anguish, embarrassment, humiliation and loss of reputation in the community caused by the arrest.

(Based upon Florida Standard Jury Instruction No.: 6.2)

In determining the total amount of damages, you should not make any reduction because of the [negligence] [fault] [responsibility] of Walgreens Co. The court in entering judgment will take into account your allocation of [negligence] [fault] [responsibility] among all persons or entities who you find contributed to Donald Austrino's damages.

(Based upon Florida Standard Jury Instruction No.: 6.2(2))

The issues for your determination on the claim of the Plaintiffs against the CITY OF ST. PETERSBURG are:

Whether the City of St. Petersburg's police officer intentionally and unlawfully detained and deprived the Plaintiff DONALD AUSTRINO of his liberty against his will in a manner which was unreasonable and unwarranted by the circumstances; and, if so, whether such intentional, unlawful, unreasonable and unwarranted detention and deprivation of liberty was a legal cause of injury or damage sustained by DONALD AUSTRINO.

(Standard Jury Instruction No. 3.5 b. and 3.6, Kanner v. First Nat'l Bank of South Miami, 287 So. 2d 715 (Fla 3 d DCA 1974: City of Miami v. Albro, 120 So. 2d 23 (Fla. 3d DCA 1960; Johnson v. Weiner, 19 So. 2d 699 (1944))

If the greater weight of the evidence does not support the claim of DONALD AUSTRINO, then your verdict should be for Defendant, CITY OF ST. PETERSBURG.

(Florida Standard Jury Instruction No.: 3.7)

If, however, the greater weight of the evidence does support the claim of the Plaintiff, Donald Austrino, then you shall consider the defenses raised by the Defendant, City of St. Petersburg.

On the first defense, the issues for your determination are:

Whether the Defendant City of St. Petersburg's police officer John Douglas had probable cause to believe that Plaintiff DONALD AUSTRINO has committed, is committing, or is about to commit an offense involving either a felony or a misdemeanor or a violation of Florida Statutes.

(Based on Florida Standard Jury Instruction No. 3.8 a.. b. and f. combined: § 901.15 Florida Statutes; Miller v. City of Jacksonville, 603 So. 2d 1310 (Fla. 1st DCA 1992); Lee v. Ferraro, 2002 WL 340670 (11th Cir. Fla.))

Probable cause, as required for an arrest without a warrant, deals with probabilities which are not technical, but are the factual and practical considerations of everyday life upon which reasonable and prudent men, not legal technicians, act.

(Walker v. State, 196 So.2d 8 (Fla. 1967))

As a defense to Plaintiff DONALD AUSTRINO's claim against the Defendant, City of St. Petersburg, for false arrest, Defendant says that its police officer had probable cause to arrest the plaintiff, in that its police officer had substantial reason to believe, or in good faith believed, that Plaintiff had committed a crime, and its police officer had a duty to arrest Plaintiff under such circumstances and under his good faith belief that Plaintiff had committed an offense.

901.15 When arrested by an officer without warrant is lawful. A law enforcement officer may arrest a person without a warrant when:

(2) A felony has been committed and he or she reasonably believes that the person committed it.

(3) He or she reasonably believes that a felony has been or is being committed and that the person to be arrested has committed or is committing it.

Reference: Florida Statute 901.15 - When arrest by officer without warrant is lawful.

The law imposes upon police officers duties which they must perform, among which is their duty to arrest those who they reasonably believe are in violation of the law.

Reference: Radtke v. Loud, 98 So.2d 891 (Fla. 3d DCA 1957); Miami v. Albro, 120 So.2d 23 (Fla. 3d DCA 1960)

In considering the legality of an arrest made by a police officer, you are instructed that the validity of an arrest does not turn on the offense announced by the officer at the time of the arrest. Where, by objective standards, probable cause to arrest for a certain offense exists, the validity of an arrest does not turn on the fact that an arrest was effected on another charge. Therefore, if you find that probable cause existed for the arrest by Officer Douglas of Plaintiff Donald Austrino for an offense, whether or not the offense was that with which he was charged, you should find that the arrest was valid.

Reference: State v. Cote, 547 So.2d 993 (Fla. 4th DCA 1989); Thomas v. State, 395 So.2d 280 (Fla. 3d DCA 1981); State v. Carmody, 553 So.2d 1366 (Fla. 5th DCA 1989); Sussman v. City of Daytona Beach, 462 So.2d 595 (Fla. 5th DCA 1985); and Bailey v. Board of County Commissioners of Alachua County, 956 F.2d 1112 (11th Cir. 1992)

In considering the legality of an arrest made by a police officer, the lawfulness of the arrest must be based upon the facts and circumstances that existed at the time the arrest was made as provided to or known by the police officer making the arrest.

Reference: Canney v. State, 298 So.2d 495 (Fla. 2d DCA 1973); Rankin v. State, 133 F.3d 1425 (11th Cir. 1998)

In order for probable cause for an arrest to exist, it is not necessary that the arresting officer know facts that would absolutely prove beyond a reasonable doubt the guilt of the person charged. Probable cause exists when the circumstances are sufficient to cause a reasonably cautious person to believe that the person accused is guilty of the offense charged.

Reference: Lee v. Giger, 419 So.2d 717 (Fla. 1st DCA 1982); Florida Game and Freshwater Fish Commission v. Dockery, 676 So.2d 471, (Fla. 1st DCA 1996)

In considering the legality of an arrest made by a police officer, the lawfulness of the arrest must be based upon the facts and circumstances that existed at the time the arrest was made. Hindsight should not be used to determine whether a prior arrest was made with probable cause.

Reference: Dodds v. State, 434 So.2d 940 (Fla. 4th DCA 1983); McCoy v. State, 565 So.2d 860 (Fla. 2d DCA 1990); Florida Game and Freshwater Fish Commission v. Dockery, 676 So.2d 471 (Fla. 1st DCA 1996)

The officer's determination of probable cause must be based upon objective facts and circumstances known to the officer at the time of the arrest and such facts, circumstances and information must be sufficient to allow a person of reasonable caution to make the determination.

Reference: State v. Brown, 725 So2d 441 (Fla. 5th DCA 1999)

Police Officers are entitled to rely on statements or information provided by others, including a professional such as a pharmacist, to support probable cause for an arrest.

(Based upon Florida Standard Jury Instruction No. 3.8)

Reference: Rankin v. Lewis, 133 F.3d 1425 (11th Cir. 1998)

The standard for determining probable cause to arrest is what a reasonable person would believe knowing all of the facts known to the officer. The standard is not to be equated with the standard of conclusiveness and probability applying to convictions based on circumstantial facts.

Reference: LeGrand v. Dean, 564 So.2d 510, 512 (Fla. 5th DCA 1990); Rodgers v. State, 30 So.2d 625, (Fla. 1946)

If you find for the City of St. Petersburg you will not consider the matter of damages. If the greater weight of the evidence does not support the defense of the Defendant, CITY OF ST. PETERSBURG and the greater weight of the evidence does support the claim of Plaintiff, DONALD AUSTRINO, then your verdict should be for the Plaintiff in the total amount of his damages.

(Florida Standard Jury Instruction No. 3.8, first paragraph)

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

(Florida Standard Jury Instruction No. 3.9)

Your verdict must be based on the evidence that has been received and the law on which I have instructed you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party.

(Based on Florida Standard Jury Instruction No. 7.1)

When you retire to the jury room, you should select one of your number to act as foreman or forewoman, to preside over your deliberations and sign your verdict. Your verdict must be unanimous, that is, your verdict must be agreed to by each of you. You will be given a verdict form,

When you have agreed on your verdict, the foreman or forewoman, acting for the jury, should date and sign it. You may now retire to consider your verdict.

(Florida Standard Jury Instruction No.: 7.2)

MALICIOUS PROSECUTION

1500. Former Criminal Proceeding

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully caused a criminal proceeding to be brought against [him/her]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was actively involved in causing [*name of plaintiff*] to be prosecuted [or in causing the continuation of the prosecution];**
2. **That the criminal proceeding ended in [*name of plaintiff*]'s favor;**
3. **That [*name of defendant*] did not reasonably believe [*insert disputed fact necessary to determine probable cause*];**
4. **That [*name of defendant*] acted primarily for a purpose other than that of bringing [*name of plaintiff*] to justice;**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Directions for Use

Do not read element #3 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see Instruction 1503, *Reasonable Grounds*).

Do not read element #2 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use Instruction 1504, *Favorable Termination*.

Note that acquittal does not necessarily reflect lack of reasonable grounds to have brought the prosecution.

Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

Sources and Authority

- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause." (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561], internal citation omitted.)
- The Supreme Court has observed: "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865], internal citations omitted.)
- "The test is whether the defendant was actively instrumental in causing the prosecution." (*Cedars-Sinai Medical Center, supra,* 206 Cal.App.3d at p. 417, quoting 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 418, p. 503.)
- In *Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654], the court observed that the Supreme Court in an 1861 case had approved a jury instruction whose effect "was to impose liability upon one who had not taken part until after the commencement of the prosecution." (*Id.* at p. 263.)
- "Originally the common law tort of malicious prosecution was limited to criminal cases, but the tort was extended to afford a remedy for the malicious prosecution of a civil action." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 58 [75 Cal.Rptr.2d 83], internal citation omitted.)
- Restatement Second of Torts, section 653 provides:

  A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if

  (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and

  (b) the proceedings have terminated in favor of the accused.

- Restatement Second of Torts, section 673 provides:

  (1) In an action for malicious prosecution the court determines whether

(a) the proceedings of which the plaintiff complains were criminal in character;

(b) the proceedings were terminated in favor of the plaintiff;

(c) the defendant had probable cause for initiating or continuing the proceedings;

(d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.

(2) In an action for malicious prosecution, subject to the control of the court, the jury determines

(a) the circumstances under which the proceedings were initiated in so far as this determination may be necessary to enable the court to determine whether the defendant had probable cause for initiating or continuing the proceedings;

(b) whether the defendant acted primarily for a purpose other than that of bringing an offender to justice;

(c) the circumstances under which the proceedings were terminated;

(d) the amount that the plaintiff is entitled to recover as damages;

(e) whether punitive damages are to be awarded, and if so, their amount.

- "Probable cause" [is defined] as " 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' " (*Clary v. Hale* (1959) 175 Cal.App.2d 880, 886 [1 Cal.Rptr. 91], internal citation omitted.)
- "The burden of proving that there was no probable cause for defendant's prosecution of plaintiff upon which an action for malicious prosecution is based rests upon the plaintiff." (*Singleton v. Singleton* (1945) 68 Cal.App.2d 681, 691 [157 P.2d 886], internal citations omitted.)
- Proof that the defendant was innocent does not necessarily establish lack of probable cause: " 'While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed, and that the plaintiff

had committed the crime.' " (*Singleton, supra,* 68 Cal.App.2d at p. 693, quoting *Ball v. Rawles* (1892) 93 Cal. 222, 234 [28 P. 937].)

- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)
- "The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution." (*Cote, supra,* 218 Cal.App.3d at p. 803, internal citation omitted.)
- "In a malicious prosecution case the plaintiff is not required . . . to show that the prosecution was inspired by personal hostility, a grudge or ill will. What is required is evidence which establishes bad faith, or the absence of an honest and sincere belief that the prosecution was justified by the existent facts and circumstances." (*Singleton, supra,* 68 Cal.App.2d at p. 696, internal citation omitted.)
- Restatement Second of Torts, section 657 provides: "The fact that the person against whom criminal proceedings are instituted is guilty of the crime charged against him, is a complete defense against liability for malicious prosecution."
- In *Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123], the court observed that "[a]cquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]"

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 418–430

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

(New September 2003)

1501. Wrongful Use of Civil Proceedings

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully brought a lawsuit against [him/her]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was actively involved in bringing [or continuing] the lawsuit;**
2. **That the lawsuit ended in [*name of plaintiff*]'s favor;**
3. **That no reasonable person in [*name of defendant*]'s circumstances would have believed [*insert disputed fact necessary to establish probable cause*];**
4. **That [*name of defendant*] acted primarily for a purpose other than succeeding on the merits of the claim;**
5. **That [*name of plaintiff*] was harmed; and**
6. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Directions for Use

Do not read element #3 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see Instruction 1503, *Reasonable Grounds*).

Do not read element #2 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use Instruction 1504, *Favorable Termination.*

Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

Sources and Authority

- "Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil

action. . . . The Restatement refers to 'wrongful use of civil proceedings,' and the phrase used in the text ('malicious institution of a civil proceeding') has been approved." (5 Witkin, Summary of Cal. Law (9th ed. 1988) § 431, p. 512, internal citations omitted.)

- "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 [118 Cal.Rptr. 184, 529 P.2d 608], internal citations omitted.)
- Restatement Second of Torts section 674 provides:

  One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

  (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

  (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.
- "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 59 [75 Cal.Rptr.2d 83], internal citation omitted.)
- A person who had no part in the commencement of the action but who participated in it at a later time may be held liable for malicious prosecution: "There does not appear to be any good reason not to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted." (*Lujan v. Gordon* (1977) 70 Cal.App.3d. 260, 264 [138 Cal.Rptr. 654].)

- "One who did not file the complaint may nevertheless be liable if he instigated or was actively instrumental in 'putting the law in motion.' " (5 Witkin, Summary of Cal. Law (9th ed. 1988) § 431, p. 514, citing *Jacques Interiors v. Petrak* (1987) 188 Cal.App.3d 1363, 1371 [234 Cal.Rptr. 44].)
- "[A] cause of action for malicious prosecution lies when predicated on a claim for affirmative relief asserted in a cross-pleading even though intimately related to a cause asserted in the complaint." (*Bertero, supra,* 13 Cal.3d at p. 53.)
- In *Bertero,* the court approved a jury instruction stating that liability can be found if the prior action asserts a legal theory that is brought without probable cause, even if alternate theories are brought with probable cause. (*Bertero, supra,* 13 Cal.3d at p. 55–57.) This holding was reaffirmed in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 695 [34 Cal.Rptr.2d 386, 881 P.2d 1083].)
- "[A] malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1153 [85 Cal.Rptr.2d 726], internal citation omitted.)
- "[T]he courts have refused to permit malicious prosecution claims when they are based on a prior proceeding that is (1) less formal or unlike the process in the superior court (i.e., a small claims hearing, an investigation or application not resulting in a formal proceeding), (2) purely defensive in nature, or (3) a continuation of an existing proceeding." (*Merlet, supra,* 64 Cal.App.4th at p. 60.)
- Restatement Second of Torts, section 681A provides:

  In an action for wrongful civil proceedings the plaintiff has the burden of proving, when the issue is properly raised, that

  (a) the defendant has initiated, continued or procured the civil proceedings against him;

  (b) the proceedings were terminated in his favor;

  (c) the defendant did not have probable cause for his action;

  (d) the primary purpose for which the proceedings were brought was not that of securing the proper adjudication of the claim on which the proceedings were based;

  (e) he suffered special harm, and the extent of the harm;

(f) the circumstances make the recovery of punitive damages appropriate.

- Restatement Second of Torts, section 681B provides:

(1) In an action for wrongful civil proceedings, the court determines whether

(a) a civil proceeding has been initiated;

(b) the proceeding was terminated in favor of the plaintiff;

(c) the defendant had probable cause for his action;

(d) the harm suffered by the plaintiff is a proper element for the jury to consider in assessing damages.

(2) In an action for wrongful civil proceedings, subject to the control of the court, the jury determines

(a) the circumstances under which the proceedings were initiated in so far as may be necessary to enable the court to determine whether the defendant had probable cause for initiating them;

(b) whether the defendant acted primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceeding was based;

(c) the circumstances under which the proceedings were terminated;

(d) the amount that the plaintiff is entitled to recover as general and special damages;

(e) whether punitive damages are to be awarded, and if so, in what amount.

- " '[P]laintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' " (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 128 [75 Cal.Rptr.2d 118], internal citation omitted.)
- "The element of favorable termination is for the court to decide . . . ." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1149.)
- "Favorable termination can occur short of a trial on the merits, but it must bear on the merits. Thus, a plaintiff does not establish favorable termination merely by showing that he or she prevailed in an underlying action." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1149, internal citation omitted.)

- "[T]he termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 128, internal citation omitted.)
- Establishing the lack of probable cause on a set of facts is traditionally "a question of law to be determined by the court, rather than a question of fact for the jury" . . . [¶] [it] "requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors . . . ." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875 [254 Cal.Rptr. 336, 765 P.2d 498].)
- "The question of probable cause is one of law, but if there is a dispute concerning the defendant's knowledge of facts on which his or her claim is based, the jury must resolve that threshold question. It is then for the court to decide whether the state of defendant's knowledge constitutes an absence of probable cause." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1154.)
- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' . . . If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury." (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)
- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1154, internal citation omitted.)
- "Probable cause may be present even where a suit lacks merit. . . . Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382 [90 Cal.Rptr.2d 408].)
- "California courts have held that victory at trial, though reversed on appeal, conclusively establishes probable cause." (*Roberts, supra,* 76 Cal.App.4th at p. 383.)
- "Without actual malice, there can be no action for malicious prosecution. Negligence does not equate with malice. Nor does the

negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468 [242 Cal.Rptr. 562].)

- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. The plaintiff must plead and prove actual ill will or some improper ulterior motive. It may range anywhere from open hostility to indifference." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)
- "The malice element of the malicious prosecution tort goes to the defendant's subjective intent in initiating the prior action. It is not limited to actual hostility or ill will toward the plaintiff. Rather, malice is present when proceedings are instituted primarily for an improper purpose. Suits with the hallmark of an improper purpose are those in which: ' ". . . (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." ' " (*Sierra Club Foundation, supra,* 72 Cal.App.4th at pp. 1156–1157, citing *Albertson v. Raboff* (1956) 46 Cal.2d 375, 383 [295 P.2d 405].)
- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 132, internal citations omitted.)
- The litigation privilege of Civil Code section 47 does not preclude malicious prosecution actions. See *Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524] (litigation privilege "has been interpreted to apply to virtually all torts except malicious prosecution"); *Silberg v. Anderson* (1990) 50 Cal.3d 205, 216 [266 Cal.Rptr. 638, 786 P.2d 365] ("The only exception . . . has been for malicious prosecution actions."); *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 406 [6 Cal.Rptr.2d 781] ("The privilege applies only to tort causes of action, and not to the tort of malicious prosecution").

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 431–454

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

(New September 2003)

1502. Wrongful Use of Administrative Proceedings

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully brought an administrative proceeding against [him/her]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was actively involved in bringing [or continuing] the administrative proceeding;**
2. **[That [*name of administrative body*] did not conduct an independent investigation;]**
3. **That the proceeding ended in [*name of plaintiff*]'s favor;**
4. **That no reasonable person in [*name of defendant*]'s circumstances would have believed [*insert disputed fact necessary to establish probable cause*];**
5. **That [*name of defendant*] acted primarily for a purpose other than succeeding on the merits of the claim;**
6. **That [*name of plaintiff*] was harmed; and**
7. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Directions for Use

Do not read element #4 if the court has determined from undisputed facts that there was no probable cause. If the jury must determine facts in dispute before the judge can determine probable cause, it may be easier to give a separate instruction listing all the factual issues that the jury must determine (see Instruction 1503, *Reasonable Grounds*).

Do not read element #3 if the court has determined that there was a favorable termination. If the jury must decide a factual dispute on favorable termination, use Instruction 1504, *Favorable Termination.*

Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

Sources and Authority

- " 'Where the prosecuting officer acts on an independent investigation of his own instead of on the statement of facts by the party making the complaint, the latter has not caused the prosecution and cannot be held liable in an action for malicious prosecution.' " (*Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 673 [151 P.2d 308], internal citation omitted.)
- Restatement Second of Torts, section 680 provides:

  One who takes an active part in the initiation, continuation or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if

  (a) he acts without probable cause to believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board, and

  (b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.
- "We adopt the rule set forth in section 680 of the Restatement of Torts and hold that an action for malicious prosecution may be founded upon the institution of a proceeding before an administrative agency." (*Hardy v. Vial* (1957) 48 Cal.2d 577, 581 [311 P.2d 494].)
- "[W]e hold that the State Bar, not respondents, initiated, procured or continued the disciplinary proceedings of [plaintiff]. Therefore, [plaintiff] failed to allege the elements required for a malicious prosecution of an administrative proceeding against respondents." (*Stanwyck v. Horne* (1983) 146 Cal.App.3d 450, 459 [194 Cal.Rptr. 228].)
- "The [Board of Medical Quality Assurance] is similar to the State Bar Association. Each is empowered and directed to conduct an independent investigation of all complaints from the public prior to the filing of an accusation." (*Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125 [195 Cal.Rptr. 5], internal citation omitted.)
- "*Hogen* and *Stanwyck* placed an additional pleading burden upon the plaintiff in a malicious prosecution case based upon the favorable termination of an administrative proceeding. Those cases held that since

it is the administrative body, and not the individual initiating the complaint, which actually files the disciplinary proceeding, a cause of action for malicious prosecution will not lie if the administrative body conducts an independent preliminary investigation prior to initiating disciplinary proceedings." (*Johnson v. Superior Court* (1994) 25 Cal.App.4th 1564, 1568 [31 Cal.Rptr.2d 199].)

- The same rules for determining probable cause in the wrongful institution of civil proceedings apply to cases alleging the wrongful institution of administrative proceedings. (*Nicholson v. Lucas* (1994) 21 Cal.App.4th 1657, 1666, fn. 4 [26 Cal.Rptr.2d 778].)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 455–458

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

(New September 2003)

1503. Reasonable Grounds

I will decide whether [*name of defendant*] had reasonable grounds for [causing [*name of plaintiff*] to be arrested or prosecuted] [bringing the [lawsuit/administrative proceeding] against [*name of plaintiff*]]. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes regarding the state of defendant's factual knowledge when the prior action was instituted.*]

Sources and Authority

- "A plaintiff has probable cause to bring a civil suit if his claim is legally tenable. This question is addressed objectively, without regard to the mental state of plaintiff or his attorney. The court determines as a question of law whether there was probable cause to bring the maliciously-prosecuted suit. Probable cause is present unless any reasonable attorney would agree that the action is totally and completely without merit." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382 [90 Cal.Rptr.2d 408], internal citations omitted.)
- In the criminal context, "probable cause" [is defined as] " 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' " (*Clary v. Hale* (1959) 175 Cal.App.2d 880, 886 [1 Cal.Rptr. 91], internal citation omitted.)
- "The question of probable cause is one of law, but if there is a dispute concerning the defendant's knowledge of facts on which his or her claim is based, the jury must resolve that threshold question. It is then for the court to decide whether the state of defendant's knowledge constitutes an absence of probable cause." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1154 [85 Cal.Rptr.2d 726], internal citations omitted.)
- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' . . . If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury." (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)

- Establishing the lack of probable cause on a set of facts is traditionally "a question of law to be determined by the court, rather than a question of fact for the jury" because it "requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors . . . ." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875 [254 Cal.Rptr. 336, 765 P.2d 498], internal citations omitted.)
- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, . . . the jury must resolve the threshold question of the defendant's factual knowledge or belief." (*Sheldon Appel Co.*, supra, 47 Cal.3d at p. 881, internal citation omitted.)
- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Sierra Club Foundation, supra,* 72 Cal.App.4th at p. 1154, internal citation omitted.)
- "Probable cause may be present even where a suit lacks merit. . . . Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts, supra,* 76 Cal.App.4th at p. 382.)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 424–428

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* § 43.05 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

(New September 2003)

1504. Favorable Termination

I will decide if the earlier [prosecution/lawsuit/proceeding] ended in [*name of plaintiff*]'s favor. But before I can do so, you must decide whether [*name of plaintiff*] has proven the following:

[*List all factual disputes that must be resolved by the jury.*]

Sources and Authority

- "[P]laintiff in a malicious prosecution action must plead and prove that the prior judicial proceedings of which he complains terminated in his favor." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 128 [75 Cal.Rptr.2d 118], internal citation omitted.)
- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184–185 [156 Cal.Rptr. 745], internal citations omitted, disapproved of on other grounds by *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 882 [254 Cal.Rptr. 336, 765 P.2d 498].)
- " 'Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.' " (*Weaver, supra*, 95 Cal.App.3d at p. 185, internal citations omitted.)
- "Favorable termination can occur short of a trial on the merits, but it must bear on the merits. Thus, a plaintiff does not establish favorable termination merely by showing that he or she prevailed in an underlying action." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1149 [85 Cal.Rptr.2d 726], internal citation omitted.)
- "[T]he termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra*, 64 Cal.App.4th at p. 128, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 421–423

4 California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.04 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

(New September 2003)

1505. Affirmative Defense—Reliance on Counsel

[*Name of defendant*] claims that [he/she] had reasonable grounds for [causing or continuing the criminal proceeding/bringing or continuing a [lawsuit/administrative proceeding]] because [he/she] was relying on the advice of an attorney. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*] made a full and honest disclosure of all the important facts known to [him/her] to the [district attorney/attorney]; and**
2. **That [he/she] reasonably relied on the [district attorney/attorney]'s advice.**

Sources and Authority

- " 'Probable cause may be established by the defendants in a malicious institution proceeding when they prove that they have in good faith consulted a lawyer, have stated all the facts to him, have been advised by the lawyer that they have a good cause of action and have honestly acted upon the advice of the lawyer.' " (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1556 [8 Cal.Rptr.2d 552], internal citation omitted.)
- "[I]f the initiator acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, [the] defense fails." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 53–54 [118 Cal.Rptr. 184, 529 P.2d 608].)
- "[T]he defense that a criminal prosecution was commenced upon the advice of counsel is unavailing in an action for malicious prosecution if it appears . . . that the defendant did not believe that the accused was guilty of the crime charged." (*Singleton v. Singleton* (1945) 68 Cal.App.2d 681, 695 [157 P.2d 886].)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, § 449

4 California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.07 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

(New September 2003)

1506. Public Entities and Employees (Gov. Code, § 821.6)

[*Name of defendant*] claims that [he/she] cannot be held responsible for [*name of plaintiff*]'s harm, if any, because [he/she] was a public employee acting within the scope of [his/her] employment. To establish this defense, [*name of defendant*] must prove that [he/she] was acting within the scope of [his/her] employment.

Directions for Use

For an instruction on scope of employment, see Instruction 3720, *Scope of Employment (Vicarious Responsibility).*

Sources and Authority

- Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."
- In *Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470], the court concluded that "the failure to instruct under section 821.6 was prejudicial error." The court observed that "[d]efendants did not enjoy an unqualified immunity from suit. Their immunity would have depended on their proving by a preponderance of the evidence [that] they were acting within the scope of their employment in doing the acts alleged to constitute malicious prosecution." (*Ibid.*)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 2000 supp.) Torts, § 246

4 California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* § 43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

(New September 2003)

1507–1519. Reserved for Future Use

1520. Abuse of Process—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully [*insert legal procedure, e.g., "took a deposition"*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [*insert legal procedure, e.g., "took the deposition of* [name of deponent]"];**
2. **That [*name of defendant*] intentionally used this legal procedure to [*insert alleged improper purpose that procedure was not designed to achieve*];**
3. **That [*name of plaintiff*] was harmed; and**
4. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Sources and Authority

- "To establish a cause of action for abuse of process, a plaintiff must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a wilful act in a wrongful manner." (*Coleman v. Gulf Insurance Group* (1986) 41 Cal.3d 782, 792 [226 Cal.Rptr. 90, 718 P.2d 77], internal citations omitted.)
- This tort has been "long recognized at common law but infrequently utilized." (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1463 [246 Cal.Rptr. 815], internal citation omitted.)
- Restatement Second of Torts, section 682 provides: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."
- "Malicious prosecution and abuse of process are distinct. The former concerns a meritless lawsuit (and all the damage it inflicted). The latter concerns the misuse of the tools the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments or improper use of discovery." (*Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 40 [23 Cal.Rptr.2d 251], internal citations omitted.)

- "The gist of the tort is the misuse of the power of the court: It is an act done under the authority of the court for the purpose of perpetrating an injustice, i.e., a perversion of the judicial process to the accomplishment of an improper purpose. Some definite act or threat not authorized by the process or aimed at an objective not legitimate in the use of the process is required. And, generally, an action lies only where the process is used to obtain an unjustifiable collateral advantage. For this reason, mere vexation [and] harassment are not recognized as objectives sufficient to give rise to the tort." (*Younger v. Solomon* (1974) 38 Cal.App.3d 289, 297 [113 Cal.Rptr. 113], internal citations omitted.)
- "Process is action taken pursuant to judicial authority. It is not action taken without reference to the power of the court." (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 530 [3 Cal.Rptr.2d 49].)
- "The term 'process' as used in the tort of abuse of process has been broadly interpreted to encompass the entire range of procedures incident to litigation. . . . This broad reach of the 'abuse of process' tort can be explained historically, since the tort evolved as a 'catch-all category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution." (*Younger, supra,* 38 Cal.App.3d at p. 296, internal citations omitted.)
- " 'The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.' " (*Spellens v. Spellens* (1957) 49 Cal.2d 210, 232–233 [317 P.2d 613], internal citation omitted.)
- "[A]n improper purpose may consist in achievement of a benefit totally extraneous to or of a result not within its legitimate scope. Mere ill will against the adverse party in the proceedings does not constitute an ulterior or improper motive." (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 876 [168 Cal.Rptr. 361], internal citations omitted.)
- "Merely obtaining or seeking process is not enough; there must be subsequent abuse, by a misuse of the judicial process for a purpose other than that which it was intended to serve. The gist of the tort is the improper use of the process after it is issued." (*Adams, supra,* 2 Cal.App.4th at pp. 530–531, internal citations omitted.)
- " ' "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and

there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." ' " (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 524 [154 Cal.Rptr. 874], internal citations omitted.)

- Civil Code section 47 provides, in part, that a privileged publication or broadcast is one made "(b) . . . (2) in any judicial proceeding." The privilege applies to statements that are (1) made in judicial or quasi-judicial proceedings, (2) by litigants or other participants authorized by law, (3) to achieve the objects of the litigation, and (4) that [have] some connection or logical relation to the action." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524].)
- "[I]t is consistent with the purpose of section 47, subdivision (2) to exempt malicious prosecution while still applying the privilege to abuse of process causes of action." (*Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 824 [266 Cal.Rptr. 360].)
- "[T]he scope of 'publication or broadcast' includes noncommunicative conduct like the filing of a motion for a writ of sale, the filing of assessment liens, or the filing of a mechanic's lien. The privilege also applies to conduct or publications occurring outside the courtroom, to conduct or publications which are legally deficient for one reason or another, and even to malicious or fraudulent conduct or publications." (*O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134 [100 Cal.Rptr.2d 602], internal citations omitted.)
- The litigation privilege can defeat an abuse-of-process claim. (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 65 [75 Cal.Rptr.2d 83].)
- "The use of the machinery of the legal system for an ulterior motive is a classic indicia of the tort of abuse of process. However, the tort requires abuse of legal process, not just filing suit. Simply filing a lawsuit for an improper purpose is not abuse of process." (*Trear v. Sills* (1999) 69 Cal.App.4th 1341, 1359 [82 Cal.Rptr.2d 281], internal citations omitted.)
- " '[T]he essence of the tort "abuse of process" lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.' [¶]We have located no authority extending the tort of abuse of process to administrative proceedings. Application of the tort to administrative proceedings would not serve the purpose of the tort, which is to preserve the integrity of the court." (*Stolz v. Wong Communications Ltd. Partnership* (1994) 25 Cal.App.4th 1811, 1822–1823 [31 Cal.Rptr.2d 229], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 459–470

4 California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, §§ 43.20–43.25 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

(New September 2003)

1521–1599. Reserved for Future Use

VF-1500. Malicious Prosecution—Former Criminal Proceeding

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] actively involved in causing [*name of plaintiff*] to be prosecuted [or in causing the continuation of the prosecution]?**

   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did the criminal proceeding end in [*name of plaintiff*]'s favor?**

   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did [*name of defendant*] reasonably believe [*insert disputed fact necessary to determine probable cause*]?**

   ____ Yes ____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] act primarily for a purpose other than that of bringing [*name of plaintiff*] to justice?**

   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]

[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on Instruction 1500, *Former Criminal Proceedings*. This form can be adapted to include the affirmative defense of reliance on counsel. See VF-1502 for a form that includes this affirmative defense. If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The

breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

(New September 2003)

VF-1501. Malicious Prosecution—Wrongful Use of Civil Proceedings

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] actively involved in bringing [or continuing] a lawsuit against [*name of plaintiff*]?**

   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did the lawsuit end in [*name of plaintiff*]'s favor?**

   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Would any reasonable person in [*name of defendant*]'s circumstances have believed [*insert disputed fact necessary to establish probable cause*]?**

   ____ Yes ____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did [*name of defendant*] act primarily for a purpose other than succeeding on the merits of the claim?**

   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]

[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on Instruction 1501, *Wrongful Use of Civil Proceedings.* Do not read question 3 if the court has determined from undisputed facts that there was no probable cause. If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on

the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

(New September 2003)

VF-1502. Malicious Prosecution—Wrongful Use of Civil Proceedings—Affirmative Defense of Reliance on Counsel

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] actively involved in bringing [or continuing] the lawsuit against [*name of plaintiff*]?**

   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] make a full and honest disclosure of all the important facts known to [him/her] to [his/her] attorney?**

   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. **Did [*name of defendant*] reasonably rely on [his/her] attorney's advice?**

   ____ Yes ____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Did the lawsuit end in [*name of plaintiff*]'s favor?**

   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **Would any reasonable person in [*name of defendant*]'s circumstances have believed [*insert disputed fact necessary to establish probable cause*]?**

____ Yes ____ No

If your answer to question 5 is no, then answer question 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. **Did [*name of defendant*] act primarily for a purpose other than succeeding on the merits of the claim?**

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. **What are [*name of plaintiff*]'s damages?**

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]

[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 1501, *Wrongful Use of Civil Proceedings,* and Instruction 1505, *Affirmative Defense—Reliance on Counsel.*

Do not read question 5 if the court has determined from undisputed facts that there was no probable cause.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

(New September 2003)

VF-1503. Malicious Prosecution—Wrongful Use of Administrative Proceedings

We answer the questions submitted to us as follows:

1. **Was [*name of defendant*] actively involved in bringing [or continuing] an administrative proceeding against [*name of plaintiff*]?**

   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of administrative body*] conduct an independent investigation?**

   ____ Yes ____ No

   If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Did the proceeding end in [*name of plaintiff*]'s favor?**

   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Would any reasonable person in [*name of defendant*]'s circumstances have believed [*insert disputed fact necessary to establish probable cause*]?**

   ____ Yes ____ No

   If your answer to question 4 is no, then answer question 5. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did [*name of defendant*] act primarily for a purpose other than succeeding on the merits of the claim?

____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [*name of plaintiff*]'s damages?

[a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]

[b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]

[c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 1502, *Wrongful Use of Administrative Proceedings.*

Do not read question 4 if the court has determined from undisputed facts that there was no probable cause.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

(New September 2003)

VF-1504. Abuse of Process

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [*insert legal procedure, e.g., "take the deposition of [*name of deponent*]"*]?**

   ____ **Yes** ____ **No**

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Did [*name of defendant*] intentionally use this legal procedure to [*insert alleged improper purpose that procedure was not designed to achieve*]?**

   ____ **Yes** ____ **No**

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

   ____ **Yes** ____ **No**

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [*name of plaintiff*]'s damages?**

   [a. Past economic loss, including [lost earnings/ lost profits/medical expenses:] $_____]

   [b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] $_____]

   [c. Past noneconomic loss, including [physical pain/mental suffering:] $_____]

[d. Future noneconomic loss, including [physical pain/mental suffering:] $_____]

TOTAL $_____

Signed: _____
Presiding Juror

Dated: _____

[When signed/After all verdict forms have been signed], this verdict form must be delivered to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 1520, *Abuse of Process—Essential Factual Elements.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

(New September 2003)

VF-1505–VF-1599. Reserved for Future Use

"Underwood, James" <underwood@law.stetson.edu>

02/16/2005 11:13 AM

To "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com>, "Terry Lewis" <TerryLe@mail.co.leon.fl.us>, <LCBROWN@co.palm-beach.fl.us>, <tgunn@fowlerwhite.com>

cc <grose@flabar.org>, <altenbec@flcourts.org>, "Hall, Carie" <chall@rumberger.com>

bcc

Subject RE: Malicious Prosecution/False Arrest instructions

Attached for your subcommittee's review is a short memorandum drafted by two Stetson law students who have recently looked at MI 6.1 and done a quick survey of some of the case law in Florida in the false imprisonment context. It appears to me that your subcommittee's efforts to include a "probable cause" instruction for this affirmative defense, along with the existing merchant's defense, should take care of the issue raised in the attached memo about the failure to instruct the jury on the restraint of the plaintiff being "without legal authority." The contrast between the civil and criminal instructions for false imprisonment cases are interesting to me as well. In any event, I hope that you find the attached helpful to your continuing efforts.

Jim Underwood

-----Original Message-----
From: Caldwell, Jr. , Dick [mailto:dcaldwell@rumberger.com]
Sent: Monday, February 14, 2005 9:43 AM
To: Terry Lewis; LCBROWN@co.palm-beach.fl.us; tgunn@fowlerwhite.com; Underwood, James
Cc: grose@flabar.org; altenbec@flcourts.org; Hall, Carie
Subject: RE: Malicious Prosecution/False Arrest instructions

Logically, I think you may well be correct. The instruction seems to refer to the tort as malicious prosecution, howwever.

-----Original Message-----
From: Terry Lewis [mailto:TerryLe@mail.co.leon.fl.us]
Sent: Monday, February 07, 2005 11:33 AM
To: LCBROWN@co.palm-beach.fl.us; tgunn@fowlerwhite.com; underwood@law.stetson.edu; Caldwell, Jr. , Dick
Cc: grose@flabar.org; altenbec@flcourts.org; Hall, Carie
Subject: RE: Malicious Prosecution/False Arrest instructions

One question I had was the reference in the instruction to a civil action. Is there really an action for malicious prosecution in a civil case? Wouldn't that be abuse of process instead if it's civil?
>>> "Gunn, Tracy" <tgunn@fowlerwhite.com> 2/7/2005 9:59:07 AM >>>
Dick:

I will take care of the "clean-up," no problem. Thanks for doing the bulk of the work on this. Best wishes to your family.

Tracy

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker PA

JUL 14 2005

Tampa, Florida
(813) 228-7411

From: Caldwell, Jr. , Dick [mailto:dcaldwell@rumberger.com]
Sent: Mon 2/7/2005 9:57 AM
To: Lucy Chernow BROWN; Gunn, Tracy; terryle@mail.co.leon.fl.us
Cc: grose@flabar.org; altenbec@flcourts.org; Hall, Carie
Subject: RE: Malicious Prosecution/False Arrest instructions

Here is what I'd recommend we report to the committee:
I. MI 5.1 - Malicious Prosecution
Add to 5.1b. the phrase, "...at the time of the event..." to clarify the time element involved. Section 5.1b. would read:

"One acts without probable cause in [instituting] [or] [continuing] a [criminal] [civil] proceeding agaginst another if there is not a reasonable ground of suspicion supported by circumstances sufficiently strong at the time of the event to cause a reasonably cautious person to believe that [the person accused is guilty of the offense charged] [the claim is justified].

I still think this is very awkward, but it folds in the Dockery language, and Tracy is correct that it is almost reqired to be in the negative. Maybe some plain English could straighten it out.

II. MI 6.1 - False Arrest. Actually, contrary to my earlier reading, there is a type of probable cause instruction buried in 6.1g, but it needs to be beefed up. I would add a new 6.1g dealing with probable cause and the Merchants' Defense thusly"

"g. Defenses. If the greater weight of the evidence does not support the claim of (claimant), then your verdict should be for (defendant). If however, the greater weight of the evidence does support the claim of (claimant), then you shall consider the defens[s] raised by (defendant].
i. On the [first] defense, the issue for your determination is whether (defendant)'s had probable cause to act as [he] [she] [it] did. Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged [suspected]. The existence of probable cause must be judged by the facts and legal state of affairs which existed at the time of the [arrest] [detention], rather than by the subjective intent of (defendant) or by events which odccur after the [arrest] [detention]."

Again, this folds in the Dockery/Mailly language. Then we could keep the "Merchant's Defense," currently 6.1g., as 6.1g.ii.

"ii. On the [second] defense, the issues for your determination are whether (name), a [merchant] [merchant's employee] had probable cause to believe that goods held for sale by the merchant were unlawfully taken by (claimant) and could be recovered by restraining (claimant); and whether (name) restrained (claimant) only in a reasonable manner and for a reasonable time."

Tracy, since I'm going to be out of pocket for a few days, could I task you with putting all of the subcommittee's comments to the above suggestions into some sort of coherent submission to the Committee's agenda for the upcoming meeting? I appreciate the help. Thx. to

everyone, and sorry again for the last-minute rush on this, which I swore was not going to occur.

-----Original Message-----
From: Lucy Chernow BROWN [mailto:LCBROWN@co.palm-beach.fl.us]
Sent: Monday, February 07, 2005 8:40 AM
To: tgunn@fowlerwhite.com; terryle@mail.co.leon.fl.us; Caldwell, Jr. , Dick
Cc: grose@flabar.org; altenbec@flcourts.org; Hall, Carie
Subject: RE: Malicious Prosecution/False Arrest instructions

Dick,
My sympathy to you for your loss. I do think it sounds like you are on the right track here re:probable cause.

>>> "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com> 2/6/2005 12:36:50 PM >>>

I'm sure that's precisely the reason the probable cause part of 5.1 is phrased the way it is. It just seemed to me to be very awkwardly phrased and difficult to understand. Probably what we'd need to do on the "hindsight" issue is to say that the jury must consider the facts/circumstances as they existed at the time of the event, rather than what may have developed or come to light later on. If it's phrased the right way, it should avoid seeming to tell them what not to consider, but focus on their proper considerations. Same thing for the "subjective intent issue" in MI 6.1. One "limiting" instruction which comes immediately to mind is the one that says if you find for defendant, you will not consider the issue of damages, but if you find for plaintiff, you shall consider the following elements.... There are probably others. I actually did a small anount of "plain English" editing on the dockery definition of probable cause, but you're absolutely correct, that it's still not the "preferred" plain English wording of the type we've discussed so much in the meetings. I've had a death in the family, and will be on the road and out of pocket for most of next week, unfortunately. I'll try to put something together about these sections, though, and circulate it to our subcommittee. That way, perhaps at least the Committee will have something to look at and talk about. This will help them give us some concrete feedback.

-----Original Message-----
From: Gunn, Tracy [mailto:tgunn@fowlerwhite.com]
Sent: Fri 2/4/2005 5:17 PM
To: Caldwell, Jr. , Dick; Judge Terry P. Lewis; Lucy Chernow BROWN
Cc: Judge Chris Altenbernd; grose@flabar.org; Hall, Carie
Subject: RE: Malicious Prosecution/False Arrest instructions
Dick:

My two-cents are as follows.

I think the reason that the probable cause instruction in the malicious prosecution section is couched in the negative is that the plaintiff has to prove the "absence" of it, so the element itself is negative. I agree that it needs rewriting, but we need to be careful to keep the meaning the same. I don't think the title matters at all since it's not

read to the jury.

As for the hindsight instruction, I like it but do we ever really instruct the jury on what they cannot consider? It seems a little strange, and I'd like to look for another example of that type of "limiting" instruction in our standards. Would these events be inadmissible udner that case authority in any event?

On MI 6.1, I do agree that the probable caue affirmative defense should be included. I see no reason to depart from the supreme court's definition in Dockery & Mailly, and I always feel it's safest and most correct to use language from the caselaw or statute, but I'm sure we're going to hear that it's not Plain English.

As for the subjective intent issue, I again question whether we should instruct the jury on what they should not consider. Again, I think we should look for other examples of instructions telling the jury what not to consider.

Thanks,
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From: Caldwell, Jr. , Dick [mailto:dcaldwell@rumberger.com]
Sent: Fri 2/4/2005 10:16 AM
To: Judge Terry P. Lewis; Lucy Chernow BROWN; Gunn, Tracy
Cc: Judge Chris Altenbernd; grose@flabar.org; Hall, Carie
Subject: Malicious Prosecution/False Arrest instructions

Just as I feared, the holiday crush buried all of my good intentions of getting somethnig circulated to the subcommittee. However, set forth below is a belated attempt to get a report together for discussion at thge upcoming meeting. I've attached for convenience the pages covering SJI MI 5.1 and 5.2 (Malicious Prosecution) and MI 6.1 (False arrest). A survey of the case law does not reflect any really major changes in substantive law since the 1978 revisions to these instructions. However, there are some changes which should be considered for the sake of clarity and to reflect some refinements in the case law. "Probable cause" is a thread which runs through both instructions. In a malicious prosecution action, plaintiff must establish an absence of probable cause as as element of the tort; in a false arrest case. the existence of probable cause is an affirmative defense. Daniel v. Village of Royal Palm Beach, ___ So.2d ___, 30 FLW D2 (Fla. 4th DCA 2004).

I. MI 5.1
5.1(b), "Lack of Probable Cause" needs work. This instruction is couched in the negative, and is not a model of clarity. The Supreme Court defined "probable cause" as "...a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged." Fla. Game & Freshwater Fish Comm'n v. Dockery, 676 So.2d 471, 474 (Fla. 1991), cited in Mailly v. Jenne, 867 So.2d 1250 (Fla. 4th DCA 2004). Would it make more sense to simply entitle this part "Probable Cause," and use the definition above, rather than talk about "Lack of Probable

Cause?" We need to add another sentence to 5.1(b), to make it clear that probable cause is to be determined as of the time of the event. How about adding a 5.1 (b)(ii) as follows:

"The existence of probable cause is to be judged by the facts and legal state of affairs which existed at the time of the arrest. Hindsight should not be used to determine whether a prior arrest was made with probable cause. In other words, events which occur after the arrest cannot remove the probable cause which existed at the time of the arrest." Mailly v. Jenne, supra at 1251; Dockery, supra, at 474.

The whole instruction, particularly 5.1(d), could use a "plain English" review, which I don't think we have time to complete in time to submit to the Committee.

II. MI 6.1
One issue here is that probable cause is not mentioned as a defense in 6.1, even though it clearly is available to the defendant. Daniel v. Village of Royal Palm Beach, supra. Do we want to incorporate the definition set forth in Dockery & Mailly above? A connected issue is that the cases say that the jury must use the "reasonably cautious person" standard objectively - i.e., the subjective belief or intent of the arresting authority is not relevant to the determination of probable cause. Rankin v. Evans, 133 F.3d 1425 (11th Cir. 1998) (standard for probable cause is the same under both federal and Florida law). Should we add a sentence to this effect to 6.1 (and 5.1, too, for that matter)?

Are there other problems with these instructions which we should discuss? Do we need a conference call on this? Let me know your thoughts. Sorry about the tardiness of this e-mail. The best laid plans, and all that....

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False Imprisonment Jury Instructions Research1.doc

Subject:	Florida Civil Jury Instructions- False Imprisonment
To:	Professor Underwood
From:	Katherine Hurst and Terri Parker
Date:	February 16, 2005

I. Florida False Imprisonment- Standard Jury Instructions

Although the focus of this research is false imprisonment in the civil context, because the lead cases are often cited to support both civil and criminal charges of false imprisonment, the current jury instructions for both have been provided below.

Based on a review of the case law, several potential omissions from the civil jury instructions have been noted as follows:

1. The most striking omission from the civil jury instructions is that they do not include the element of "without legal authority," which is standard throughout the case law. However, this element is represented in the criminal false imprisonment jury instructions, so sample language is readily available.
2. Some courts require the plaintiff to prove that the detention was unreasonable and unwarranted under the circumstances, yet this element is not reflected in the instructions. See *Rivers v. Dillards* below.

A. Jury Instructions in Civil Cases:
MI 6.1 False imprisonment

a. Issues* on claim:

The issues for your determination on the claim of (claimant) against (defendant) are whether (defendant) intentionally caused (claimant) to be completely restrained against [his] [her] will. In telling you the issues, I have used four terms which you must understand. They are "intentional restraint," "causing restraint," "complete restraint," and "restraint against one's will." I will explain those terms now:
* Other potential issues are discussed in the Comments.

b. Intentional restraint:

"Intentional restraint" means this: one restrains another intentionally when [he] [she] acts for the purpose of causing such restraint or with knowledge that such restraint will, to a substantial certainty, result from [his] [her] acts.

c. Causing restraint:

"Causing restraint" means this: one causes another's restraint when [his] [her] acts directly and in a natural and continuous sequence produce or contribute substantially to producing the restraint, so that it can reasonably be said that, but for those acts, the restraint would not have occurred. [A person who makes a mistake in reporting or

identifying another to law enforcement officers is not liable for causing the other to be restrained if the person making the mistaken report or identification acts in good faith and does not instigate, persuade, or request the officers to restrain the other.]

d. Complete restraint:

"Complete restraint" means this: the person is completely restrained when [he] [she] is not free, or reasonably believes that [he] [she] is not free, to leave a place to which [he] [she] has been confined. A person is not completely restrained when there is a reasonable means of escape which is apparent or known to the person.

e. Restraint against one's will:

"Restraint against one's will" means this: a person is restrained against [his] [her] will when [he] [she] does not consent to the restraint.

f. Burden of proof on claim:

If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant). However, if the greater weight of the evidence does support the claim of (claimant), [then your verdict should be for (claimant) and against (defendant)] [then you shall consider the defense raised by (defendant)].*

g. Merchant's defense (§812.015(3), F.S.):

On the defense, the issues for your determination are whether (name), a [merchant] [merchant's employee], had probable cause to believe that goods held for sale by the merchant were unlawfully taken by (claimant) and could be recovered by restraining (claimant); and whether (name) restrained (claimant) only in a reasonable manner and for a reasonable time. One has probable cause to believe something when, under all the circumstances, a reasonably cautious person would believe it.
*Example only. See Comment on other potential defenses.

h. Burden of proof on defense:

If the greater weight of the evidence supports the defense, your verdict should be for (defendant). However, if the greater weight of the evidence does not support the defense and does support the claim of (claimant), your verdict should be for (claimant) and against (defendant).

i. "Greater weight of the evidence" defined:

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

j. Damages:

If you find for (defendant), you will not consider the matter of damages. But, if you find for (claimant), you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate (claimant) for such [loss] [injury] [or] [damage] as the greater weight of the evidence shows was caused by the conduct complained of. If you find for (claimant), you shall consider the following elements of damage:

Elements may be adapted from

MI 5.2 Malicious Prosecution (Damages).

If you find for (claimant) but find that no [loss] [injury] [or] [damage] has been proved, you should award (claimant) nominal damages. Nominal damages are damages of an inconsequential amount which are awarded when a wrong has been done but no actual damage is proved.

Punitive damages charge may be given as in 6.12.

Comments on MI 6.1

1. Consciousness of restraint. An additional element of a false imprisonment claim is that the person restrained was aware of the restraint or was otherwise harmed by it, Restatement (2d) of Torts §42. If that element is in issue, an appropriate instruction should be given.

2. Causing restraint. The bracketed charge at the end of 6.1c should be given if there is a factual issue of whether defendant's report to the police was an actionable cause of claimant's restraint. Pokorny v. First Federal Savings & Loan Ass'n, 382 So.2d 678 (Fla. 1980).

3. Complete restraint. Claimant was completely restrained if he reasonably believed he was, though he may in fact have been free to leave. See Restatement (2d) of Torts, §§41, 42. Though claimant's belief that he was completely restrained was unreasonable, complete restraint may nevertheless have occurred if claimant was peculiarly suspectable and defendant acted to exploit that susceptibility. See, by analogy, Restatement (2d) of Torts, §27.

4. Arrest pursuant to warrant. An arrest pursuant to warrant or other court order is privileged unless the instrument is void on its face. Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927). If claimant seeks to avoid the effect of a warrant or court order for his arrest, the issue will ordinarily be one of law; but if a jury question arises, an appropriate instruction should be given allocating the burden of proof to claimant.

5. Arrest without warrant or court order. The burden of pleading and proving justification for restraint made without warrant or court order is on defendant. S. H. Kress & Co. v. Powell, 132 Fla. 471, 180 So. 757 (1938); Johnson v. Weiner, 155 Fla. 169, 171, 19 So.2d 699, 700 (1944). Various statutes justify restraint under stated circumstances, e.g., §§812.015, 901.15, 901.151, F.S. 1979.

JICIV FL-CLE MI

B. Standard Jury Instructions in Criminal Cases

9.2 FALSE IMPRISONMENT § 787.02, FLA.STAT.

To prove the crime of False Imprisonment, the State must prove the following two elements beyond a reasonable doubt:
1. (Defendant) [forcibly] [secretly] [by threat]
[confined]
[abducted]
[imprisoned]
[restrained]
(victim) against [his] [her] will.
2. (Defendant) had no lawful authority.
Read only if confinement is alleged and child is under 13 years of age
Confinement of a child under the age of 13 is against [his] [her] will if such confinement is without the consent of [his] [her] parent or legal guardian.

JICRIM FL-CLE 172

II. Florida's Landmark False Imprisonment Cases

A. *Fisher v. Payne*, 113 So. 378 (Fla. 1927).
   i. The plaintiffs, the Fishers, filed suit against two doctors for malicious prosecution and false imprisonment after the wife had been adjudicated insane on the advice of the physicians and committed by the state. *Id.* at 378-379.
   ii. Holding: The Court affirmed in favor of the defendants. *Id.* at 378.
   iii. The Court reasoned that lawful imprisonment or commitment cannot constitute false imprisonment. *Id.* at 380.
   iv. The Court said that the proper claim would be for malicious prosecution rather than false imprisonment, but that the facts of this case did not support such a cause of false imprisonment. *Id.* at 380.

B. *Kress v. Powell*, 180 So. 757 (Fla. 1938).
   i. Plaintiff, a 17 year-old minor, and her friend were detained by a store manager for paying with what the manager erroneously thought was a counterfeit five dollar bill. After detaining the shoppers, the manager called the police. The police took custody of the shoppers and detained them at the police station for a time. Once it was determined that the five dollar bill was genuine, the police officer released the shoppers. Plaintiff sued the department store on two counts- false imprisonment and malicious prosecution.
   ii. Holding: the Court reversed and remanded because the lower court erroneously overruled a demurrer as to the second count of malicious prosecution. *Id.* at 764.
   iii. The Court noted that "'false imprisonment is the unlawful restraint of a person contrary to his will' to recover for damages for which an action of

trespass must be brought, the gist of which is the unlawful detention of the plaintiff." *Id.* at 762 (quoting *Fisher v. Payne*, 113 So. 378, 380).

iv. The Court also distinguished false imprisonment from malicious prosecution by noting that probable cause is not an element of false imprisonment, but rather a defense; that malice is only material to damages; and that imprisonment "under legal authority [] may be malicious but it cannot be false." *Id.* at 762.

C. *Johnson v. Weiner*, 19 So.2d 699 (Fla. 1944).

i. Raymond Johnson, the plaintiff, was arrested while shopping in defendant's store. The defendant had sworn out a warrant for Jack Johnson, and upon seeing Raymond Johnson shopping in his store, the defendant notified the police that Jack Johnson was on the premises. The police arrested and detained the plaintiff. *Id.* at 699-700.

ii. Holding: the Court reversed and remanded in favor of the plaintiff because his declaration was sufficient to show that the defendant was "instrumental in procuring the arrest and imprisonment of the plaintiff." *Id.* at 701.

iii. The Court noted that the trial judge had likely mistaken malicious prosecution for false imprisonment in ruling for the defendant. *Id.* at 700.

iv. False imprisonment requires an act "done for the purpose of imposing a confinement, or with knowledge that such confinement will, to a substantial certainty, result from it." *Id.* at 700 (quoting Dodson v. Solomon, 183 So. 825).

D. *Pokorny v. First Federal Savings & Loan Association of Largo, Florida*, 382 So.2d 6578 (Fla. 1980)

i. The plaintiffs, Pokorny and Shuping, were two deaf-mutes who had entered defendant bank with a note requesting zipper bags. When the bank teller told the two men that she did not have any zipper bags, they pointed to the note and to the cash drawer in such a manner that the teller thought she was being robbed. The teller pressed a silent alarm and contacted FBI agents, who took the two men into custody, handcuffed them, and transported them to Tampa for questioning. They were subsequently released without being charged. Then, Pokorny, Shuping, and Shuping's wife sued the bank for proximately causing the false imprisonment of the two men. *Id.* at 680-681.

ii. Holding: the Court affirmed the lower courts' findings of not liable. Borrowing its analysis from Johnson v. Weiner, the Court found that the defendant bank did not directly procure the arrest of Pokorny and Shuping. *Id.* at 683.

iii. The Court further noted that an arrest by a law enforcement official is different than a detainment by a private citizen. *Id.* at 683.

iv. Liability for false imprisonment requires that a private citizen must have actively and personally participated in the false imprisonment. The mere act of reporting an incident erroneously believed to be a crime which results in detainment by law enforcement officers does not constitute false imprisonment. *Id.* at 681-682.

III. A Survey of More Recent False Imprisonment Cases in Florida

A. *Everett v. Florida Institute of Technology*, 503 So.2d 1382 (Fla. 5th Dist. App. 1987).
   i. The plaintiff, Everett, appealed dismissal of his complaint for failure to state a cause of action. The defendant confined plaintiff involuntarily as a mental patient under the Baker Act. *Id.* at 1383.
   ii. Holding: the court affirmed the lower court's decision as it related to malicious prosecution, but reversed as to the false imprisonment count. *Id.*
   iii. The court noted that false imprisonment "does not require proof that a legal proceeding was commenced without probably cause, and with malice. All that is required [for false imprisonment] are allegations that a person has been unlawfully restrained without color of authority." *Id.*

B. *Canto v. J.B. Ivey and Co.*, 595 So.2d 1025 (Fla 1st Dist. App. 1992).
   i. The plaintiffs, two children, were caught on defendant store's videotape handing each other the store's jewelry and then putting something in their pockets. A store employee stopped the children and escorted them to the store's security office. The children were held for an hour before police arrived and another hour after. The parents of the children then filed suit against the store, and appealed on the grounds that the jury instructions were confusing after the jury found for the defendant. *Id.* at 1026-1027.
   ii. Holding: the court affirmed and held that the jury instructions, which stated that the defendant would be liable for false imprisonment if the store restrained the children "'in an unreasonable manner and without probable cause'" were not confusing. *Id.* at 1027.
   iii. Although the instructions should not have included the words "'in an unreasonable manner and,'" the judge instructed the jury that, if at any time it found no probable cause to further detain the children, it should find for the plaintiffs. Such instruction was sufficient to clarify the jury instructions. *Id.* at 1027.

C. *Jackson v. Navarro*, 665 So.2d 340 (Fla. 4th Dist. App. 1995).
   i. The plaintiff, a rental car agency employee, was arrested on suspicion of falsifying vouchers to aid in the transportation of drugs. After his arrest, the plaintiff sued the sheriff for false arrest ("a.k.a. false imprisonment"). *Id.* at 340.
   ii. Holding: the court noted that "if the imprisonment is under legal authority it may be malicious but it cannot be false. This is true where legal authority is shown by valid process, even if irregular or voidable." *Id.* at 341.
   iii. The court further noted that *Malley v. Briggs*, 475 U.S. 335 (1985), should not be applied in false imprisonment cases, but only malicious prosecution. *Id.*

D. *Rivers v. Dillards*, 698 So.2d 1328 (Fla. 1st Dist. App. 1997).

i. The plaintiff, Rivers, sued Dillard's department store for false imprisonment, and other torts, for being detained by a store security guard, who was an off-duty police officer, while shopping. A store employee directed a security guard to detain Rivers and her companions after Rivers purchased a pair of shoes. The guard took the plaintiff's drivers license, and the employee took her picture without permission. The plaintiff and her companions could see a bulletin board with a "Wall of Shame" hanging in a nearby hallway. *Id.* at1329.

ii. Holding: the court reversed as to false imprisonment, because the reasonableness of the detention under the circumstances was a question of fact that could not be decided on summary judgment. *Id.* at 1333.

iii. The court noted that "a plaintiff must show that the detention was unreasonable and unwarranted under the circumstances." *Id.* at 1331 (referencing *Harris v. Lewis State Bank*, 436 So.2d 338 (Fla. 1st Dist. App. 1983).

E. *Herrera v. Catatumbo*, 844 So.2d 664 (Fla. 3d Dist. App. 2003).

i. The plaintiff, the Herrera's, sought a motion for supplemental declaratory relief to force Catatumbo, an insurance carrier, to cover over one million dollars in damages assessed to the Herreras in a related suit between the Herreras and a Venezuelan airline. The airline's employees, after a verbal altercation with the Herreras, stripped and body/cavity searched the Herreras. The insurance carrier claimed, among other things, that the award of punitive damages made maliciousness implicit in the airline's actions and all three of the Herrera's claims, and that as a result the damages were not covered by the policy.

ii. Holding: the court reversed and remanded in favor of the Herreras, with directions to pay the damages under the insurance policy because it found that malice was not implicit in the punitive damage awards.

iii. The court noted that Florida's standard jury instructions on punitive damages, which applied to the false imprisonment and other claims here, authorize punitive damages for either intentional misconduct or gross negligence.

F. *Moore v. Department of Corrections, State of Florida*, 833 So.2d 822 (Fla. 1st Dist. App. 2003).

i. The plaintiff, Moore, had not paid her probation fees, so a department of corrections officer filed an affidavit that resulted in an arrest warrant. After Moore's probation ended, the officer did not revoke the outstanding warrant, and Moore was arrested for that warrant. Moore then sued the state department of corrections for false imprisonment for failing to revoke the warrant once her probationary period was over. *Id.* at 823-824.

ii. Holding: the court affirmed a lower court's dismissal of her claim. *Id.* at 823.

iii. The court noted that merely providing information to the authorities that a violation of the law occurred does not support a claim of false imprisonment. *Id.* at 824.

G. *Spears v. Albertson's, Inc.*, 848 So.2d 1176 (Fla. 1st Dist. App. 2003).

i. The plaintiff, Spears, was a long time Albertson's employee who was taken into the manager's office and accused of stealing six hundred dollars from the registers. Although the manager claimed he told Spears she could leave at any time, she claimed that she was prevented from leaving and from calling her husband until the police arrived. She sued Albertson's for false imprisonment. *Id.* at 1177-1178.

ii. Holding: the court ruled that material issues of fact remained and reversed the lower court's finding of summary judgment for the defendant. *Id.* at 1177. Because the question of whether the restraint was reasonable is a question for a trier of fact, false imprisonment cannot be decided by summary judgment. *Id.* at 1178.

iii. The court summarizes the law in the area of false imprisonment in Florida. *Id.* at 1178. The court defines false imprisonment as the "unlawful restraint of a person against his or her will, and the gist of the action is the unlawful detention of the person and the deprivation of his or her liberty." *Id.* (citing *Escambia County School Board v. Bragg*, 680 So.2d 571, 672 (Fla. 1st Dist. App. 1996)). For liability for false imprisonment, one must have directly or indirectly procured the imprisonment by personal and active participation. *Id.* (citing *Johnson v. Weiner*, 19 So.2d 699 (Fla. 1944)). While the plaintiff must prove she had an unreasonable and unwarranted detainment, he need not prove that he protested to demonstate that the restraint was against his will. *Id.* (citing *Harris v. Lewis State Bank*, 436 So.2d 338 (Fla. 1st Dist. App. 1983)).

"Lumish, W ndy F." <WLumish@CarltonFields.com>
02/16/2005 11:22 AM

To "Terry Lewis" <TerryLe@mail.co.leon.fl.us>, <grose@flabar.org>, <altenbec@flcourts.org>, <tgunn@fowlerwhite.com>, <wgraham@jud11.flcourts.org>, <reajr@robertaustinlaw.com>, <lsstewart@stfblaw.com>

cc

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Subject RE: Comments

In the better late than never category, I throw out two issues which I would suggest may be a good starting point for our subcommittee's discussion:

1. I have always struggled with the section titled Issues (3.1 to 3.9). The section on issues seems to be a mix of topics some of which belong elsewhere. For example, 3.5 is titled negligence. 3.6 is part of proximate cause with the real definition being in section 5.I think we could make a significant improvement in organization if we focused on this section.

2. The second section I think could be reorganized is the miscellaneous section. Just as negligence and products are separately set out in sections, I think that the various causes of action covered in miscellaneous should be separately delineated.

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-----Original Message-----
From: Terry Lewis [mailto:TerryLe@mail.co.leon.fl.us]
Sent: Monday, February 07, 2005 11:23 AM
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Subject: Comments

Having reviewed some of the other state's organization schemes and thought about it, anyone have any suggestions for improvement with ours?

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Re: Abuse of Process

Ladies and Gentlemen:

Enclosed are some excerpts from treatise treatment on the subject.

Sincerely,

Terry P. Lewis

TPL/lmo
Enclosure

JUL 14 2005
5-104

1-22 Florida Torts § 22.20

Florida Torts

DIVISION II ACTIONS BASED ON INTENTIONAL CONDUCT

Chapter 22 MALICIOUS PROSECUTION AND ABUSE OF PROCESS

B Abuse of Process

1-22 Florida Torts § 22.20

§ 22.20 Nature of the Cause of Action

Abuse of process is the deliberate and intentional misuse of judicial process for some unlawful ulterior motive that is not an appropriate purpose for the legal proceeding. [1] There are few Florida cases that involve abuse of process and none in which an appellate court has affirmed a trial court finding or verdict of abuse of process. The cases provide little guidance, other than to explain that which is not abuse of process.[2] In *Cline v. Flagler Sales Corp.*,[3] the Third District Court of Appeal cited Prosser with approval.[4] Thus, Prosser's definition of the tort is instructive.

Prosser has defined the tort as an act or threat unauthorized by the process or aimed at an objective not contemplated by the proceeding.[5] For example, abuse of process occurs when in the course of properly conducted proceedings, a party attempts to coerce the opposing party into surrendering money or property, using the proceedings themselves as a threat.[6] It is not abuse of process to utilize judicial machinery in the prescribed manner, though the complainant may bear ill will or evil intentions toward the one being prosecuted or sued.[7] A cause of action for abuse of process requires both allegations of a willful and intentional misuse of process for some wrongful or unlawful objective or collateral purpose, and that the act or acts constituting the misuse occurred after the process is issued.[8] The ulterior purpose normally consists of an intention to gain an advantage collateral to the benefits normally derived from the use of the process employed.[9] Therefore, use of judicial process with malice or in a harassing manner will not, without more, be sufficient to impose liability for abuse of process.[10] In fact, malice need not be found before liability for abuse of process can attach.[11] The maliciousness or lack of foundation that supports the alleged cause of action itself is irrelevant.[12]

"Process" may mean an action that is initiated independently, such as commencement of a suit, or one initiated collaterally, such as attachment.[13] The filing of a counterclaim may also constitute issuance of process for purposes of the cause of action.[14]

Abuse of process is unique among intentional torts because it is the only tort that is based on the perversion of process.[15] There is no requirement of confinement against the will of the plaintiff, as in false imprisonment. Nor is there any requirement that there have been any previous or underlying lawsuit, brought frivolously or without probable cause, as in malicious prosecution. The action merely requires that the process be issued for some ulterior motive other than that for which it appears intended on its face.[16] Unlike malicious prosecution, a claim for abuse of process may be brought as a counterclaim.[17] This is true because termination of the pending claim is not an element required for the tort of abuse of process.

FOOTNOTES:

Footnote 1. Cline v. Flagler Sales Corp., 207 So. 2d 709 (Fla. 3d DCA 1968) .

Footnote 2. *See, e.g.*, Marty v. Gresh, 501 So. 2d 87 (Fla. 1st DCA 1987) ; Shupack v. Groh, 498 F.2d 675 (5th Cir. [Fla.] 1974) ; Laird v. Vogel, 334 So. 2d 650 (Fla. 3d DCA 1976) .

Footnote 3. Cline v. Flagler Sales Corp., 207 So. 2d 709 (Fla. 3d DCA 1968) .

Footnote 4. Prosser, *The Law of Torts*, § 115 (3d ed., West 1964); *see* Prosser & Keeton, *The Law of Torts*, § 121 (5th ed., West 1984).

Footnote 5. *See* Prosser & Keeton, *The Law of Torts*, § 121 (5th ed., West 1984).

Footnote 6. *See* Prosser & Keeton, *The Law of Torts*, § 121 (5th ed., West 1984); *see also* Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) .

Footnote 7. *See* Prosser & Keeton, *The Law of Torts*, § 121 (5th ed., West 1984).

Footnote 8. Marty v. Gresh, 501 So. 2d 87 (Fla. 1st DCA 1987) ; Miami Herald Publishing Co. v. Ferre, 636 F. Supp. 970 (S.D. Fla. 1985) .

Footnote 9. Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) .

Footnote 10. Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) .

Footnote 11. Gause v. First Bank of Marianna, 457 So. 2d 582 (Fla. 1st DCA 1984) ; Marty v. Gresh, 501 So. 2d 87 (Fla. 1st DCA 1987) .

Footnote 12. Cazares v. Church of Scientology of Cal., Inc., 444 So. 2d 442 (Fla. 5th DCA 1983) .

Footnote 13. Peckins v. Kaye, 443 So. 2d 1025 (Fla. 2d DCA 1983) .

Footnote 14. Peckins v. Kaye, 443 So. 2d 1025 (Fla. 2d DCA 1983) .

Footnote 15. *See* Prosser & Keeton, *The Law of Torts*, § 121 (5th ed., West 1984).

Footnote 16. *See* Prosser & Keeton, *The Law of Torts*, § 121 (5th ed., West 1984).

Footnote 17. Peckins v. Kaye, 443 So. 2d 1025 (Fla. 2d DCA 1983) ; Blue v. Weinstein, 381 So. 2d 308 (Fla. 3d DCA 1980) ; Cline v. Flagler Sales Corp., 207 So. 2d 709 (Fla. 3d DCA 1968) . *See also* ✦ § 22.04[3][c].

Service: **Get by LEXSTAT®**
TOC: Florida Torts > /. . . / > B Abuse of Process > **§ 22.20 Nature of the Cause of Action**
Citation: **1-22 Florida Torts @ 22.20**
View: Full
Date/Time: Tuesday, April 12, 2005 - 10:20 AM EDT

Service: Get by LEXSTAT®
TOC: Florida Torts > /. . . / > B Abuse of Process > § 22.21 Willfully Using Judicial Process in Improper Manner
Citation: 1-22 Florida Torts @ 22.21

1-22 Florida Torts § 22.21

Florida Torts

DIVISION II ACTIONS BASED ON INTENTIONAL CONDUCT

Chapter 22 MALICIOUS PROSECUTION AND ABUSE OF PROCESS

B Abuse of Process

1-22 Florida Torts § 22.21

§ 22.21 Willfully Using Judicial Process in Improper Manner

[1]--Willful Use

The plaintiff in an action for abuse of process must plead and prove that the defendant has committed a willful and intentional misuse of process in a manner or for a purpose not intended by law. [1] In *Peckins v. Kaye,*[2] the plaintiffs filed a complaint against the defendants, who responded with a counterclaim. The plaintiffs then filed suit, alleging that the defendants' counterclaim was brought for the purpose of delaying the disposition of the main action and thus was an abuse of process. The trial court granted the defendants' motion for summary judgment on the issue of whether the defendant had abused process. The district court affirmed the trial court, noting that while the filing of a counterclaim may be an abuse of process, the plaintiff must demonstrate a deliberate attempt to achieve an improper purpose not within the ordinary conduct of the proceedings. The record revealed that one of the defendants had threatened the plaintiffs with undue expenditures of time and money prior to the filing of the counterclaim. The court observed that while this was evidence of an ulterior motive that was insufficient in itself to maintain an action for abuse of process, since during the course of the proceedings there was no proof of an intentional act to pervert the objective of the process.[3]

[2]--Improper Manner

The crux of an action for abuse of process is the misuse of legal process.[4] There is no single rule covering the broad range of process encompassed by the tort and the many contexts in which judicial process is employed.[5] Whether process has been used for a proper purpose must be determined by reference to applicable statute, regulation, or case law. Liability will then turn on whether the process was utilized within the scope of its authorized purpose. For example, when an Internal Revenue Service summons was served on the plaintiff in good faith and prior to a recommendation for criminal prosecution, there was no improper use of process.[6] In addition, when a purported tax sale purchaser brought an unlawful detainer action and took possession of property and removed the true owner's belongings, there was no improper use of process because the actions by the purported purchaser were authorized by court order and he had taken the property pursuant to a presumptively valid tax deed.[7]

One case, however, found that there was sufficient evidence of abuse of process to be submitted to a jury. In *Bothmann v. Harrington,*[8] an ex-wife filed suit against her ex-husband to set aside the property settlement agreement they had entered into on dissolution of their marriage. As part of her action, the ex-wife caused a *lis pendens* to be recorded against the ex-husband's condominium. The husband, however, had entered into a contract to sell the

condominium to a third party three days prior to the filing of the *lis pendens*. When the third party discovered the *lis pendens,* he refused to close the property sale until it was removed. The ex-wife refused her ex-hud's requests to do so. Although the ex-husband was subsequently granted an order to have it removed and the sale of the condominium was closed, he filed suit against his ex-wife alleging abuse of process. The trial court granted a summary judgment in favor of the ex-husband on this issue. On appeal, the district court summarily concluded that there was a genuine issue of material fact as to whether the ex-wife had incurred liability to her ex-husband on a theory of abuse of process, and accordingly, summary judgment in favor of the husband was improvidently granted.[9]

FOOTNOTES:

Footnote 1. Peckins v. Kaye, 443 So. 2d 1025 (Fla. 2d DCA 1983) .

Footnote 2. Peckins v. Kaye, 443 So. 2d 1025 (Fla. 2d DCA 1983) .

Footnote 3. Peckins v. Kaye, 443 So. 2d 1025 (Fla. 2d DCA 1983) .

Footnote 4. *See* Prosser & Keeton, *The Law of Torts,* § 121 (5th ed., West 1984).

Footnote 5. *See* Prosser & Keeton, *The Law of Torts,* § 121 (5th ed., West 1984). *See also* § 22.20.

Footnote 6. *See* Shupack v. Groh, 498 F.2d 675 (5th Cir. [Fla.] 1974) .

Footnote 7. *See* Laird v. Vogel, 334 So. 2d 650 (Fla. 3d DCA 1976) .

Footnote 8. Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) .

Footnote 9. Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) .

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TOC: Florida Torts > /. . . / > B Abuse of Process > **§ 22.21 Willfully Using Judicial Process in Improper Manner**
Citation: **1-22 Florida Torts @ 22.21**
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JUL 1 4 2005

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TOC: Florida Torts > / . . . / > B Abuse of Process > **§ 22.22 Ulterior Motive or Purpose**
Citation: **1-22 Florida Torts @ 22.22**

1-22 Florida Torts § 22.22

Florida Torts

DIVISION II ACTIONS BASED ON INTENTIONAL CONDUCT

Chapter 22 MALICIOUS PROSECUTION AND ABUSE OF PROCESS

B Abuse of Process

1-22 Florida Torts § 22.22

§ 22.22 Ulterior Motive or Purpose

The plaintiff in an abuse of process action must plead and prove that the defendant had an ulterior motive or purpose in procuring and utilizing the subject process. [1] There is no abuse of process when process is used to accomplish the result for which it was issued, regardless of an incidental or concurrent motive of spite or ulterior purpose.[2] The plaintiff must prove that the defendant misused the process for some collateral purpose.[3]

The usual case of abuse of process involves some form of extortion, in which the defendant attempts to coerce the plaintiff into performing some act under threat of subjecting the plaintiff to legal proceedings.[4] Even when the sole or primary reason for the issuance of the subject process is for the purpose of harassing the plaintiff, there is no abuse of process, unless it can be demonstrated that the defendant was attempting to achieve a purpose collateral to the cause of action.[5]

FOOTNOTES:

Footnote 1. Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) .

Footnote 2. Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) .

Footnote 3. Peckins v. Kaye, 443 So. 2d 1025 (Fla. 2d DCA 1983) .

Footnote 4. *See* Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) .

Footnote 5. *See* Peckins v. Kaye, 443 So. 2d 1025 (Fla. 2d DCA 1983) .

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Citation: **1-22 Florida Torts @ 22.22**
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1-22 Florida Torts § 22.23

Florida Torts

DIVISION II ACTIONS BASED ON INTENTIONAL CONDUCT

Chapter 22 MALICIOUS PROSECUTION AND ABUSE OF PROCESS

B Abuse of Process

1-22 Florida Torts § 22.23

§ 22.23 Statute of Limitations

A cause of action for abuse of process accrues and the statute of limitations begins to run from the termination of the acts that consti-tute the abuse complained of and not from the termination of the action in which the subject process issued. [1] The action must be commenced within the four-year limitation period set forth in Florida Statutes Section 95.11 (3)(o) .[2]

FOOTNOTES:

Footnote 1. Blue v. Weinstein, 381 So. 2d 308 (Fla. 3d DCA 1980) .

Footnote 2. Blue v. Weinstein, 381 So. 2d 308 (Fla. 3d DCA 1980) .

Service: **Get by LEXSTAT®**
TOC: Florida Torts > / . . . / > B Abuse of Process > **§ 22.24 Damages**
Citation: **1-22 Florida Torts @ 22.24**

1-22 Florida Torts § 22.24

Florida Torts

DIVISION II ACTIONS BASED ON INTENTIONAL CONDUCT

Chapter 22 MALICIOUS PROSECUTION AND ABUSE OF PROCESS

B Abuse of Process

1-22 Florida Torts § 22.24

§ 22.24 Damages

Once abuse of process is established, the damages recoverable are generally the same as those recoverable in a malicious prosecution action. [1] Special damages are recoverable if they are specifically pleaded and proved. They must have been foreseeable and normal consequences of the alleged wrongful conduct, and the conduct must be a substantial factor in bringing about the losses.[2] Punitive damages are also recoverable if the plaintiff can establish actual malice on the part of the defendant.[3]

For causes of action arising after October 1, 1999, a defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence.[4] "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.[5] "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to the conduct.[6] The amount of punitive damages that may be awarded is limited by statute.[7] For further discussion of punitive damages, see ✦ Chapter 113, *Punitive Damages.*

FOOTNOTES:

Footnote 1. Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) . *See also* ✦ ch. 110, "Damages, Interest, Costs, and Attorneys' Fees"; ✦ ch. 113, "Punitive Damages."

Footnote 2. Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) .

Footnote 3. Bothmann v. Harrington, 458 So. 2d 1163 (Fla. 3d DCA 1984) (holding that legal malice is presumed to exist when the tort of abuse of process is established). *See also* ✦ chs. 110, "Damages, Interest, Costs, and Attorneys' Fees," ✦ 112, "Economic Loss," ✦ 113, "Punitive Damages."

Footnote 4. § 768.72(2), (4), Fla. Stat.

Footnote 5. § 768.72(2)(a), Fla. Stat.

Footnote 6. § 768.72(2)(b), Fla. Stat.

Footnote 7. *See* § 768.73, Fla. Stat.

Service: **Get by LEXSTAT®**
TOC: Florida Torts > / . . . / > B Abuse of Process > **§ 22.24 Damages**
Citation: **1-22 Florida Torts @ 22.24**
View: *Full*
Date/Time: Tuesday, April 12, 2005 - 10:22 AM EDT

"Caldwell, Jr. , Dick"
<dcaldwell@rumberger.com>
07/12/2005 03:00 PM

To <grose@flabar.org>, <wgraham@jud11.flcourts.org>, <terryle@mail.co.leon.fl.us>
cc "Scott Makar" <SMakar@coj.net>, "Lucy Chernow BROWN" <lcbrown@co.palm-beach.fl.us>, "Gunn, Tracy" <tgunn@fowlerwhite.com>, "Robert E. Austin, Jr:"
bcc
Subject RE: Agenda material

History: This message has been replied to.

Gerry:
(1) The e-mail from Sammy Cacciatore on the proposal to draft nursing home instructions should be added to Tab 9. You were on the addressee list for Sammy's e-mail this morning, but I've attached the test of it below in case you can't put your finger on it. The Negligence Subcommittee adopted Sammy's recommendation.

Dear Dick –

I've now been able to go through the earlier version of the nursing home statute and complete my anecdotal survey of those involved in the practice on both sides. There really does not seem to be an overwhelming need to do a set of charges in regard to the older version of the statute. The cases under the old statute are pretty much through the pipeline. There are still some out there, but it does not appear to really warrant the effort it would take.

Additionally, we need to discuss the nursing home situation as to whether we should attempt a set of instructions regarding the amended statute. It appears that because of coverage issues, bankruptcies and nursing homes that are going bare or have become bare that the number of cases actually going to trial has been greatly reduced. We ought to discuss whether we should look into this again or bring that to the Committee's attention.

S. Sammy Cacciatore, Esquire

(2) Wendy Lumish's memo concerning the res ipsa instruction should be added, probably to Tab 6. I think you were a recipient of that one also, but I will forward it to you in a minute just in case. The Subcommittee adopted Wendy's recommendation not to proceed with a re-drafting of the instruction. Just FYI, however, we do recommend that the Note on Use be reworked, as it's way out of date.

(3) Judge Terry Lewis drafted a proposed instruction on Abuse of Process. We had been asked to look at whether this was a separate claim from Malicious Prosecution, deserving of its own instruction. Case law indicated that it was so separate, thus the draft instruction. The Subcommittee adopted Terry's draft a a basis for discussion for the Committee as a whole. Again, I'm sure you were on the addressee list, but I'll forward it momentarily. This could go under either Tab 5 (since it arose out of the discussion of this topic)

or Tab 6.

(4) Judge Lewis is likewise drafting proposed re-workings of MI 5.1 and 5.2. Our discussion focused on the definition of probable cause, attempting (among other things) to make the definition common to both instructions. He should forward that directly to you. If for some reason it doesn't arrive in time for inclusion by you, let me know and I'll have appropriate copies made for presentation at the meeting. That should go under Tab 6.

(5) I am rewording Comment 2 to 6.2f. I probably won't be able to get that to you in time, so will just plan on having copies at the meeting.

(6) The Negligence Subcommittee was also tasked with evaluating the suggestion by Mr. Weinstein that 5.1 b and c be revised to eliminate the word "substantially" or "substantial" as a modifier for the word "cause." I will send you a separate report by e-mail reflecting the Subcommittee's recommendation that this not be done. Included in the report, however, will be a comment that several members of the Subcommittee felt these instructions were less than crystal clear, and requesting guidance from the Committee whether we should embark upon a revision of them.

Hope this helps.

-----Original Message-----
From: grose@flabar.org [mailto:grose@flabar.org]
Sent: Tuesday, July 12, 2005 1:48 PM
To: wgraham@jud11.flcourts.org; terryle@mail.co.leon.fl.us; Caldwell, Jr. , Dick
Subject: Agenda material

If you have any material you think should be added to the workbook for this meeting, you still can email it to me today, and in turn I can add the page numbers and email it to the committee. I am leaving for The Breakers in the morning, so if you have material to add but cannot get it to me today, please make about 30 copies to take with you to the meeting.

Gerry

ABUSE OF PROCESS

In order to recover on his/her claim of abuse of process, [plaintiff's name] must prove by the GWOTE all of the following :

1. [defendant's name] intentionally caused [describe the legal process or procedure alleged to have been abused, e.g. institution of criminal proceedings].

2. [defendant's name] willfully used this process or procedure in order to [describe the improper or illegal use, objective or motive, e.g. to coerce the payment of a debt].

3. [defendant's name] 's action caused harm or loss to [plaintiff's name]

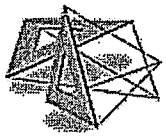
If there is an affirmative defense :

If you find that one or more of the above statements have not been proven by the GWOTE, then your verdict shall be for [defendant's name] If, on the other hand, you find that all have been proven, you should consider [D's name]'s affirmative defense. An affirmative defense is one that asserts that even if what the plaintiff claims is true, he/she is still not liable for plaintiff's harm or loss. The affirmative defense asserted here is [name it]. In order for [D's name] to be relieved of liability based on this affirmative defense, he/she must prove by the GWOTE the following :

[list the elements]

Definitions of "caused" and "greater weight of the evidence"

Damages [see malicious prosecution]



Gerry Rose/The Florida Bar
08/19/2005 01:45 PM

To "Lucy Chernow Brown" <LCBROWN@co.palm-beach.fl.us>
cc
bcc
Subject New draft definition of Probable Cause

Thanks for the follow-up info. I have not heard anything from the others.

Gerry

"Lucy Chernow Brown" <LCBROWN@co.palm-beach.fl.us> wrote on 08/19/2005 11:37:13 AM:

> Gerry,
> Have you received any comments on your amended wording of the
> p.c. definition? The people I have run it by, agree with me that
> your amended wording seems to do a good job of addressing the
> potentially confusing issue of
> subjective vs. objective consideration, by focusing on exactly what
> matters the juror should be considering, and it puts the focus on
> the reasonability factor. Lucy
>
> >>> <grose@flabar.org> 08/15/05 10:23 AM >>>
>
> I am almost convinced that your wording should be left as is. But
> here is a wordier possibility. I am not sure that it says anything
> different from your concise statement, but perhaps it would help
> ensure that the jurors get the right idea.
>
> Probable cause is determined from the perspective of by considering
> the circumstances known to the [officer][accuser] at the time of the
> alleged incident and by considering the [officer's][accuser's]
> knowledge, training, and experience.
>
> Gerry
>
> "Lucy Chernow Brown" <LCBROWN@co.palm-beach.fl.us> wrote on
> 08/15/2005 08:22:43 AM:
>
> > Gerry, I do see the validity of your point; however, the phrase
> > used in most of the cases, "standing in the shoes of" means more
> > than just the "facts and circumstances known to," it actually
> > includes all the knowledge and training and experience of the
> > reasonable police officer, in the given situation. I do think it
> > would be a good idea to keep trying to find an appropriate phase
> > that would convey the concept of "standing in the shoes of." that
> > might be better than "from the perspective of". What do you think?
> >
> > >>> <grose@flabar.org> 08/12/05 4:17 PM >>>
> >
> > You may have understood my reason for objecting a bit to the
> > "perspective of the [officer] . . ." line, but in case my garbled
> > explanation made no sense, here's another try to explain why I think
> > the line should be tinkered with a bit more. My understanding is
> > that probable cause is to be judged by looking at the facts and
> > circumstances known to the officer. But the officer's personal
> > viewpoint should not be considered. If I am right so far, my
> > argument is that the word "perspective" connotes (or at least might

> > be understood by jurors to mean) that the jurors should consider the
> > officer's personal viewpoint. I am probably quibbling about
> > something that really does not matter. Nevertheless, for your
> > consideration I suggest replacing "perspective of" with "facts and
> > circumstances known to".
> >
> > Gerry
> >
> > "Lucy Chernow Brown" <LCBROWN@co.palm-beach.fl.us> wrote on
> > 08/12/2005 10:11:06 AM:
> >
> > >
> > > ----- Message from "Lucy Chernow Brown" <LCBROWN@co.palm-beach.fl.
> > > us> on Fri, 12 Aug 2005 10:03:23 -0400 -----
> > >
> > > To:
> > >
> > > <grose@flbar.org>,<tgunn@fowlerwhite.com>, <laura@mail.co.leon.fl.
> > > us>, <terryle@mail.co.leon.fl.us>, <reajr@robertaustin.com>
> > >
> > > cc:
> > >
> > > <smaker@coj.net>,<jreynolds@rumberger.com>
> > >
> > > Subject:
> > >
> > > New draft definition of Probable Cause
> > >
> > > Everyone,
> > >   Here is a fresh attempt for us to use as a new working draft
> > > of the p.c. definition, along with a legal memo.
> > >
> > > * Probable cause is a reasonable ground of suspicion
> > >
> > > * supported by facts and circumstances
> > >
> > > * sufficient to cause a reasonably cautious person
> > >
> > > * to believe that the accused is guilty of the offense[s] with
> > > which [s]he is accused.
> > >
> > > * Probable cause is determined from the perspective of the
> > > [officer][accuser]
> > >
> > > * at the time of the alleged incident.
> > >
> > >
> > > Issue 1: How is probable cause defined in civil and criminal
> > > proceedings for malicious prosecution?
> > > In civil and criminal proceedings for malicious prosecution,
> > > probable cause has been defined as "a reasonable ground of suspicion
> > > supported by circumstances sufficiently strong in themselves to
> > > warrant a cautious man in the belief that person accused is guilty
> > > of the offense with which he is charged," and "one need not have
> > > certainty as to the outcome of the criminal or civil proceeding to
> > > have probable cause for instituting such an action." Fee, Parker &
> > > Lloyd, P. A. v. Sullivan, 379 So.2d 412 (Fla. 4th DCA 1980). See
> > > also Bell v. Anderson, 414 So.2d 550 (Fla. 1st DCA 1982); Thompson
> > > v. Taylor, 183 So.2d 16 (Fla. 1st DCA 1966). In Phelan v. City of
> > > Coral Gables, 415 So.2d 1292 (Fla. 3d DCA 1982), the court held that

> > > "the determinative factor as to the existence of probable cause as
> > > an element of a malicious prosecution action is whether the suit was
> > > brought without reasonable prospect of success." Other courts have
> > > noted that a lack of probable cause for initiating a criminal
> > > proceeding giving rise to a claim for malicious prosecution can be
> > > shown by proof that the proceeding was instituted "on the basis of
> > > facts susceptible to being explained as innocent conduct." See
> > > Lindeman v. C.J. Stoll, Inc., 490 So.2d 101(Fla. 2d DCA 1986);
> > > Harris v. Lewis State Bank, 482 So.2d 1378 (Fla. 1st DCA 1986).
> > > The standard of conduct required for a person beginning or
> > > continuing any proceeding is that of a reasonable or ordinary
> > > prudent person. Heard v. Mathis, 344 So.2d 651 (Fla. 1st DCA 1977).
> > > See also Food Fair Stores, Inc. v. Kincaid, 335 So.2d 560 (Fla. 2d
> > > DCA 1976) (holding for probable cause for prosecution to exist, the
> > > circumstances of the situation must be such that a prudent man would
> > > set in motion the forces of a criminal proceeding). "In order for
> > > probable cause to exist on issue of malicious prosecution, the
> > > countenance of situation must be such that a cautious man would set
> > > in motion the forces of a criminal proceeding, and where it would
> > > appear to a cautious man that further investigation is justified
> > > before instituting a proceeding liability may attach for failure to
> > > do so." Kelly v. Millers of Orlando, Inc., 294 So.2d 704 (Fla. 4th
> > > DCA 1974). See also Priest v. Groover, 289 So.2d 767 (Fla. 2d
> DCA 1974).
> > > Probable cause for a criminal prosecution has been defined as a
> > > reasonable ground for suspicion, supported by circumstances
> > > sufficiently strong in themselves to warrant a cautious, or as some
> > > courts put it, a prudent, man in the belief that the party is guilty
> > > of the offense with which he is charged; as the existence of such
> > > facts and circumstances as would excite belief in a reasonable mind,
> > > acting on the facts within the knowledge of the prosecutor, that the
> > > person charged was guilty of the offense for which he was
> > > prosecuted, and as such facts and circumstances as, when
> > > communicated to the generality of men of ordinary and impartial
> > > minds, are sufficient to raise in them a belief of real, grave
> > > suspicion of the guilt of the person.
> > >
> > > Cold v. Clark, 180 So.2d 347 (Fla. 2d DCA 1965).
> > > Other considerations
> > > In context of an action for malicious prosecution, malice in the
> > > commencement or continuance of an original criminal or civil
> > > judicial proceeding may be inferred from a lack of probable cause,
> > > but want of probable cause cannot be inferred from malice. Central
> > > Florida Machinery Co., Inc. v. Williams, 424 So.2d 201 (Fla. 2d DCA
> > > 1983). See also Applestein v. Preston, 335 So.2d 604 (Fla. 3d DCA
> > > 1976); Thompson v. Taylor, 183 So.2d 16 (Fla. 1st DCA 1966). A
> > > magistrate's determination of probable cause to issue arrest warrant
> > > is not a conclusive presumption of probable cause, unless probable
> > > cause determination was based upon adversary hearing and there was
> > > no evidence of fraud or other improper means in securing warrant.
> > > Harris v. Boone, 519 So.2d 1065 (Fla. 1st DCA 1988). See also
> > > Lindeman v. C.J. Stoll, Inc., 490 So.2d 101 (Fla. 2d DCA 1986). But
> > > see Foutz v. Great Cent. Ins. Co., 448 So.2d 537 (Fla. 5th DCA
> > > 1984)(holding a presumption arises from a magistrate's finding of
> > > probable cause which is conclusive, absent fraud or other corrupt
> > > means employed by person initiating prosecution, to bar subsequent
> > > malicious prosecution action). A denial of a motion for judgment of
> > > acquittal at conclusion of state's case does not create a
> > > presumption of probable cause so as to bar a later action for
> > > malicious prosecution. Pinkerton v. Edwards, 425 So.2d 147 (Fla. 1st

> > > DCA 1983). The acquittal of the person tried for violating the law
> > > is not sufficient to establish absence of probable cause for
> > > instituting criminal proceedings. Applestein v. Preston, 335 So.2d
> > > 604 (Fla. 3d DCA 1976); Sponder v. Brickman, 214 So.2d 631 (Fla. 3d
> > > DCA 1968). A dismissal of criminal charges does not alone establish
> > > an absence of probable cause so as to preclude action for malicious
> > > prosecution. Thomson McKinnon Securities, Inc. v. Light, 534 So.2d
> > > 757 (Fla. 3d DCA 1988). Judgment of conviction is conclusive
> > > evidence of probable cause for purposes of a subsequent malicious
> > > prosecution action unless judgment was obtained by fraud, perjury,
> > > or other corrupt means. Padrevita v. City of Lake Worth, 367 So.2d
> > > 739 (Fla. 4th DCA 1979). See also Fisher v. Maas Bros., Inc., 149
> > > So.2d 910 (Fla. 2d DCA 1963). Finally, a jury's finding of no
> > > liability as to plaintiff's false arrest/false imprisonment claim
> > > does not establish the existence of probable cause with respect to a
> > > malicious prosecution claim. Maybin v. Thompson, 606 So.2d 1240
> > > (Fla. 2d DCA 1992).
> > > It should be noted that the under the fellow officer rule an
> > > arresting officer is not required to have sufficient firsthand
> > > knowledge to constitute probable cause and it is sufficient if an
> > > officer initiating the chain of communication receive information
> > > from an official source or eyewitness who, it seems reasonable to
> > > believe, is telling the truth. Polk v. Williams, 565 So. 2d 1387
> > > (Fla. 5th DCA 1990).
> > > Issue 2: In a malicious prosecution case, does there have to be a
> > > lack of probable cause for the specific crime charged.
> > >
> > > In other words, what if there was probable cause for another crime
> > > but not for the crime charged.
> > > I could not locate any case on point, but courts have defined
> > > probable cause in proceedings for malicious prosecution as "a
> > > reasonable ground of suspicion supported by circumstances
> > > sufficiently strong in themselves to warrant a cautious man in the
> > > belief that person accused is guilty of the offense with which he is
> > > charged." See Fee, Parker & Lloyd, P. A. v. Sullivan, 379 So.2d 412
> > > (Fla. 4th DCA 1980).
> > > Issue 3: Suggested Instruction
> > >
> > > Previously Suggested Definition
> > > Probable cause means that the facts and circumstances existing at
> > > the time of the incident were sufficient to justify a reasonably
> > > cautious person standing in the shoes of/from the perspective or
> > > point of view of the arresting officer/accuser in the belief that
> > > the criminal charge/civil claim against the plaintiff was meritorious.
> > >
> > > Possible Definition
> > >
> > > Probable cause means that there is a reasonable ground of suspicion
> > > supported by facts and circumstances sufficient to justify a
> > > reasonably prudent and cautious person in the belief that the
> > > criminal charge/civil claim with which he is charged/accused is
> > > valid. One need not have certainty as to the outcome of the
> > > criminal or civil proceeding to have probable cause for initiating
> > > such an action. One factor in determining the existence of probable
> > > cause is whether the criminal or civil proceeding was brought
> > > without reasonable prospect of success, or whether it would appear
> > > to a reasonably prudent man that further investigation is justified.
> > >
> > > An arresting officer is not required to have sufficient firsthand
> > > knowledge to constitute probable cause and it is sufficient if an

> > > officer initiating the chain of communication receive information
> > > from an official source or eyewitness who, it seems reasonable to
> > > believe, is telling the truth.
> > > Malice in the commencement or continuance of an original criminal or
> > > civil judicial proceeding may be inferred from a lack of probable
> > > cause, but want of probable cause cannot be inferred from malice.
> > > Judgment of conviction is conclusive evidence of probable cause for
> > > purposes of a subsequent malicious prosecution action unless
> > > judgment was obtained by fraud, perjury, or other corrupt means.
> > >

"Robert E. Austin, Jr." <reajr@robertaustinlaw.com>
08/28/2005 03:10 PM

To "James Richard Caldwell, Jr." <dcaldwel@rumberger.com>
cc "Gerry Rose" <grose@flabar.org>, "Lucy Chernow Brown" <lcbrown@co.palmbeach.fl.us>
bcc
Subject Sub-Committee Meeting 8-12-05

Attached are cases that might provide food for thought, i.e. probable cause for arrest without warrant and malicious prosecution.

Bob[attachment "889 So2d 988 (Probable Cause.pdf" deleted by Gerry Rose/The Florida Bar] [attachment "901 So2d 222 (First Hand - Imputed).pdf" deleted by Gerry Rose/The Florida Bar] [attachment "KnowledgeArrestingOfficer.pdf" deleted by Gerry Rose/The Florida Bar]

889 So.2d 988
889 So.2d 988, 30 Fla. L. Weekly D2
(Cite as: 889 So.2d 988)

District Court of Appeal of Florida,
Fourth District.
Felicia H. DANIEL, Appellant,
v.
VILLAGE OF ROYAL PALM BEACH, Florida,
Stacy Preece, and Daniel Fellows,
Appellees.
No. 4D04-688.

Dec. 22, 2004.

Background: Motorist, who was arrested but who was later acquitted of reckless driving, brought action against arresting officer and others for malicious prosecution and false arrest. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Elizabeth T. Maass, J., granted final summary judgment in favor of defendants. Motorist appealed.

Holdings: The District Court of Appeal, Gross, J., held that:

(1) arresting officer had probable cause to arrest motorist for reckless driving;

(2) under the fellow-officer rule, observations of sheriff deputy could be imputed to arresting officer to justify arrest; and

(3) in determining whether there was probable cause to arrest motorist for reckless driving, it did not matter that officer actually arrested motorist for aggravated assault.

Affirmed.

West Headnotes

[1] Malicious Prosecution k15
249k15
In a malicious prosecution case, the plaintiff must establish an absence of probable cause as an element of the tort.

[2] False Imprisonment k13
168k13
In a false arrest case, the existence of probable cause is an affirmative defense.

[3] Malicious Prosecution k20
249k20
For purposes of establishing lack of probable cause as element of malicious prosecution, probable cause exists when the circumstances are sufficient to cause a reasonably cautious person to believe that the person arrested is guilty of a criminal offense.

[4] False Imprisonment k13
168k13
For purposes of proving existence of probable cause as affirmative defense to false arrest, probable cause exists when the circumstances are sufficient to cause a reasonably cautious person to believe that the person arrested is guilty of a criminal offense.

[5] Automobiles k349(2.1)
48Ak349(2.1)
Arresting officer had probable cause to arrest motorist for reckless driving; evidence indicated that motorist pulled in front of deputy sheriff, who was driving unmarked police car, and stopped very quickly in middle of road, and motorist purposefully slowed vehicle to harass deputy sheriff. West's F.S.A. § 316.192(1).

[6] Automobiles k349(2.1)
48Ak349(2.1)
Under the fellow-officer rule, observations of sheriff deputy, who was driving unmarked police car while observing motorist, could be imputed to arresting officer to justify motorist's warrantless arrest for reckless driving. West's F.S.A. §§ 316.192(1), 901.15(5).

[7] Automobiles k349(2.1)
48Ak349(2.1)
In determining whether arresting officer had probable cause to arrest motorist for reckless driving, it did not matter that officer actually arrested motorist for aggravated assault; validity of arrest did not turn on offense announced by officer at time of arrest. West's F.S.A. §§ 316.192(1), 901.15(5).

[8] Arrest k63.4(2)

35k63.4(2)
Validity of an arrest does not turn on the offense announced by the officer at the time; if there is a valid charge for which a person could have been arrested, probable cause exists.

*989 Patrick B. Flanagan of Flanagan, Maniotis, Berger & Ryan, P.A., West Palm Beach, for appellant.

Richard H. McDuff and Scott D. Alexander of Johnson, Anselmo, Murdoch, Burke, *990 Piper & McDuff, P.A., Fort Lauderdale, for appellee Village of Royal Palm Beach.

Stephanie Deutsch of Weiss, Serota, Helfman, Pastoriza, Guedes, Cole & Boniske, P.A., Fort Lauderdale for appellees Stacy Preece and Daniel Fellows.

GROSS, J.

Felicia Daniel appeals a final summary judgment entered against her on her claims for false arrest and malicious prosecution. We affirm, because the record evidence conclusively demonstrated that there was probable cause to arrest Daniel for reckless driving, a charge for which she was later tried and acquitted.

To prevail on a motion for summary judgment, the moving party must conclusively demonstrate that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. *See* Fla. R. Civ. P. 1.510(c); *Holl v. Talcott,* 191 So.2d 40, 43 (Fla.1966). "The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party." *Holl,* 191 So.2d at 43. The correctness of summary judgment is a question of law which is reviewed de novo by this court. *See Volusia County v. Aberdeen at Ormond Beach, L.P.,* 760 So.2d 126, 130 (Fla.2000).

[1][2][3][4] The existence of probable cause is crucial to both false arrest and malicious prosecution. In a malicious prosecution case, the plaintiff must establish an absence of probable cause as an element of the tort; in a false arrest case, the existence of probable cause is an affirmative defense. *See Jackson v. Navarro,* 665 So.2d 340, 342 (Fla. 4th DCA 1995). "[P]robable cause exists when the circumstances are sufficient to cause a reasonably cautious person to believe that the person [arrested] is guilty of" a criminal offense. *Mailly v. Jenne,* 867 So.2d 1250, 1251 (Fla. 4th DCA), *review denied,* 884 So.2d 23 (Fla.2004).

[5] Here, the arresting officer had probable cause to arrest Daniel for reckless driving. Section 316.192(1), Florida Statutes (2003), provides that "[a]ny person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving."

Three witnesses gave the arresting officer information that supported the reckless driving charge. First, civilian witness Nancy Leach gave a written statement at the scene. She observed a near accident between Daniel's station wagon and an unmarked police car driven by Deputy Sheriff April Sovich. She saw Daniel "swerving in and out of traffic," and believed that Daniel purposely slowed her vehicle to "harass" Deputy Sovich. A second civilian witness, Michael Arbarchuk, saw Deputy Sovich swerve to avoid a crash. He told the arresting officer that Daniel passed Deputy Sovich's car and "gave the lady [Deputy Sovich] the finger." He indicated that Daniel pulled in front of Deputy Sovich and "stopped very quickly in the middle of the road causing" her to hit the stopped car.

Third, Deputy Sovich told the arresting officer that she had "swerved to avoid" Daniel's station wagon. Daniel "threw her hands in the air and appeared to be yelling" at Deputy Sovich. Daniel changed lanes, "threw up the middle finger of her hand" at Deputy Sovich while speeding by, and "pulled directly in front" of her. Once in front of Deputy Sovich, Daniel "kept hitting her brakes and then speeding up."

[6] This information justified the arresting officer in making the arrest. Reckless driving is a misdemeanor. Section 901.15(5), Florida Statutes (2003), authorizes a warrantless misdemeanor arrest *991 for violations of Chapter 316 that occur within an officer's presence. Under the "fellow officer rule," Deputy Sovich's observations could be imputed to the arresting officer to justify the arrest under the statute. *See State v. Adderly,* 809 So.2d 75, 76-77 (Fla. 4th DCA 2002); *Huebner v. State,* 731 So.2d 40, 44 (Fla. 4th DCA 1999).

[7][8] For the purpose of finding probable cause, it does not matter, as Daniel argues, that the arresting officer placed her under arrest for [illegible]

assault. The validity of an arrest does not turn on the offense announced by the officer at the time; if there is a valid charge for which a person could have been arrested, probable cause exists. *See State v. Cote,* 547 So.2d 993, 996 (Fla. 4th DCA 1989); *Jernigan v. State,* 566 So.2d 39, 40 (Fla. 1st DCA 1990); *Gasset v. State,* 490 So.2d 97, 98 (Fla. 3d DCA 1986).

Daniel points to the existence of many factual disputes concerning her encounter with Deputy Sovich. However, these disputes are not material to the existence of probable cause. That the civilian witnesses provided certain information to the arresting officer was not in dispute; this information justified the arrest, even if Daniel had a different version of the events.

WARNER, J., and SILVERMAN, SCOTT, Associate Judge, concur.

889 So.2d 988, 30 Fla. L. Weekly D2

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901 So.2d 222
901 So.2d 222, 30 Fla. L. Weekly D961
(Cite as: 901 So.2d 222)

District Court of Appeal of Florida,
Second District.
STATE of Florida, Appellant,
v.
Victor W. BOATMAN, Appellee.
No. 2D04-1956.

April 13, 2005.

Background: Defendant moved to suppress evidence of marijuana and psilocyn found during search incident to arrest for misdemeanor offense. The Circuit Court, Pinellas County, W. Douglas Baird, J., granted motion. The state appealed.

Holding: The District Court of Appeal, Altenbernd, C.J., held that off-duty auxiliary deputy was allowed, under fellow-officer rule, to delegate to another law enforcement officer his statutory authority to make warrantless arrest for misdemeanor.
Reversed and remanded.

West Headnotes

[1] Arrest k63.4(11)
35k63.4(11)
Off-duty auxiliary deputy was allowed, under fellow-officer rule, to delegate to another law enforcement officer his statutory authority to make warrantless arrest for misdemeanor, and thus defendant's arrest by the other officer was valid under statute allowing an officer to make warrantless arrest when a person has committed misdemeanor "in the presence of the officer" if the arrest is made immediately or in fresh pursuit; fellow-officer rule applied to misdemeanors as well as felonies. U.S.C.A. Const.Amend. 4; West's F.S.A. §§ 901.15(1), 901.18.

[2] Arrest k63.4(11)
35k63.4(11)
Fellow-officer rule operates to impute the knowledge of one officer in the chain of investigation to another, for the purpose of determining whether an officer can make a valid warrantless arrest based on information provided by another officer. U.S.C.A. Const.Amend. 4.

[3] Arrest k63.4(11)
35k63.4(11)
In the context of a felony, the fellow-officer rule allows the information constituting probable cause to arrest to be imputed from one officer to another. U.S.C.A. Const.Amend. 4.

[4] Arrest k63.4(11)
35k63.4(11)
Fellow-officer rule allows the information that a misdemeanor has occurred in the presence of an officer to be imputed from one officer to another, and thus an officer, under statute allowing an officer to make a warrantless arrest when a person has committed a misdemeanor "in the presence of the officer" if the arrest is made immediately or in fresh pursuit, can make a valid warrantless arrest for a misdemeanor based on information provided by another officer. U.S.C.A. Const.Amend. 4; West's F.S.A. §§ 901.15(1), 901.18.

[5] Arrest k63.4(11)
35k63.4(11)
"Fellow-officer rule" is typically, although not always, a rule permitting an officer who has lawful power to arrest a person the option of delegating that function to another officer. U.S.C.A. Const.Amend. 4.

***223** Charles J. Crist, Jr., Attorney General, Tallahassee, and Amanda Lea Colon, Assistant Attorney General, Tampa, for Appellant.

James Marion Moorman, Public Defender, and Richard J. Sanders, Assistant Public Defender, Bartow, for Appellee.

ALTENBERND, Chief Judge.

The State appeals an order granting Victor W. Boatman's motion to suppress marijuana and psilocyn. Law enforcement officers discovered the contraband during a search incident to Mr. Boatman's arrest for a misdemeanor offense. Mr. Boatman argued, and the trial court agreed, that the arrest was unlawful because it was performed by a

fellow officer who had not personally witnessed the misdemeanor offense. Because we conclude that the fellow officer rule applies to a misdemeanor arrest and that the initial officer was permitted to delegate authority for the arrest to a fellow officer, we reverse and remand for further proceedings.

On November 5, 2003, an off-duty auxiliary deputy with the Pinellas County Sheriff's Department was driving home when he happened upon a vehicle that was parked on the side of the road with the front end partially obstructing an intersection. The deputy stopped and approached the car. He found a passenger from the vehicle on his knees in the grass vomiting and Mr. Boatman, the driver, passed out behind the wheel of the vehicle with the keys in the ignition. The deputy awoke Mr. Boatman and obtained his driver's license. A computer check indicated the license was suspended.

In the meantime, two on-duty backup deputies arrived. The auxiliary deputy explained to the two responding deputies what he had witnessed and asked one of them to arrest Mr. Boatman for driving while license suspended. One of the deputies complied, and a search incident to the arrest revealed marijuana and psilocyn.

[1] Mr. Boatman did not dispute that the off-duty auxiliary deputy had the authority to arrest him for the misdemeanor offense of driving while license suspended and to thereafter search him and the vehicle. *See, e.g.*, § 943.10(8), Fla. Stat. (2003) (defining "auxiliary law enforcement officer" and the scope of authority for that position). [FN1] Mr. Boatman argues, however, that the only deputy who had the authority to make the arrest was the auxiliary deputy who witnessed the misdemeanor. He bases this argument on section 901.15(1), Florida Statutes (2003), which states that an officer is permitted to make a warrantless arrest when a person has committed a *224 misdemeanor "in the presence of the officer" if the arrest is made "immediately or in fresh pursuit." *See* § 901.15(1). We disagree with his argument.

> FN1. In a motion for rehearing before this court, Mr. Boatman argued that the off-duty auxiliary deputy did not have powers of arrest pursuant to statute. This issue was not raised before the trial court or in the initial briefing in this court. Our record is not clear as to the statutory authority under which this deputy was acting. We therefore do not address this issue. On remand, Mr. Boatman is free to raise this issue if the circumstances merit it.

[2][3][4] The "fellow officer rule" operates to impute the knowledge of one officer in the chain of investigation to another. *See Berry v. State,* 493 So.2d 1098 (Fla. 4th DCA 1986) (an officer receiving a radio transmission to detain a certain individual has authority to stop the person described; the legitimacy of the stop will depend on whether the reporting officer had sufficient grounds to order the person detained); *see also United States v. Hensley,* 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (holding that when a police communique has been issued on the basis of articulable facts supporting a reasonable suspicion, any authorized officer may make an investigatory stop on the basis of that bulletin, even though the officer making the stop is not aware of the underlying facts). In the context of a felony, the fellow officer rule allows the information constituting probable cause to be imputed from one officer to another. *Voorhees v. State,* 699 So.2d 602 (Fla.1997). We see no reason why the same rule should not allow the information that a misdemeanor has occurred in the presence of an officer to be imputed from one officer to another.

Although this court has not previously held that the fellow officer rule applies to misdemeanor offenses, we have assumed as much in dicta in cases addressing related issues. In *B.D.K. v. State,* 743 So.2d 1155 (Fla. 2d DCA 1999), we held that a misdemeanor arrest was unlawful because it did not occur immediately upon the offense or within hot pursuit. Although it was not germane to the dispositive issue in the case, we noted, "The 'fellow officer rule' applies to misdemeanors as well as to felonies." *Id.* at 1157. In support of that statement, we cited *Horsley v. State,* 734 So.2d 525 (Fla. 2d DCA 1999), in which we held that the collective observations of two officers did not provide the officers with sufficient information to arrest the defendant for violating a municipal ordinance, but noted that we agreed with the State's general argument that the fellow officer rule applied to misdemeanor arrests.

A majority of jurisdictions that have addressed this issue have reached a similar conclusion under similar circumstances. *See Torrey v. City of Tukwila,* 76 Wash.App. 32, 882 P.2d 799, 804 (1994); *Spano*

Warren, 103 N.M. 472, 709 P.2d 194, 197-98 (N.M.Ct.App.1985); *State v. Bryant,* 678 S.W.2d 480 (Tenn.Crim.App.1984); *State v. Costa,* 111 R.I. 602, 306 A.2d 36 (1973). *But see Penn v. Commonwealth,* 13 Va.App. 399, 412 S.E.2d 189 (1991), *aff'd,* 244 Va. 218, 420 S.E.2d 713 (1992).

[5] The fellow officer rule is typically, although not always, a rule permitting an officer who has lawful power to arrest a person the option of delegating that function to another officer. As a result, the rule is related to the provision in section 901.18, Florida Statutes (2003), which permits an officer making an arrest to "command the aid of persons she or he deems necessary to make the arrest." Under that statute, we have expressly allowed an officer observing a misdemeanor in his presence to delegate to a fellow officer the authority to make the misdemeanor arrest. *See State v. Eldridge,* 565 So.2d 787 (Fla. 2d DCA 1990); *see also Huebner v. State,* 731 So.2d 40 (Fla. 4th DCA 1999); *Kirby v. State,* 217 So.2d 619 (Fla. 4th DCA 1969). Of course, under section 901.15(1), that delegated arrest power must still be exercised "immediately" or in "fresh pursuit."

Mr. Boatman argues that the language of section 901.15(5), which explicitly provides that an arresting officer may rely upon information from other officers in ***225** making an immediate arrest for a violation of chapter 316, Florida Statutes (2003), committed in the officer's presence, suggests that the legislature did not intend to permit such reliance in misdemeanor arrests under section 901.15(1). The language that Mr. Boatman relies upon was added to section 901.15(5) in 1996. *See* ch. 96-413, § 68, Laws of Fla. It clearly was added to address the issue of traffic stops for non-criminal infractions when the officer performing the stop is not the officer who was using the radar gun or otherwise observing the traffic infraction. We decline to interpret this relatively recent amendment as evidence of the legislature's intent to prohibit the application of the fellow officer rule in the context of misdemeanor arrests under section 901.15(1).

We therefore reverse the trial court's order granting Mr. Boatman's motion to suppress and remand for further proceedings.

Reversed and remanded.

SALCINES and CANADY, JJ., Concur.

901 So.2d 222, 30 Fla. L. Weekly D961

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Case: Huebner v. State
Excerpt from: 731 So.2d 40, *44

We note, however, that section 901.18, Florida Statutes, which pertains to the authority of an officer in "making a lawful arrest" to enlist the aid of others, does not apply to the facts in this case, because Officer Christoffers did not arrest appellant or directly participate with Officer Thomas in making her arrest. Rather, the provisions of sections 901.25(2) and 901.15 govern the detention and arrest authority of these officers. Officer Christoffers had the authority to arrest appellant outside his jurisdiction while in fresh pursuit and could properly communicate his observations of the appellant's driving conduct to Officer Thomas. Officer Thomas, in turn, could act upon this information under the "fellow officer" rule in continuing the fresh pursuit and making a valid stop and arrest of appellant for driving under the influence. [FN3] The "fellow officer" rule or doctrine "operates to impute the knowledge of one officer in the chain of investigation to another." State v. Evans, 692 So.2d 216, 218 (Fla. 4th DCA 1997). As stated in Crawford v. State, 334 So.2d 141, 142 (Fla. 3d DCA 1976), an "arresting officer is not required to have sufficient firsthand knowledge to constitute probable cause. It is sufficient if the police officer initiating the chain of communication ... had first hand knowledge."

FN3. It is undisputed that Officer Thomas developed probable cause to arrest appellant for driving while under the influence after observing appellant and administering road sobriety tests.

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Subject Draft of MI 5.1

All:

attached is a draft of revisions to MI 5.1. I tried to include the version of probable cause which was reflected in the notes of the November meeting. The draft changes a couple of the comments, so look at these carefully.

With respect to some of the issues we've discussed:
(1) the probable cause definition contains the language that the jury must consider what was known to the defendant at the time of the incident. The cases dealing with the issues of imputed knowledge of the officer, and the sufficiency of probable cause for any crime (not just the one verbalized at the time) are inserted in the comment to 5.1b. It seemed that might be a good way to point out the issues, without making the instruction more verbose than it already is.

(2) the draft undoubtedly can use some "plain English" polishing. I did try to re-word sections b., c. and d to get away from the "one acts..." or "one is..." language, which seemed contra to the plain English trends we're trying to embrace.

I'll try to get drafts of 5.2 and 6.1 out maybe later this afternoon or tomorrow. I'd suggest a conference call as soon as mutually convenient so we can get a good "final" draft to Gerry in time to be included in the agenda for this months' meeting.

Thx.

[attachment "malpros (3).DOC" deleted by Gerry Rose/The Florida Bar]

MALICIOUS PROSECUTION (ISSUES AND ELEMENTS)

a. Issues:

The issues for your determination on the claim of (claimant) against (defendant) are whether (defendant) maliciously and without probable cause [instituted] [or] [continued] a [criminal] [civil] proceeding against (claimant) which later terminated in favor of (claimant).

b. Lack of probable cause:

"Probable cause" means that the facts and circumstances known to [(defendant)] [name of other person whose knowledge is at issue] [in existence] at the time [of the incident] were sufficient to cause a reasonably cautious [officer] [person] to believe that [[the accused] [claimant] committed a crime] the [[claim] [proceeding] was justified].

Comment on MI 5.1b

See State v. Boatman, 901 So.2d 222 (Fla. 2d DCA 2005); Daniel v. Village of Royal Palm Beach, 889 So.2d 988 (Fla. 4th DCA 2004).

[NOTE: Wright v. Yurko, 446 So.2d 1162, 1166, states that a lesser standard of "probable cause" obtains in a civil proceeding than in a criminal action, citing Prosser sec. 120 at 854-55 (4th ed. 1971). I haven't found any other Florida case which follows up on that, and Yurko goes on to define probable cause in a fashion similar to that employed here. My suggestion is not to get into that by way of instruction or comment/note, but thought it should be pointed out.]

c. Malice:

"Maliciously" or "malice" means that (defendant) [instituted] [continued] a [criminal] [civil] proceeding against (claimant) if [he] [she] [it] did so for the primary purpose of injuring (claimant), or recklessly and without regard for whether the proceeding was justified, or for any primary purpose except [to bring an offender to justice] [to establish what [he] [she] [it] considered to be a meritorious claim]. In determining whether (defendant) acted maliciously, you may consider all the circumstances at the time, including any lack of probable cause to [institute] [continue] the proceeding.

d. Instituting or continuing a proceeding:

A [criminal] [civil] proceeding was [instituted] [continued] against (claimant) by (defendant) if the proceeding resulted directly and in natural and continuous sequence from (defendant's) actions, so that it can reasonably be said that, but for such actions, the proceeding would not have

been [instituted] [continued]. [(Defendant) is not regarded as having [instituted] a criminal proceeding against (claimant) if in good faith {he] [she] [it] made a full and fair disclosure of what [he] [she] [it] knew to the proper authorities, and left the decision to [institute] [continue] the proceeding entirely to the judgment of the authorities.]

Comment on MI 5.1d

See Kilburn v. Davenport, 286 So.2d 241 (Fla. 3d DCA 1973); Zippy Mart, Inc. v. Mercer, 244 So.2d 522 (Fla. 1st DCA 1970). See also, State ex rel. Hardy v. Blount, 261 So.2d 172 (Fla. 1972).

e. Burden of proof on claim: [NO CHANGE]

f. Advice of counsel as defense: [NO CHANGE]

g. Burden of proof on defense: [NO CHANGE]

h. "Greater weight of the evidence" defined: [NO CHANGE]

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bcc
Subject MI 6.1 revisions

Attached in a draft of MI 6.1, False Imprisonment. A couple of notes:

I added language that the arrest must be unwarranted and unreasonable under the circumstances, and without lawful authority. Neither of these two criteria are contained in the current instruction, although clearly set forth in the case law. I really struggled with the definition of "without lawful authority," finding no meaningful definition in the cases.

We need to look at whether there are additional defenses which need instructions, and what if any new comments should be inserted.

I tried to format the instruction so that it might be a little easier to read from the bench.

I've CC'd Bruce Berman's Plain English subcommittee, for any comments they have.

I'll try to prepare an abuse of process instruction which we talked about before, and get it circulated.

[attachment "MI 6.doc" deleted by Gerry Rose/The Florida Bar]

MI 6.1

FALSE IMPRISONMENT

a. Issues on claim:

These are the issues you must decide on the claim of (claimant) against (defendant): whether (defendant) intentionally caused (claimant) to be completely restrained against [his] {her] will in a manner unreasonable and unwarranted under the circumstances, and that (defendant) had no lawful authority to do so.

In telling you the issues, I have used five terms which you must understand. They are:

"intentionally restrained,"

"caused restraint,"

"completely restrained,"

"restrained against (claimant's) will," and

"without lawful authority."

I will explain those terms now:

b."Intentionally restrained" means that (defendant) restrained (claimant) with the very purpose of causing such restraint, or with the knowledge that such restraint would, to a substantial certainty, result from (defendant's) acts.

c. "Caused restraint" means that (defendant's) actions directly and in a natural and continuous sequence produced or contributed substantially to producing the restraint, so that it can reasonably be said that, but for those acts, the restraint would not have occurred. [A person who makes a mistake in reporting or identifying another person to law enforcement officers is not liable for causing the other person to be restrained, if the person making the mistaken report or identification acts in good faith and does not instigate, persuade, or request the officers to restrain the other person.]

d. "Completely restrained" means that (claimant), at the time of the incident, was not free, or reasonably believed [he] [she] was not free, to leave a place to which [he] [she] had been confined. However, a person is not "completely restrained" when there is a reasonable means of escape which is apparent or known to the person.

e. "restrained against (claimant's will)" means that (claimant) did not consent to the restraint.

f. "without lawful authority" means that (defendant) did not act under color of law.

[Note: this definition has given me considerable trouble. I have not found a case which gives a definition of "lawful authority," or "without lawful authority," so the above is really nothing more than circular reasoning, and tells the jury very little. The cases do say, though, that lack of "lawful authority" is one of the elements of false imprisonment. See, Everett v. Florida Inst. of Technology, 503 So.2d 1382 (Fla. 5th DCA 1987), and the absence of this factor from the current instruction has been one of the criticisms voiced. Maybe we don't even need a definition of that phrase, in absence of case law or statutory circumscription.
Several of the cases do point up that there is a difference between an arrest by a law enforcement officer, and a "citizen's arrest," or the detention or procurement of an arrest by a civilian. In the case of an arrest or detention by a law enforcement officer, this phrase would almost seem meaningless, as long as the officer was acting within his jurisdiction. This draft does not get into this distinction, just as the current instruction does not.
I invite any thoughts on this issue.]

g. Burden of proof on claim:

If the greater weight of the evidence does not support the claim of (claimant), your v edict should be for (defendant). However, if the greater weight of the evidence does support the claim of (claimant), [then your verdict should be for (claimant) and against (defendant)] [then you shall consider the defense[s] raised by (defendant)]

h. Probable cause*:

On the [first] defense, the issue you must decide is whether [(defendant) had probable cause to restrain (claimant)] [whether (name), a [merchant] [merchant's employee] had probable cause to believe that goods held for sale by the merchant were unlawfully taken by (claimant) and could be recovered by restraining (claimant) for a reasonable time and in a reasonable manner.] "Probable cause" means that the facts and circumstances known to (defendant) [in existence] at the time [of the incident] were sufficient to cause a reasonably cautious person [officer] to believe that (claimant) had committed a crime [an offense?].

* Example only. See Comment on other potential defenses.

[What, if any, additional defenses should be added in here? If the complaint were phrased in terms of negligence, to invoke insurance coverage, comparative negligence might lie

as a defense, for example. The * comes out of the existing instruction, but if there are other defenses which could be laid out here, is it helpful to do so?]

i. Burden of proof on defense:

If the greater weight of the evidence supports this defense, your verdict should be for (defendant) and against (claimant). If, however, the greater weight of the evidence does not support this defense, and does support the claim of (claimant), your verdict should be for (claimant) and against (defendant).

[the wording of 6.1i above, as with current 6.1h, is predicated upon probable cause as a complete defense. If there are in fact additional defenses which should be mentioned which are not a complete bar to the claim, should we insert a comparative negligence type of "burden of proof" instruction?]

j. "Greater weight of the evidence" defined

[Same as current 6.1i]

k. Damages

[Same as current 6.1j]

Comments on MI 6.1

[No change made here, except that the subsections will need to be re-numbered. We probably do need to find some more recent case cites in lieu of the older references set forth in the current instructions.]

THOMAS B. BLUMEL, SR., Plaintiff, v. THOMAS A. MYLANDER, individually and in his official capacity as Hernando County Sheriff; HERNANDO COUNTY, a political subdivision of the State of Florida; and CORRECTIONS CORPORATION OF AMERICA, a Tennessee corporation, Defendants.

CASE NO. 95-1534-CIV-T-17A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

919 F. Supp. 423; 1996 U.S. Dist. LEXIS 3129; 9 Fla. L. Weekly Fed. D 662

March 12, 1996, DONE AND ORDERED

COUNSEL: [**1] For THOMAS B. BLUMEL, SR., plaintiff: Christopher M. Shulman, [COR LD NTC], Law Office of Christopher M. Shulman, Tampa, FL.

For THOMAS A. MYLANDER, individually and in his official capacity as Hernando County Sheriff, defendant: Caroline Anne Falvey, [COR LD NTC], Green, Kaster & Falvey, P.A., Ocala, FL.

For HERNANDO COUNTY, a political subdivision of the State of Florida, defendant: F. Scott Pendley, [COR LD NTC], Dean, Ringers, Morgan and Lawton, P.A., Orlando, FL.

JUDGES: ELIZABETH A. KOVACHEVICH, United States District Judge

OPINIONBY: ELIZABETH A. KOVACHEVICH

OPINION:

[*424] ORDER ON CCA'S MOTION TO DISMISS AND BLUMEL'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause comes before the Court on the following motions, responses, and supporting material:

1. Defendant Corrections Corporation of America's (hereinafter CCA) Motion to Dismiss and Memorandum of Law in Support, filed October 17, 1995 (Docket No. 6).

2. Memorandum in Opposition to CCA's Motion to Dismiss, filed November 2, 1995 (Docket No. 8).

3. Plaintiff Thomas B. Blumel, Sr.'s (hereinafter Blumel) Motion for Partial Summary Judgment, filed December 8, 1995 (Docket No. 17).

4. Defendant Hernando [**2] County's (hereinafter the County) Memorandum of Law in Response to Blumel's Motion for Partial Summary Judgment, filed January 4, 1996 (Docket No. 23).

[*425] 5. CCA's Response to Plaintiff's Motion for Partial Summary Judgment, and Memorandum of Law in Support, filed January 4, 1996 (Docket No. 24).

FACTS

On November 9, 1992, a Hernando County deputy sheriff arrested Blumel, a county resident. Acting without a warrant, the deputy arrested Blumel for allegedly violating a restraining order, which rendered him in civil contempt of court. The deputy then transported Blumel to the Hernando County Jail, which was operated by CCA pursuant to a contract.

After spending the night in jail, Blumel appeared before a Hernando County Judge, the Honorable Peyton Hyslop. According to Blumel's complaint, "Judge Hyslop did not determine whether Blumel was entitled to a public defender, did not specifically advise him of the charges against him, and did not make any determination as to either probable cause or [Blumel's] entitlement to

bail." Verified Civil Rights Complaint and Demand for Jury Trial at 3 (Docket No. 1). Instead, Blumel alleges that the judge indicated he was in the "wrong [**3] court." Thus, the judge sent Blumel back to the jail until he appeared before Florida Circuit Judge Richard Tombrink, Jr., who had issued the restraining order.

Blumel spent the next thirty (30) days in jail. Finally, on December 10, 1992, Blumel was brought before Judge Tombrink. Dismissing the civil contempt charge for a lack of evidence, Judge Tombrink released Blumel from custody.

PROCEDURAL HISTORY

On September 18, 1995, Blumel filed a verified complaint against three (3) defendants, including the County and CCA. n1 In his complaint, Blumel alleges that the County and CCA violated Section 1983, *42 U.S.C. § 1983* (1988), by unconstitutionally depriving Blumel of his liberty without due process. Essentially, Blumel asserts that the County and CCA violated their constitutional duty to ensure that warrantless pre-trial detainees, such as Blumel, are detained only after a judicial determination of probable cause within the first 48 hours after arrest. With respect to CCA, which operated the Hernando County jail pursuant to a contract, Blumel also alleges two (2) state law claims, false imprisonment and negligence.

n1 The third defendant, Hernando County Sheriff Thomas A. Mylander, settled with Blumel in November, 1995 (Docket Nos. 11, 14).

[**4]

On October 10, 1995, the County answered Blumel's verified complaint. In its answer, the County denies most of the allegations and raises eleven (11) affirmative defenses (Docket No. 4). Unlike the County, CCA has not yet answered Blumel's complaint. Instead, in one of the matters at bar, CCA moves to dismiss it for failure to state any claims upon which relief could be granted.

Pursuant to Local R. M.D. Fla. 3.05(c), the parties met to prepare a case management report on November 6, 1995. According to the report, the parties agreed that discovery would begin on December 6, 1995 (Docket No. 15). However, on the same day that discovery was to begin, Blumel served the defendants with a motion for partial summary judgment. In this motion, which is also before the Court, Blumel seeks summary judgment with respect to his Section 1983 claim.

CCA'S MOTION TO DISMISS

I. The Standard for Dismissal

Under Conley v. Gibson, a district court should not dismiss a complaint "for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts" that would entitle the plaintiff to relief. *355 U.S. 41, 45 (1957);* accord *Bracewell v. Nicholson Air* [**5] *Services, Inc., 680 F.2d 103, 104 (11th Cir. 1982).* To survive a motion to dismiss, a plaintiff may not merely "label" his or her claims. At a minimum, the Federal Rules of Civil Procedure require "a short and plain statement of the claim" that "will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it [*426] rests." *Conley, 355 U.S. at 47* (quoting *Fed. R. Civ. P. 8(a) (2)*).

In deciding a motion to dismiss, this Court will examine only the four corners of the complaint. *Rickman v. Precisionaire, Inc., 902 F. Supp. 232 (M.D. Fla. 1995).* Also, the Court must accept a plaintiff's well pled facts as true and construe the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); Howry v. Nisus, Inc., 910 F. Supp. 576 (M.D. Fla. 1995).*

II. Count I: Section 1983

To impose Section 1983 liability on a state actor for failing to act to preserve a constitutional right, a plaintiff must establish: (1) that he possessed a constitutional right which was deprived; (2) that the defendant had a policy or custom; (3) that the policy or custom constituted a deliberate indifference [**6] to the plaintiff's constitutional right; and (4) the policy or custom was the moving force behind the deprivation. *City of Canton v. Harris, 489 U.S. 378, 388, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989); Oviatt v. Pearce, 954 F.2d 1470, 1473-75 (9th Cir. 1992);* see also *Ali v. Clearwater, 807 F. Supp. 701, 706-07 (M.D. Fla. 1992).*

A person arrested and detained without a warrant has a constitutional right to have a judicial officer determine probable cause within the first forty-eight (48) hours. *County of Riverside v. McLaughlin, 500 U.S. 44, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991); Gerstein v. Pugh, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975).* In the case at bar, Blumel alleges that the County and CCA violated this right by failing to ensure that Blumel received due process.

In its motion to dismiss, CCA asks the Court to dismiss Blumel's Section 1983 claim because, as a matter of law, "errors in the arrest and commitment process are not chargeable to a corrections institution." CCA's Motion to Dismiss and Memorandum of Law in Support at 4 (Docket No. 6). As support, CCA advances *Buenrostro v. Collazo, 777 F. Supp. 128 (D.P.R. 1991),* aff'd on other [**7] grounds, *973 F.2d 39 (1st Cir. 1992).* In

addition, CCA argues that it shares judicial immunity from Section 1983 liability because it was merely implementing a judge's order. As support, CCA relies on *United States ex rel. Bailey v. Askew, 486 F.2d 134 (5th Cir. 1973).*

Blumel responds by distinguishing Buenrosto and Askew. Specifically, Blumel argues that, unlike the Buenrosto and Askew judges, Judge Hyslop did not sign any commitment order, valid or otherwise.

The Court agrees with Blumel and, therefore, denies CCA's motion to dismiss Count I. In Buenrosto, the court dismissed a plaintiff's Section 1983 claim against two prison officials because "if . . . plaintiff was sent to the State Penitentiary with a facially-valid commitment order, there certainly can be no duty on the part of the Department of Corrections to verify or otherwise review the correctness of the judicially issued order." *777 F. Supp. at 135* (emphasis added). Similarly, the Askew court affirmed the dismissal of a Section 1983 claim, holding that "a jailer cannot be held liable for an error in an order of commitment which is patently proper." *486 F.2d at 135* (emphasis added). **[**8]**

Unlike the Buenrosto and Askew complaints, Blumel's Complaint alleges sufficient facts to state a valid Section 1983 claim against CCA. Indeed, Blumel asserts that neither Judge Hyslop or any other judicial officer "ever determined whether there was probable cause to detain Blumel." Verified Civil Rights Complaint and Demand for Jury Trial at 3-4 (Docket No. 1). In contrast, the Buenrosto and Askew judicial officers found probable cause to detain those plaintiffs and accordingly issued "facially-valid" or "patently proper" commitment orders. *777 F. Supp. at 135; 486 F.2d at 135.* Therefore, Blumel's alleged facts are materially different from the alleged facts in Buenrosto and Askew.

Notwithstanding Buenrosto and Askew, CCA may be held liable for constitutional violations under the "public function" theory. With the exception of slavery, the federal Constitution does not generally restrict "individual invasion of individual rights . . . ." *The Civil Rights Cases, 109 U.S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883).* However, when a governmental entity delegates one its traditional or "public functions" to a **[*427]** private entity, the private entity may be held **[**9]** liable under the Constitution with respect to its performance of that function. *Marsh v. Alabama, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946); Jeffries v. Georgia Residential Finance Auth., 678 F.2d 919, 924-25* (11th Cir.), cert. denied, *459 U.S. 971, 74 L. Ed. 2d 283, 103 S. Ct. 302 (1982); Gerber v. Longboat Harbour North Condominium, Inc., 757 F. Supp. 1339, 1341 (M.D. Fla. 1991).* For example, "if a state contracted with a private corporation to run its prisons it would no doubt subject the private prison employees to § 1983 suits under the public function doctrine." *Plain v. Flicker, 645 F. Supp. 898, 907 (D.N.J. 1986).*

By statute, the State of Florida permits counties to contract with private entities to run their jails and prisons. *Fla. Stat. § 951.062(1)* (1995). Accordingly, in the present case, Blumel alleges that the County contracted with CCA to run the jail where Blumel sat for over a month. Therefore, because the County delegated a "public function" to CCA, Blumel may seek to hold CCA liable under Section 1983 for depriving his liberty without due process.

III. Count II: False Imprisonment

Florida courts define the tort of false imprisonment **[**10]** as "the unlawful detention of the plaintiff and deprivation of his liberty." *Johnson v. Weiner, 155 Fla. 169, 19 So. 699, 700 (Fla. 1944); Harris v. Lewis State Bank, 436 So. 2d 338, 341 (Fla. 1st DCA 1983).* To be "unlawful," the detention must be "unreasonable and unwarranted under the circumstances." *Harris, 436 So. 2d at 341; Kanner v. First National Bank of South Miami, 287 So. 2d 715, 717 (Fla. 3d DCA 1974).* In addition, the defendant must have detained the plaintiff "for the purpose of imposing a confinement, or with the knowledge that such confinement will, to a substantial certainty, result . . . ." *Johnson, 19 So. at 700.*

In the first of two (2) motions before the Court, CCA argues that Blumel fails to allege facts sufficient to support a finding of an "unlawful" detention. The Court disagrees. For the reasons stated earlier, this Court finds that Blumel's allegations support a Section 1983 claim. See supra Count I. The same set of facts, if proven, could easily constitute false imprisonment. In other words, proof that CCA violated Section 1983 would clearly support a finding that CCA "unlawfully detained Blumel under the law of false imprisonment. Thus, the Court **[**11]** denies CCA's motion to dismiss Count II.

IV. Count III: Negligence

In Florida, a plaintiff proves a prima facie case of negligence by showing that the defendant owed him or her a duty of care and that the defendant's breach of that duty proximately caused injury to the plaintiff. See, e.g., *Lake Parker Mall, Inc. v. Carson, 327 So. 2d 121, 123 (Fla. 2d DCA 1976),* cert. denied, *344 So. 2d 323 (Fla. 1977).* Whether a duty of care exists is a question of law. *McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992).*

In its motion to dismiss, CCA argues that it did not owe any duty of care to the plaintiff. CCA advances no further support for its argument other than asking the Court to avoid expanding Florida tort law. In response, Blumel advances *Layden v. Corrections Corporation of*

America, 570 So. 2d 994 (Fla. 1st DCA 1990), where the court reinstated a jury's finding that CCA negligently caused that plaintiff to remain in jail several months longer than necessary while awaiting trial. Although duty was not at issue in Layden, the case does adequately address CCA's cursory concern about expanding Florida tort law. Since the Florida court in Layden found **[**12]** CCA liable for "jailer negligence," then this Court could comfortably do the same without delving into novel state law issues or violating *Erie Railroad v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).*

Notwithstanding Layden, CCA clearly owed a duty of care to its inmates under Florida regulatory law, which has "the force and effect of [a] statute." *Florida Livestock Board v. Gladden, 76 So. 2d 291, 293 (Fla. 1954);* accord *McCoy v. Hollywood Quarries, Inc., 544 So. 2d 274, 277 (Fla. 4th DCA 1989).* Under Fla. Admin. Code Ann. r.33-8.004(1) (1995), CCA had a duty to "inquire and reasonably determine that established rules, **[*428]** regulations and legal procedures" were met before admitting Blumel to its jail. In addition, the regulation states that "any legal or procedural questions concerning the admission of a person to a detention facility must be clearly resolved prior to their [sic] admission." Id.

In paragraph thirty-two (32) of his complaint, Blumel sufficiently alleges CCA's duty of care:

> CCA had a duty to exercise reasonable care in determining whether it was appropriate to continue to confine a warrantless arrestee delivered into CCA [**13] custody, which duty included, at a minimum, a duty to bring such arrestee before a judicial officer for determinations of probable cause and entitlement to bail. CCA had a concomitant duty to review the arrestee's first appearance and probable cause documents, exercising reasonable care in ascertaining whether a judicial officer had made these determinations.

Verified Civil Rights Complaint and Demand for Jury Trial at 11-12 (Docket No. 1). Because the above allegations factually apply Fla. Admin. Code Ann. r.33-8.004(1), Blumel successfully opposes CCA's motion to dismiss Count III. Cf. *Raske v. Dugger, 819 F. Supp. 1046, 1055 (M.D. Fla. 1993)* (dismissing a plaintiff's negligence claim because he failed to specify the defendant's statutory duties of care).

BLUMEL'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Standard of Review

The Court will grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c).*

As Rule 56 implies, **[**14]** district courts should not grant summary judgment until the non-movant "has had an adequate opportunity for discovery." *Snook v. Trust Co. of Georgia Bank, 859 F.2d 865, 870 (11th Cir. 1988);* see also *McCallum v. City of Athens, 976 F.2d 649, 650 (11th Cir. 1992)* (noting that a party may move for summary judgment only after exchanging "appropriate" discovery); *Ross v. Bank South, NA., 885 F.2d 723, 730 (11th Cir. 1989)* (affirming summary judgment because the non-movant was unable to create any issue of fact after "substantial discovery"), cert. denied, *495 U.S. 905, 109 L. Ed. 2d 287, 110 S. Ct. 1924 (1990).* Indeed, "the whole purpose of discovery in a case in which a motion for summary judgment is filed is to give the opposing party an opportunity to discover as many facts as are available and he considers essential to enable him to determine whether he can honestly file opposing affidavits." *Parrish v. Board of Commissioners of the Alabama State Bar, 533 F.2d 942, 948 (5th Cir. 1976).* Thus, out of fairness to the non-movant, "summary judgment may only be decided upon an adequate record." *WSB-TV v. Lee, 842 F.2d 1266, 1269 (11th Cir. 1988).*

After a party moves **[**15]** for summary judgment, the non-movant "bears the burden of calling to the district court's attention any outstanding discovery." *Cowan v. J.C. Penney Co., 790 F.2d 1529, 1530 (11th Cir. 1986).* Once it is convinced that discovery is inadequate, the district court should deny summary judgment. See, e.g., *Elk v. Townson, 839 F. Supp. 1047, 1051 (S.D.N.Y. 1993)* (granting summary judgment after "discovery [had] been completed and both parties [had] ample opportunity to uncover facts and evidentiary support for them"); *Hall v. Sanchez, 708 F. Supp. 922, 923 n.1 (N.D. Ill. 1989)* (denying summary judgment during the "early stages of discovery" and reminding the defendant that he "may present a summary judgment motion . . . at the close of discovery"). A district court may grant summary judgment in the early stages of discovery only if "further discovery would be pointless" and the movant is "clearly entitled to summary judgment." *Robak v. Abbott Laboratories, 797 F. Supp. 475, 476 (D. Md. 1992)* (granting summary judgment in the "early stages" of discovery because "no material fact [could] be genuinely disputed under the allegations of the Complaint").

[*429] II. Discussion **[**16]**

In his motion, Blumel seeks partial summary judgment as to liability on Count I, his Section 1983 claims against the County and CCA. As his sole factual basis, Blumel personally verifies and swears to his Complaint's truthfulness. Blumel also served the County and CCA on the first discovery date, December 6, 1995. Accordingly, the County and CCA, the non-movants, respond by arguing that summary judgment is inappropriate during the early stage of discovery, especially when discovery just began.

The Court agrees with the County and CCA, and finds that there has been inadequate time for discovery. Blumel's motion is blatantly premature in that discovery began on the very day of its service. Also, Blumel seeks summary judgment while CCA's motion to dismiss is pending and before it has answered the Complaint. Finally, because Blumel merely verifies his Complaint, he could not plausibly convince the Court that he is "clearly entitled to summary judgment" or that "further discovery would be pointless."

If the Court were to rule on the merits of Blumel's motion, such ruling would frustrate the County and CCA's right to factually investigate. Indeed, as the Eleventh Circuit has stressed, [**17] fairness to non-movants requires that they have ample opportunity to understand what facts can be genuinely disputed.

By bringing his motion so prematurely, Blumel not only disregards the County's and CCA's discovery rights, but also wastes the Court's time. As the above case law demonstrates, the Eleventh Circuit's position regarding when to bring a summary judgment motion is clear. In fact, Blumel's premature motion borders on violating *Fed. R. Civ. P. 11* because it appears to be unwarranted by existing law or brought for an improper purpose. The Court cautions Blumel's counsel to proceed with extraordinary care when making future filings. Accordingly, it is

ORDERED that CCA's Motion to Dismiss (Docket No. 6) be **DENIED**; Blumel's Motion for Partial Summary Judgment (Docket No. 17) be **DENIED WITHOUT PREJUDICE** to resubmit at the appropriate time; and the defendant CCA has ten (10) days to answer the complaint.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 12th day of March, 1996.

ELIZABETH A. KOVACHEVICH

United States District Judge

S. H. KRESS & COMPANY v. DOROTHY POWELL, a minor, by her next friend, MARY POWELL

[NO DOCKET NUMBER]

SUPREME COURT OF FLORIDA, Division B

132 Fla. 471; 180 So. 757; 1938 Fla. LEXIS 1771

April 25, 1938

PRIOR HISTORY: [***1]

A writ of error to the Circuit Court for Escambia County, L. L. Fabisinski, Judge.

COUNSEL:

Watson & Pasco & Brown, for Plaintiff in Error;

Coe & McLane, for Defendant in Error.

JUDGES:

BROWN, J., WHITFIELD, P.J., and CHAPMAN, J., concur; ELLIS, C.J., and TERRELL and BUFORD, J.J., concur in the opinion and judgment.

OPINIONBY:

BROWN

OPINION:

[**759] [*474] BROWN, J.

Dorothy Powell, a minor, by her next friend, Mary Powell, brought an action at law against S. H. Kress & Company to recover for false imprisonment and malicious prosecution. The declaration consisted of two counts Demurrer to the declaration was overruled. Pleas were then filed, and the court sustained a demurrer to the third, fifth and seventh pleas to the first count, and the third, fifth, seventh, eighth, ninth and eleventh pleas to the second count of the declaration. Trial was had, and the jury found for the plaintiff and assessed her damages at $650.00. [*475] From the judgment entered upon that verdict, the defendant took this writ of error.

The first count of the declaration reads:

"The plaintiff, Dorothy Powell, a minor, by her next friend, Mary Powell, by her attorneys, sues the defendant, [***2] S. H. Kress & Company, a Corporation, for that heretofore, to-wit, on and prior to the 24th day of December, A.D. 1934, the defendant was engaged in the operation of a retail chain store in the City of Pensacola, Escambia County, Florida, and therein employed as manager one Faircloth, whose duty it was to manage and conduct the business and to guard its interests against theft, pilferage, passing of spurious coin and other misdemeanors liable to result in monetary loss to his employers and on the said date, the plaintiff, a minor female of the age of seventeen (17) years, entered said store as a customer to purchase goods and tendered in payment thereof a five dollar bill, lawful money of the United States, but the said Faircloth, acting in his capacity, as manager aforesaid, inspected the said five dollar bill and falsely declared the same to be counterfeit, and then and there caused the plaintiff to be detained in said store, gave her into the custody of a policeman and caused her to be falsely imprisoned in the police station of the City of Pensacola, from which imprisonment she was duly discharged upon subsequent inspection of the said five dollar bill by the proper officers of [***3] said city, it being apparent that the same was genuine. And the detention and delivery of the plaintiff to said policeman occurred in the presence of a large number of persons in the store of the defendant during the busy hours of Christmas eve, and plaintiff was embarrassed, humiliated and greatly damaged thereby and by the imprisonment consequent thereon; for all of which she sues and claims one thousand five hundred ($1,500.00) dollars damages."

[*476] It is contended that the demurrer to the declaration should have been sustained, because even though it be admitted that Faircloth, the manager of the

Kress store in Pensacola, had the duty of protecting the interests of the Kress Company from theft, pilferage, and the passage of spurious coin, yet such duty did not carry with it implied authority to do the alleged acts complained of so as to bind the defendant; that the declaration does not allege any express authority to do those acts, and there is no allegation of ratification by the defendant of them.

Each count alleges that Faircloth had the express duty "to manage and conduct the said business, and to guard its interests against theft, pilferage, passing of spurious [***4] coin and other misdemeanors liable to result in monetary loss to his employers." The first count alleges that Faircloth "then and there caused plaintiff to be detained in said store, gave her into the custody of the policeman and caused her to be falsely imprisoned in the police station in the City of Pensacola." The second count alleges that Faircloth, acting as defendant's agent, "commenced a criminal proceeding for the passage of counterfeit money against the plaintiff by then and there summoning a policeman and delivering the plaintiff to his custody and informing the said policeman that the said plaintiff had attempted to pass a counterfeit five dollar bill and by causing the said policeman to take the said plaintiff into his custody upon the said charge and conduct her to the police station of the City of Pensacola, which said prosecution was terminated in favor of this plaintiff upon the inspection of the five dollar bill by the proper officers of the City of Pensacola, who determined the same to be genuine."

There have grown up in this country large businesses, which usually have their principal offices in some large city [**760] with numerous branches or units of that [***5] business in many [*477] other states in the Union. The principal officers of the corporation are to the found only at the home office of the corporation. In each unit or branch of the business is placed in authority one who is generally designated as the "manager" of the local unit, and who usually has the authority to select and to discharge his employees, to place orders for merchandise with the parent organization, and in some businesses to purchase merchandise from other corporations. The "manager" is responsible in a general way for the prosperity and welfare of the local unit of that particular business. He is not to be classed with a mere clerk or employee; he is a vice-principal. To permit a corporation of this type to escape liability for the acts of its "manager" on the ground that he is not one of the principal officers of the corporation and that he must have actual express authority to do the particular thing in question would be going entirely too far afield from the realities, because for all practical purposes, the "manager" is the head of the corporation so far as the local unit of the business is concerned, and wrongful acts of the "manager" which are done [***6] in behalf of the corporation's interests there, if they cause injury or damage to another, will make the corporation liable. *Hotel Tutwiler Operating Co. v. Evans, 208 Ala. 252, 94 So. 120,* also *35 A.L.R. 695, et seq.*, and *77 A.L.R., 927, 936,* where cases pro and con are cited.

"The term 'manager' applied to an officer or representative of a corporation, implies the idea that the management of the affairs of the company has been committed to him with respect to the property and business under his charge. Consequently his acts in and about the corporation's business so committed to him, is within the scope of his authority. 5 Words & Phrases, First Series, p. 4319; *Sullivan v. Evans-Morris-Whitney Co., 54 Utah 293, 180 P.* [*478] *435.* The designation 'manager' implies general power, and permits a reasonable inference that he was invested with the general conduct and control of the defendant's business and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company." *Newark Shoe Co., 190 N.C. 406, 130 S.E. 32,* citing numerous authorities.

The acts alleged in the first count to have been done by Faircloth, the "manager" [***7] of the Kress store in Pensacola, were impliedly authorized by the defendant, if done in pursuance of any of the express duties alleged. There is a very close relation between the duty of protecting the interests of the defendant against the passage of spurious coin and other misdemeanors liable to result in monetary loss to the company, and the alleged act of the "manager" in causing the detention or false imprisonment of the plaintiff because of an erroneous belief that a five dollar bill she attempted to pass in the Kress store was counterfeit.

The alleged act of the "manager" in causing plaintiff to be taken to the police station was not necessarily done solely for the purpose of vindicating public justice, which is generally not actionable; *Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214;* but may also have been done to prevent the plaintiff from later passing or attempting to pass the same five dollar bill in the defendant's store in exchange for merchandise, which the "manager" may have believed would result in financial loss to his company, as well as to prevent others from doing similar acts. See *United Cigar Stores Co. v. Young, 36 App. D.C. 390; Hostettler* [***8] *v. Carter, 73 Okla, 125, 175 Pac. 244.* Whether the allegations of the first count were proven was, under the evidence adduced, and such reasonable inferences as might be drawn therefrom, a question for the jury.

[*479] The general principle for which plaintiff in error contends, as applied to mere servants, or clerks, has been recognized by this Court in the case of *Winn &*

Lovett Grocery Co. v. Archer, supra, wherein this Court, speaking through Mr. Justice DAVIS, said:

"There is a marked distinction between a false imprisonment or arrest caused by an agent for the purpose of protecting property, or recovering it back, and an arrest or imprisonment caused for the purpose of punishing an offender for an act already done. Ordinarily there is no implied authority in a servant having the custody of property, to take such steps as the thinks fit to punish a person who he erroneously supposes has committed a crime against the property, and the trend of decision is against holding the master liable when the arrest has been made after the supposed crime has been committed, and not for the protection of his property or interests. In such cases the agent is presumed to have **[***9]** **[**761]** acted on his own account, for the vindication of justice, since his agency relates solely to the property, and the act of punishing the offender is not anything done with reference to it." (Citing authorities.) "However, there is clearly an implied authority to do all things that may be proper and necessary for the protection of the property (*Carter v. Howe Mach. Co. [1879], 51 Md. 290, 34 Am. Rep. 311);* and it has been held that where a servant has reason to believe that property has actually been stolen, and that he can recover it by taking the supposed thief into custody, and the evidence shows beyond question that the object which the servant had in view in procuring the arrest of the plaintiff was not to vindicate public justice, but to recover the property, or charges due thereon, the servant is acting within the scope of his employment and the limits of the implied authority, and the master is liable, however erroneous, mistaken, or malicious **[*480]** the act may be. *Cameron v. Pacific Exp. Co. (1892), 48 Mo. App. 99.* See *Allen v. London & S.W.R. Co. (1870), L.R. 6 Q.B. (Eng.) 65, 40 L.J.Q.B.N.S. 55, 23 L.T. N.S 612, 19* Week, Rep 127, 11 Cox. C.C. 621. For **[***10]** other cases holding that the employer is liable when an employee falsely arrests a person in protecting the property of the principal or corporation when the person falsely arrested had none of the property, see *Field v. Kane, 99 Ill. App. 1; Knowles v. Bullene, 71 Mo. App. 341; Ataples v. Schmid, 18 R.I. 224, 26 Atl. Rep. 193, 19 L.R.A. 824."*

In the case from which this quotation is taken, the defendant corporation was sued for damages for false imprisonment alleged to have been caused by one of the clerks in defendant's grocery store. In the case at bar we are dealing with the acts and conduct of the manager of the store, and while the declaration omits any allegation to the effect that the acts and conduct of said manager were done in pursuance of any effort to recover possession of any property which the plaintiff had obtained from the store in exchange for the five dollar bill which the plaintiff had tendered in payment of goods purchased or attempted to be purchased, it does allege that it was the duty of said manager to guard the interests of the defendant corporation against the passing of spurious coin and other misdemeanors liable to result in monetary loss to his employers, **[***11]** and that, acting in his capacity as such manager, he inspected the five dollar bill tendered by the plaintiff, falsely pronounced it to be counterfeit, and caused the plaintiff to be detained in the store and given into the custody of a policeman, etc. Our conclusion is that neither of the counts of the declaration were subject to demurrer on the ground that the same failed to show that Faircloth was acting within the scope of his authority as manager of the store, and that, under the facts alleged, the declaration failed to **[*481]** show that the defendant corporation was legally liable for any damage caused by the acts of said manager which the declaration complains of.

The second count of the declaration purported to be a count for malicious prosecution. However, the demurrer interposed thereto was upon practically the same grounds as those upon which the demurrer to the first count was based. We have already dealt with those grounds dealing with the question of the defendant's liability for the acts of its store manager, which are common to both counts. But the demurrer to the second count also contained this ground: that "said count states no cause of action against **[***12]** this defendant." Such a general ground of demurrer is not a compliance with the statute, which requires the substantial matters of law intended to be argued to be stated, and will not avail, unless, upon a bare inspection of the pleading demurred to, it should be found so faulty and defective as to constitute no cause of action, or defense, as the case may be. *Heathcote v. Fairbanks, Moss & Co., 53 So. 950, 60 Fla. 97; Wauchula Development Co. v. Peoples Stockyards Bank, 86 Fla. 298, 98 So. 220.* The fact is that the second count contains allegations of specific facts, which are substantially the same as the allegations of facts contained in the first count, and hence these allegations, if extricated from the legal conclusions of the pleader to which they are attached, might be sufficient to substantially charge *false imprisonment,* but they were not, under our decisions, on even a cursory examination thereof, sufficient to state a cause of action for *malicious prosecution,* which was the purported purpose of this count. The "summoning of a policeman and delivering the plaintiff to his custody and informing the policeman that the plaintiff had attempted to pass a counterfeit **[***13]** five dollar bill" was not the commencement of a judicial proceeding, and did not involve **[*482]** the issuance **[**762]** of legal process, so as to constitute malicious prosecution; not did the additional allegations that this was done maliciously and without probable cause, and that this so called "prosecution terminated in favor of the plaintiff upon inspection of the five dollar bill by the

proper officers of the City of Pensacola who determined the same to be genuine," supply the defect, or show that any *judicial proceeding* was terminated in plaintiff's favor.

In the case of *Tatum Bros. Real Estate & Inv. Co. v. Watson, 92 Fla. 278, 109 So. 623,* this court held that:

"The gist of the action of malicious prosecution is that plaintiff has been without probable cause and maliciously made the subject of legal process resulting in his damage.

"An action for maliciously putting the law in motion lies in all cases where there is a concurrence of the following elements; (1) The commencement or continuance of an original criminal or civil judicial proceeding. (2) Its legal causation by the present defendant against plaintiff who was defendant in the original proceeding. **[***14]** (3) Its *bona fide* termination in favor of the present plaintiff. (4) The absence of probable cause for such proceeding. (5) The presence of malice therein. (6) Damage conforming to legal standards resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action."

To like effect see *Duval Jewelry Co. v. Smith, 102 Fla. 717, 136 So. 878,* 38 C.J. 386-387; and *Fisher v. Payne, 93 Fla. 1085, 113 So. 378.* In the last cited case, this Court dealt with some of the distinctions between false imprisonment and malicious prosecution, in the course of which it was said that "False imprisonment is the unlawful restraint of a person contrary to his will," to recover damages for which an action of trespass must be brought, the gist of which is the unlawful detention of the plaintiff. See **[*483]** also 11 R.C.L. 791-793, and Crandall's Fla. Common Law Prac., Section 115.

In 25 C.J. 444-447, it is well said:

"Although not always observed, the distinction between malicious prosecution and false imprisonment is fundamental. But briefly, the essential difference between a wrongful detention for which malicious prosecution will lie, and one for which **[***15]** false imprisonment will lie, is that in the former the detention is malicious but under the due forms of law, whereas in the latter the detention is without color of legal authority. In malicious prosecution plaintiff must allege and prove malice and want of probable cause and the termination of the proceeding favorably to plaintiff, whereas in false imprisonment the allegation of want of probable cause is not essential, and the burden is on defendant to prove probable cause as a defense or in mitigation. Malice is material only on the issue of damages, and the termination of the proceeding is not material. If the imprisonment is under legal authority it may be malicious but it cannot be false. This is true where legal authority is shown by valid process, even if irregular or voidable. Void process will not constitute legal authority within this rule."

By overruling the demurrer to this defective count, which ruling we deem to have been erroneous, the element of malice, which was not mentioned in, nor essential to, the first count, was expressly injected into the pleadings in the case, and this issue with regard to malicious prosecution, without probable cause, was submitted **[***16]** to the jury, and charged upon by the court. Thus one of the grounds of the motion for new trial was the giving by the Court of charge No. 1 requested by the plaintiff, which was:

"The court charges you that the malice charged in the second count of the declaration does not necessarily mean **[*484]** personal malevolence or ill-will, but merely means that state of mind wherein one willfully or recklessly does a wrongful act to the injury of another, and the jury in such cases may in their discretion infer the existence of malice from the institution of a criminal proceeding when probable cause so to do does not exist."

The court also refused to direct a verdict in favor of the defendant on this second count, made when the taking of testimony was closed, although the evidence was not sufficient to prove a malicious prosection as thereby attempted to be charged, nor indeed was it sufficient to prove actual malice under the first count, even if it had been expressly charged therein.

The court sustained demurrers to certain of defendant's pleas, but those pleas which were held good against demurrer were sufficient to permit the defendant to present to the court and jury all defenses [***17] which it endeavored to present by evidence offered, including the defenses attempted to be set up in the pleas which went out on **[**763]** demurrer. We have carefully considered these pleas, the demurrers thereto, and the court's rulings thereon, and our conclusion is that no harmful or reversible error appears.

Defendant in error contends that where the verdict is general, as it is here, it will not be set aside on motion for a new trial if one sufficient count of the declaration was sustained by the evidence; citing 46 C.J. 192, and cases therein cited; also citing Section 4501 of the Compiled General Laws of 1927. This later section, and the one preceding it, relate to motions in arrest of judgment. Said Section 4501 provides, among other things, that no judgment after the verdict of the jury, shall be stayed or reversed for any faulty count in the declaration where the same declaration contains one count which is good, or for any imperfection, omission, defect or lack of form in any pleading, **[*485]** not affecting the merits of the cause; unless the party making the objection was injured

by the irregularity, or unless the objection was made before the returning of the [***18] verdict.

As above shown, there was a demurrer interposed to the second county, also a motion for a directed verdict in favor of the defendant on that count, and an exception taken to certain charges which were given with relation to that count which were not applicable to the first count, and which tended to the prejudice of the interest of the defendant to a trial of the issues raised by the first count and the pleas interposed thereto.

It is quite generally held that if defects or insufficiencies of the pleadings do not affect the determination of the case upon the merits or prejudice the substantial rights of the opposite party, they afford no basis for a reversal. 5 C. J.S. page 846.

And on page 861 of the same work it is said that: "Error in overruling a demurrer is harmless only where there are circumstances which show that the fact that the pleading was permitted to stand could have had no effect on the final result." Numerous cases are cited in support of this general principle, which principle appears to be recognized by the language of the latter part of Section 5401 C.G.F.

Applying these principles to the rulings above referred to, relating to the second count [***19] of the declaration, our conclusion is that harmful error was committed in overruling the demurrer to, and later declining to instruct a verdict for defendant on said second count, and the giving of charges relating to malice based thereon, which requires a reversal of this case.

Generally speaking, there are but two kinds, of damages which are recoverable in actions of tort -- compensatory and punitive.

[*486] In an action for malicious prosecution, exemplary or punitive (sometimes called vindictive) damages are recoverable where actual malice and want of probable cause are shown, or where the legal proceedings complained of were commenced under circumstances of oppression, wantonness, or a reckless disregard of plaintiff's rights. 38 C.J. 448-449.

In an action for false imprisonment, which may be brought regardless of whether there was, or was not, malice, the elements of recoverable *compensatory* damages may include bodily injuries or physical suffering, which are the proximate result of the unlawful imprisonment, or illness caused thereby; physical inconvenience and discomfort suffered by reason of the conditions of the place of confinement; loss of time, and losses [***20] sustained in the business or employment of the plaintiff; expenses incurred as a result of the unlawful imprisonment; mental suffering endured because thereof, such as embarrassment, humiliation, deprivation of liberty, disgrace and injury to the feelings, of the person unlawfully imprisoned, as well as injury to his reputation, resulting therefrom. 25 C.J. 556-560. In this case the elements charged are embarrassment, humiliation and deprivation of liberty. In the case of *Smith v. Bagwell, 19 Fla. 117,* this Court held:

"Compensatory damages are defined as such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses, and bodily pain and suffering. Exemplary, vindictive or punitory damages are such as blend together the interests of society and of the aggrieved individual, and are not only a recompense to the sufferer but also a punishment to the offender and an example to the community."

In the case of *Winn & Lovett Grocery v. Archer, 126 Fla. 308,* [*487] *171 So. 214,* this Court, speaking through Mr. Justice DAVIS, said:

[**764] "Exemplary damages are given solely as a punishment where torts are committed with fraud, actual [***21] malice or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. Exemplary or punitive damages are therefore damages *ultra* compensation, and are authorized to be inflicted when the wrong done partakes of a criminal character, though not punishable as an offense against the State, or consists of aggravated misconduct or a lawless act resulting in injury to plaintiff, when sought to be redressed by a civil action for the tort.

"Exemplary or punitive (sometimes called vindictive) damages are assessable dependent on the circumstances showing moral turpitude or atrocity in the defendant's conduct in causing an injury that is wanton and malicious or gross and outrageous to such an extent that the measured compensation of the plaintiff should have an additional amount added thereto as 'smart money' against the defendant, by way of punishment or example as a deterrent to others inclined to commit similar wrongs." * * *

"In order to recover exemplary or punitive damages the declaration must allege some general facts and circumstances of fraud, malice, gross negligence or oppression [***22] tending to show plaintiff's right to recover such damages in addition to damages by way of compensation. But punitive or exemplary damages need not be described or demanded in the declaration by that name, in order to be recoverable." (Citing many authorities.)

See also 25 C.J. 562, where it appears that circumstances of aggravation attending the tort sued for, may form the [*488] basis for enhancing the allowance of compensatory damages which are otherwise recoverable, which principle was recognized in *Winn & Lovett Gro-*

cery v. Archer, supra. The reason for this rule perhaps is that the aggravated character of the wrongful conduct, when attended for instance, by harsh or insulting language, or needlessly violent and oppressive measures, may well cause greater humiliation or mental pain. There was no evidence of such circumstances of aggravation in this case.

See also 11 R.C.L. 819-821.

It is not necessary to go into a discussion of the evidence in this case, except to say that there is no evidence of any express or actual malice shown. While the plaintiff did not make out a strong case by any means, there was enough evidence to submit the case to the jury upon the [***23] first count in the declaration. But the amount of the verdict is probably larger than would have been allowed if the case had been tried on that count alone. While the store manager may have been overzealous in his conduct, when the suspicious looking five dollar bill was brought to his attention, and the taking of the young lady plaintiff to the police station for the bill to be inspected was not justifiable, the conduct of neither the manager nor the policeman was discourteous nor attended by "circumstances of aggravation," and the court's charge with relation to that element of enhancement of damages was not justified by the evidence.

For the reasons above pointed out the judgment of the court below will be reversed and the cause remanded.

LEXSEE 147 F.SUPP2D 1334

FOREST CARD, Plaintiff vs. MIAMI-DADE COUNTY FLORIDA, Defendant

CASE NO. 98-0009-CIV-JORDAN

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

147 F. Supp. 2d 1334; 2001 U.S. Dist. LEXIS 7134

May 24, 2001, Decided
May 29, 2001, Filed

DISPOSITION: [**1] County's motion for summary judgment GRANTED and Mr. Card's cross-motion DENIED.

COUNSEL: For Plaintiff: Jeffrey Norkin, Esq., Miami, Fl.

For Defendant: Jason Bloch, Esq., Stephen P. Clark, Miami, FL.

JUDGES: Adalberto Jordan, United States District Judge.

OPINIONBY: Adalberto Jordan

OPINION: [*1337]

ORDER GRANTING MIAMI-DADE COUNTY'S MOTION FOR SUMMARY JUDGMENT

Forest Card sues Miami-Dade County for common law false imprisonment and violation of his civil rights under *42 U.S.C. § 1983*. He alleges that, after his arrest in 1993 for reckless driving while under the influence of alcohol, he languished in jail for 27 days waiting for a court-ordered psychological evaluation that was never performed. He further contends that his continued detention was caused by the County's lack of a policy or procedure to ensure timely psychological evaluations for inmates in its custody. Federal jurisdiction exists pursuant to *28 U.S.C. § § 1331* & 1367.

The County has moved for summary judgment on both claims. Mr. Card, in turn, has filed a cross-motion for partial summary judgment on liability. Because no reasonable jury could find that the County was deliberately indifferent [**2] to Mr. Card's constitutional rights, or that the County falsely imprisoned Mr. Card, the County is entitled to judgment as a matter of law. Accordingly, the County's motion for summary judgment [D.E. 91] is GRANTED, and Mr. Card's cross-motion [D.E. 88] is DENIED. n1

n1 At calendar call, I informed counsel that I was denying the County's motion on Mr. Card's § 1983 claim. But after further reviewing *Board of County Commissioners v. Brown, 520 U.S. 397, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997)*, and *Gold v. City of Miami, 151 F.3d 1346 (11th Cir. 1998)*, I conclude that the § 1983 claim, like the common law false imprisonment claim, cannot survive summary judgment.

I. RELEVANT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter [**3] of law." *Fed. R. Civ. P. 56(c)*. A material fact is one that might affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. Where the nonmoving party fails to prove an essential element of its case for which it has the burden of proof at trial, summary judgment is warranted. *See Celotex Corp. v. Catrett,* [*1338] *477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Hilburn v. Murata Elecs. North Am., Inc., 181 F.3d 1220, 1225 (11th Cir. 1999)*.

II. RELEVANT FACTS

On December 20, 1993, Mr. Card was arrested in Miami-Dade County by a City of Miami police officer for reckless driving while under the influence of alcohol. *See* Arrest Form [D.E. 90, Exh B] (Dec. 20, 1993). Mr. Card's blood alcohol level was within the legal limits at .040 and .042 on a breathalyser test administered by the Miami Police Department. *See* Breath Test Result Affidavit [D.E. 90, Exh. C] (Dec. 20, 1993). Mr. Card was subsequently processed by the County Department of Corrections into a jail facility. *See* Jail Booking Record at 1 [D.E. 90, Exh. D] (Dec. 20, 1993). [**4]

A. MR. CARD'S MEDICAL SCREENING AND INITIAL APPEARANCE

As part of the routine intake procedure, the County conducted a medical screening of Mr. Card. *See* Medical History and Physical Assessment [D.E. 90, Exh. E] (Dec. 20, 1993). The County contends, and some documents indicate, that Mr. Card was voicing suicidal thoughts, and was therefore placed in protective custody. *See id.*; Progress Record [D.E. 92, Exh. D] (Dec. 20, 1993); Affidavit of Kim Smith P 2 [D.E. 101] (August 17, 2000). Mr. Card disputes this contention, asserting that he had no suicidal thoughts, much less voiced any in the medical screening. *See* Deposition of Forest Card at 33-34 [D.E. 36, Exh. 1] (July 22, 1998). In any event, the County placed Mr. Card on suicide watch. *See* County's Statement of Facts P 5 [D.E. 93] (July 14, 2000).

Bond was set at a hearing on December 21, 1993, but Mr. Card was unable to post it. According to court records, Judge Pineiro appointed a public defender to represent Mr. Card. The public defender demanded discovery on behalf of Mr. Card and requested a jury trial. *See* Appendix [D.E. 69, Exh. D] (Dec. 21, 1993). Mr. Card, though, maintains that he [**5] never went before Judge Pineiro and was not provided with counsel at that time. *See* Card Deposition at 37, 42, 105. Two additional charges - failure to sign a summons and drunk and disorderly conduct - were filed against Mr. Card on December 23, 1993, and were both dismissed for time served the following day. *See* Plaintiff's Statement of Facts P 5 [D.E. 89] (Jul. 14, 2000).

B. THE ORDER FOR A PSYCHOLOGICAL EVALUATION

On December 29, 1993, Mr. Card appeared before Judge Deehl, who set the case for trial, and ordered Mr. Card released on his own recognizance. *See id.* P 6. An unidentified party, however, moved for a psychiatric evaluation of Mr. Card. *See id.* Without holding a hearing on this request, Judge Deehl ordered that Mr. Card be detained pending an inpatient psychiatric evaluation, which was to be arranged immediately. The examination, pursuant to Judge Deehl's order, was to take place at the County jail or at Jackson Memorial Hospital ("JMH"), "within the discretion" of JMH's staff doctors. n2 The sheriff was ordered to produce Mr. Card [*1339] for the evaluation, and following the evaluation, JMH's staff doctors were to submit a report. Judge Deehl's evaluation [**6] order indicates at the bottom that copies of the order were sent to the Department of Corrections, JMH, and the staff doctors. *See* Order for Psychiatric Evaluation [D.E. 90, Exh. F] (Dec. 29, 1993). The booking records from the Department of Corrections contain an entry for Judge Deehl's December 29, 1993, order, together with the phrase "ROR" (released on own recognizance), thereby indicating that the Department was aware of the order. *See* Jail Booking Record at 1.

n2 JMH is part of the County's Public Health Trust, a corporate public body which, among other things, makes recommendations to the County concerning the provision of medical care. *See* Miami-Dade County Code § 25A-1 *et seq.* The County provides funding to the Trust "for the cost of services and supplies provided to medically indigent persons." *See id.* at § 25A-5(a).

The County contends that Mr. Card was found to be competent in a psychiatric examination conducted two weeks later, on January 12, 1994. *See* Evaluation [D. [**7] E. 90, Exh. K] (Jan. 12, 1994). Mr. Card, on the other hand, maintains that no medical examination was ever conducted. *See* Card Deposition at 84. While he was in custody, Mr. Card did not file any grievances or lodge any complaints concerning his continued detention. *See id.* at 92-94. Nor, apparently, did his public defender.

On January 24, 1994, Judge Deehl signed an order for Mr. Card's immediate release, and Mr. Card was released the following day. The charges against Mr. Card were nolle prossed by the state attorney in 1996.

C. THE ROLE OF MENTAL HEALTH ADMINISTRATOR'S OFFICE

Bertha Borge, the Assistant Director of the Mental Health Administrator's Office for Florida's Eleventh Judicial Circuit Court, testified that her office is responsible for coordinating psychiatric evaluations of pre-trial detainees such as Mr. Card. *See* Affidavit of Bertha Borge PP 1-2 [D.E. 92, Exh. H] (July 17, 2000). According to Ms. Borge, her office contacts JMH, which assigns the case to a staff doctor, who then individually schedules an evaluation. *See id.* P 3. Ms. Borge says that the County Department of Corrections has no role in scheduling such evaluations and is only [**8] responsible for facilitating the evaluations by making the detainee available. *See id.* In Ms. Borge's view, the lag between the

December 29, 1993, order and the January 12, 1994, evaluation of Mr. Card was not unreasonable. *See id.* P 5.

D. THE POSITION OF THE COUNTY DEPARTMENT OF CORRECTIONS

Ronald Kovacs, the Chief of Special Services for the County Department of Corrections, testified that the Department has no control over the provision of court-ordered psychiatric evaluations. *See* Deposition of Ronald Kovacs at 4 [D.E. 90, Exh. J] (July 5, 2000). John Gagliardi, a Miami-Dade Corrections Captain and Bureau Supervisor, also testified that the Department is not responsible for ensuring that court-ordered psychiatric evaluations are carried out. *See* Deposition of John Gagliardi at 3, 9 [D.E. 90, Exh. I] (July 5, 2000). Captain Gagliardi, answering a hypothetical question, agreed that it would not be the Department's responsibility if a court-ordered evaluation that was supposed to be performed within five days was not performed for two years. *See id.* at 10.

III. THE CIVIL RIGHTS CLAIM

Mr. Card asserts that the County is responsible for his continued **[**9]** detention, **[*1340]** which violated his constitutional rights under the Fourth, Eighth, and Fourteenth Amendments. Mr. Card alleges that his rights were violated by the 27-day detention pending the psychiatric evaluation, as well as the one-day delay in processing his release. Mr. Card points out that Judge Deehl ordered his evaluation to take place "immediately," and that the County should have, at a minimum, complied with Florida's involuntary commitment provisions.

Because I find that Mr. Card's constitutional rights were violated, if at all, by the 27-day detention, that is the focus of my analysis. Mr. Card's claim that the one-day delay in processing his release amounts to a due process violation is simply not colorable. *See Baker v. McCollan, 443 U.S. 137, 145, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979)* (finding that three-day detention due to mistaken identification was not unconstitutional).

The County seeks summary judgment on Mr. Card's civil rights claim. First, the County argues that Mr. Card's constitutional rights were not violated, and that even if they were, it was not the County which violated them. Second, the County asserts that it was not acting pursuant **[**10]** to an official policy or custom, and therefore municipal liability cannot be imposed under § 1983.

As the County correctly points out, the rights of pretrial detainees are properly evaluated under the due process clause of the Fourteenth Amendment, rather than the Fourth or Eighth Amendments. *See City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244, 77 L. Ed. 2d 605, 103 S. Ct. 2979 (1983); Lancaster v. Monroe County, 116 F.3d 1419, 1425 n.6 (11th Cir. 1997); Wilkins v. May, 872 F.2d 190, 192-93 (7th Cir. 1989).* To impose liability on the County for failing to act to preserve a constitutional right under § 1983, Mr. Card must establish (1) that his constitutional rights were violated; (2) that the County had a policy or custom that constituted a deliberate indifference to his constitutional right; and (3) that the violation was caused by the policy or custom. *See City of Canton v. Harris, 489 U.S. 378, 388, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989). See also Blumel v. Mylander, 954 F. Supp. 1547, 1554 (M.D. Fla. 1997)* (applying these factors).

Because of the summary judgment posture, **[**11]** I assume several facts in Mr. Card's favor. First, I assume that Mr. Card was never provided any hearing concerning the need for a psychological evaluation. Second, I assume that no one ever performed a psychological evaluation on Mr. Card. Third, I assume that Mr. Card was not provided with counsel prior to his release on January 25, 1994.

A. PROCEDURAL DUE PROCESS n3

> n3 The County's motion for summary judgment addresses both substantive and procedural due process. Neither Mr. Card's complaint nor his cross-motion for summary judgment, however, raise a substantive due process claim. Accordingly, I will analyze Mr. Card's § 1983 claim only within the rubric of procedural due process.

Had it not been for the court-ordered psychological evaluation, Mr. Card would have been released on December 29, 1993. There can be no doubt that Mr. Card's continued detention through January 24, 1994, for an evaluation that I assume (for summary judgment purposes) did not take place, affected a liberty interest protected **[**12]** by the Fourteenth Amendment. *See, e.g., Vitek v. Jones, 445 U.S. 480, 491-94, 100 S. Ct. 1254, 63 L. Ed. 2d 552* **[*1341]** *(1980)* ("The transfer of a [convicted] prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections."); *Jackson v. Indiana, 406 U.S. 715, 738, 32 L. Ed. 2d 435, 92 S. Ct. 1845 (1972)* ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."); *Lynch v. Baxley, 744 F.2d 1452, 1463 (11th Cir. 1984)* ("We forbid the use of jails for the purpose of detaining persons awaiting involuntary commitment proceedings, finding that to do so violates those persons' substantive and procedural due process rights."). The due process clause is therefore implicated by Mr. Card's prolonged detention. *See generally Zinermon v. Burch, 494 U.S. 113, 127, 108 L. Ed. 2d 100, 110 S. Ct.*

975 (1990) ("The Court has usually held that the Constitution requires some kind of a hearing *before* the state deprives a person of liberty or property.") (emphasis in original).

To determine whether a procedural due process violation **[**13]** occurred, a court must decide "what process the state provided and whether it was constitutionally adequate." *Id. at 126.* "This inquiry... examine[s] the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by any statute or tort law." *Id.*

For summary judgment purposes, I assume, as I must, that Mr. Card was never provided any sort of a hearing to determine whether a psychological evaluation was warranted, and was never given a psychological evaluation. The County nevertheless argues that Mr. Card cannot prevail under a procedural due process theory because post-deprivation state law remedies are available for him to vindicate his rights. In determining the relevance of such remedies, the initial question is whether the conduct complained of was random and unauthorized. *See, e.g., Daniels v. Williams, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)* ("[The due process clause] is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."). If the alleged violation was random and unauthorized, post-deprivation **[**14]** remedies are the only ones the state can reasonably provide, and thus are the only process due under the Constitution. See *Zinermon, 494 U.S. at 128; Parratt v. Taylor, 451 U.S. 527, 538-39, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981).* If the violation is neither random nor unauthorized, pre-deprivation remedies are practicable and post-deprivation remedies become constitutionally irrelevant. *See Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-35, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982).*

When a government actor deprives an individual of liberty by violating a state law which, if complied with, would have provided pre-deprivation process, that person has suffered a procedural due process violation. *See Zinermon, 494 U.S. at 138.* Because Mr. Card was deprived of his liberty pending a court-ordered psychological evaluation, and because Florida law suggests that procedural deprivation remedies were available, his detention was not random or unauthorized. *Id. at 135-38.*

Florida has a statutory scheme governing pre-trial detention and release. The presumption is in favor of pre-trial release, unless the defendant **[**15]** has previously **[*1342]** violated conditions of release, has threatened any victim, witness, juror, or judicial official, is charged with trafficking controlled substances, or is charged with a "dangerous crime." *FLA. STAT. § 907.041(4)(b).* Even if the defendant meets one of these four criteria, the court must find that no condition of release would sufficiently address the problem. A court may only order pre-trial detention after a hearing at which the state bears the burden of demonstrating the need for pre-trial detention. *See* Fla. R. Crim. P. 3.131(b)(1). Furthermore, "unless charged with a capital offense or an offense punishable by life imprisonment *and* the proof of guilt is evident or the presumption great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on reasonable conditions." § 3.131 (a) (emphasis added). In determining appropriate conditions of release, if any, the court may take into consideration the defendant's mental condition, among other factors. *See* § 3.131(b)(3). As noted earlier, Judge Deehl allowed Mr. Card to be released on his own recognizance, but subsequently ordered him held pending a psychological **[**16]** evaluation.

Rule 3.210 of the Florida Rules of Criminal Procedure governs competency standards applied to criminal defendants about to stand trial. Rule 3.210 provides that, if at any material stage of the proceeding the court has reasonable ground to believe that the defendant is incompetent, it shall enter an order setting a hearing, to be held within 20 days, and requiring the examination of the defendant by at least two experts. *See* Fla. R. Crim. P. 3.210(b). A defendant who is on pre-trial release may be ordered to attend the examination as a condition of release. *See* § 3.210(c). A defendant may be taken into custody pending the evaluation if the court determines that the defendant will not submit to, or is not likely to attend, the evaluation. *See id.* A motion for an evaluation shall not otherwise affect the defendant's right to release. *See id.*

It is unclear from this sparse record whether the request by the unidentified party for a psychological evaluation of Mr. Card was made under Rule 3.210. What is abundantly clear is that this procedure was not followed at all. There is no finding on the record that Mr. Card was unwilling to attend a non-custodial psychiatric **[**17]** evaluation. Moreover, there is no evidence that Judge Deehl or any other judge held a competency hearing, and there is no indication that the evaluation was aimed at determining Mr. Card's competence to stand trial.

Florida law also provides a mechanism for the involuntary commitment of the mentally ill, commonly referred to as the Baker Act. *See FLA. STAT. § § 394.451 et seq.* The Act protects the rights of those committed to mental institutions against their will by requiring a competency evaluation within 72 hours. *See* § 394.463. The Act mandates such an evaluation, even for patients who are unable to make a determination that evaluation is necessary. *See* § 394.463(1)(a).

Again, there is no evidence that anyone, including the County, complied with the Baker Act. Nothing in the record indicates that Mr. Card was asked whether he would submit to an evaluation, and there is no suggestion that he was unable to make that determination for himself. More importantly, Mr. Card was not evaluated within 72 hours. In fact, even assuming the County's version of events is correct, almost three weeks passed before the evaluation took place. [*1343]

As best I can tell from the record [**18] before me, Mr. Card was not provided or offered the procedures set forth in § 907.041, Rules 3.131 or 3.210, or Florida's Baker Act. Although none of these provisions speak directly to Mr. Card's situation, they do provide a guide as to the available policies and laws of the state of Florida in dealing with pre-trial detainees held solely pending a psychiatric evaluation. Because Mr. Card's detention was not random or unauthorized under *Zinermon*, I find that there is an issue of fact as to whether Mr. Card was deprived of his right to procedural due process.

B. MUNICIPAL LIABILITY UNDER § 1983

Although Mr. Card's procedural due process rights may have been violated, it does not necessarily follow that a trial is warranted. Mr. Card has sued only the County, and I now turn to the question of whether this record contains sufficient evidence to permit the municipal liability claim to go to a jury. The question is whether Mr. Card has amassed enough evidence to convince a jury that the County is legally responsible for any constitutional violation.

It is well settled, and undisputed here, that municipalities and counties can be sued directly under *42 U.S.C. § 1983.* [**19] *See Monell v. Department of Social Servs., 436 U.S. 658, 690, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).* Municipalities are not subject to liability on a *respondeat superior* theory, as only direct liability may be imposed. *See id. at 691.* Municipalities can be held liable only if the unconstitutional action implements an official municipal policy or is pursuant to a governmental custom. *See id.* Although § 1983 does not contain an independent state of mind requirement, the Supreme Court has held that a municipality at the very least must act "deliberately" in order for liability to be imposed. *See Board of County Commissioners v. Brown, 520 U.S. 397, 404, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997)* ("[A] plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.").

"A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality." *Sewell v. Town of Lake Hamilton, 117 F.3d 488, 489 (11th Cir.1997)* [**20] (citing *Monell, 436 U.S. at 690-91).* A custom is a practice that is so settled and permanent that it takes on the force of law. *Id.* (citing *Monell, 436 U.S. at 690-91).* "'To establish a policy or custom, it is generally necessary to show a persistent and wide-spread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality.'" *Wayne v. Jarvis, 197 F.3d 1098, 1105 (11th Cir. 1999)* (quoting *Depew v. City of St. Marys, 787 F.2d 1496, 1499 (11th Cir.1986)).*

Municipal liability may also be imposed when the absence of a policy establishing appropriate procedures to ensure against violation of a person's constitutional rights results in a violation of those rights. *See, e.g., Rivas v. Freeman, 940 F.2d 1491, 1495 (11th Cir. 1991)* (finding liability where county failed to establish procedures regarding identification of arrestees, warrantless searches, and computer-based information checks). Mr. Card, relying on *Rivas*, alleges that the [*1344] County did not have policies or procedures to ensure that court-ordered psychiatric evaluations [**21] would be timely performed.

To establish the absence of a policy under *Rivas*, Mr. Card has submitted the testimony of Mr. Kovacs, the Chief of Special Services for the Department of Corrections, and Mr. Gagliardi, a Miami-Dade Corrections Bureau Supervisor Captain. Chief Kovacs testified that the Department of Corrections has no control over the provision of court-ordered psychiatric evaluations. Captain Gagliardi testified that the Department has no responsibility to see that court-ordered psychiatric evaluations are carried out. Answering a hypothetical question, Captain Gagliardi agreed that it would not be Corrections' responsibility if a court-ordered evaluation that was supposed to be performed within five days was not performed for two years.

The County argues that it was neither equipped nor responsible for arranging Mr. Card's evaluation or ensuring that it was performed. The County relies on the testimony of Ms. Borge, who testified that the Mental Health Administrator's Office is responsible for coordinating court-ordered psychiatric evaluations of criminal defendants. The County asserts that Ms. Borge's affidavit demonstrates that it is the Eleventh Judicial Circuit, [**22] rather than the County, that bears responsibility for ensuring that such evaluations are timely performed. The County's position finds some support in *Brooks v. George County, 84 F.3d 157, 168-69 (5th Cir. 1996)* (upholding grant of summary judgment in favor of court clerk in § 1983 action by a plaintiff who had been held in custody eight months after charges against him dropped -- although the plaintiff claimed that the clerk had a policy of failing to send dismissal order to defen-

dants or their counsel, the judge, and not the clerk, was the policy maker for the county court system).

Although Ms. Borge states that her office arranges and coordinates the evaluations, I am unconvinced on this record that the County is relieved of all constitutional responsibility for ensuring that inmates over whom it has physical custody are moved as promptly as possible through the system. This is particularly the case due to the fact that the psychiatric evaluations are conducted by staff doctors at JMH, which is part of the County's Public Health Trust. The County has put forth no evidence regarding any policies or procedures it has adopted to prevent detainees like Mr. Card from [**23] falling through the cracks and languishing in jail while awaiting an evaluations. It is possible that the County has such policies or procedures, but none have been proffered.

Mr. Card cites *Blumel, 954 F. Supp. at 1547,* for the proposition that it is a municipality's responsibility to ensure that an inmate is not held in violation of his or her constitutional rights. The plaintiff in *Blumel* was held for 30 days without a probable cause hearing, and suffered a deprivation of his right to procedural due process. *See id. at 1555-56. Blumel* held that the county's official policymaker was responsible for the prolonged detention, and specifically distinguished the situation in which a prisoner is held pursuant to a judicial commitment order. *See id. at 1561* (citing *United States ex rel. Bailey v. Askew, 486 F.2d 134, 135 (5th Cir. 1973)* ("[A] jailer cannot be held liable for an error in an order of commitment which is patently proper."); *Tucker v. City of Montgomery Bd. of Comm'rs, 410 F. Supp. 494, 511 (M.D. Ala. 1976)* (involving a city jail warden who "accepted plaintiffs for incarceration [**24] pursuant to judicial orders of commitment"); [*1345] *State of La. ex rel. Purkey v. Ciolino, 393 F. Supp. 102, 108 (E.D. La. 1975)* (deeming a § 1983 claim against a state prison warden frivolous because "prison wardens are immune from . . . damages for merely asserting custody over a prisoner pursuant to a valid commitment order")). That, of course, is the situation here, as Mr. Card remained in custody pursuant to Judge Deehl's order. *Blumel* is therefore distinguishable.

Mr. Card also relies on the Eleventh Circuit's decision in *Ancata v. Prison Health Services, 769 F.2d 700, 705 (11th Cir. 1985),* to support his argument that the County cannot avoid liability in a § 1983 suit by delegating or contracting for a prisoner's medical care. *Ancata* held that municipal governments have a nondelegable duty to provide medical care to incarcerated individuals, but the Eleventh Circuit noted that any constitutional tort for which a plaintiff seeks redress must be the result of an official policy or custom of the contracting entity. *See id. at 705 & n.8.* The County argues that the psychiatric evaluation was not the Department of Corrections' [**25] responsibility, and therefore *Ancata* is not applicable. I conclude, however, that this record is insufficient to determine whether the County, as the umbrella over the Department of Corrections, is ultimately responsible for ensuring compliance with court evaluation orders. Ms. Borge's affidavit indicates that the Mental Health Administrator's Office is responsible for arranging the evaluation, but there is no evidence of any policy or procedure the County may have to ensure that such arrangements are made. *See* Borge Affidavit P 2. Furthermore, the fact that the Department of Corrections may not have been responsible for *arranging* the evaluation does not lead to the inevitable conclusion that the County had no responsibility to ensure that its inmates' constitutional rights were not violated by JMH, the entity in the Public Health Trust ultimately responsible for evaluating inmates. *See Ancata, 769 F.2d at 706 & n.11.* It is no answer to an inmate in Mr. Card's position that the County, the entity holding him against his will, has no responsibility to ensure that his constitutional rights are not violated by his continued presence in its custody.

The County [**26] further argues that to impose municipal liability, Mr. Card must show that the County knew of his alleged illegal detention, that the County was deliberately indifferent to his plight, and that there was a causal connection between the County's response to the problem and the unjustified detention. *See Sample v. Diecks, 885 F.2d 1099, 1110 (3d Cir. 1989).* In *Sample,* the plaintiff was held for nine months after he should have been released, despite his complaints to the prison's senior records officer that he was being detained after the expiration of his sentence. *Id. at 1105.* The prison, however, clearly had policies in place to calculate sentences and release dates. The problem in *Sample* was that the official charged with that responsibility failed to properly discharge his duty, which the Third Circuit agreed constituted deliberate indifference in light of the prisoner's complaints. *See id. at 1111-12* (affirming factual findings of the district court).

I agree with the County. Given the undisputed fact that the Mental Health Administrator's Office -- a part of the state court system -- is responsible for arranging psychological [**27] evaluations, the County's failure to have a policy, procedure, or system in place to make sure that inmates like Mr. Card do not fall through the cracks is not facially unconstitutional. [*1346] Thus, Mr. Card must establish, under § 1983, that the County's lack of a policy or procedure was deliberately indifferent as to its known or obvious consequences:

> Quite apart from the state of mind required to establish the underlying constitutional violation . . .a plaintiff seeking to

> establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate [his] rights must demonstrate that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. A showing of simple negligence or even heightened negligence will not suffice.

Brown, 520 U.S. at 407 (citations omitted). Deliberate indifference can be shown by "continued adherence to an approach that [policymakers] know or should know has failed to prevent tortious conduct" or by "the existence of a pattern of tortious conduct by inadequately trained employees." *Id. at 407-08. Cf. Farmer v. Brennan, 511 U.S. 825, 839-40, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994)* **[**28]** ("Subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment.").

Unfortunately for Mr. Card, there is no evidence of deliberate indifference on the part of the County. The County may have been negligent in not concerning itself with court-ordered psychological evaluations, but there is nothing to suggest that the County knew, or should have known, about the obvious consequences of not having a policy or procedure to ensure the timely evaluation of inmates. Mr. Card, for example, has not presented evidence that other inmates had previously languished in jail while awaiting psychological evaluations or that County policymakers had been made aware of the risk of such occurrences. *See Gold v. City of Miami, 151 F.3d 1346, 1351-53 (11th Cir. 1998)* (reversing jury verdict in favor of § 1983 plaintiff who alleged that city had policy of inadequate training and supervision of officers in connection with arrests made under disorderly conduct statute -- the plaintiff did **[**29]** not present evidence of prior constitutional violations or false arrests involving statute, and evidence that 15% of disorderly conduct charges in five-year period were dismissed or nolle prosed was insufficient to impose municipal liability). Because the Mental Health Administrator's Office is charged with arranging evaluations, and because pre-trial detainees like Mr. Card are normally afforded counsel who can monitor the progress of such evaluations, the risk from the failure of the County to have a policy or procedure to prevent incidents like this one is not so obvious in the abstract as to support a jury finding of deliberate indifference. *See Armstrong v. Squadrito, 152 F.3d 564, 577-79 (7th Cir. 1998)* (holding that jail's will-call system was not deliberately indifferent to detainee's substantive due process rights not to be subject to prolonged detention without court appearance, even though jail merely placed detainees' names on will-call list and left to court the responsibility of ensuring that detainees received expeditious hearing, given back-up plan by which jail accepted formal written complaints from detainees concerning their confinements).

IV. [**30] FALSE IMPRISONMENT

Mr. Card also claims that his 27-day imprisonment by the County constitutes **[*1347]** false imprisonment under Florida law. In Florida, the tort of false imprisonment is identical to the tort of false arrest. *See Rankin v. Evans, 133 F.3d 1425, 1431 n.5 (11th Cir. 1998); Weissman v. K-Mart Corp., 396 So. 2d 1164, 1164 n.1 (Fla. 3d DCA 1981).* An arrest pursuant to a valid warrant, based on probable cause, is an affirmative defense to a false arrest claim. *See Jackson v. Navarro, 665 So. 2d 340, 342 (Fla. 4th DCA 1995).* False imprisonment is detention without color of legal authority, *see id. at 341,* and occurs when "there is an improper restraint which is not the result of a judicial proceeding." *Id. at 342* (citing WILLIAM L. PROSSER, LAW OF TORTS § 119 (4th ed. 1971)).

The County contends that because the arrest was made with probable cause, a fact Mr. Card does not dispute, a claim of false imprisonment cannot lie. Mr. Card's claim, however, is that his imprisonment became unlawful after December 29, 1993 and, not upon his arrest. But it is also undisputed that, after that date, the **[**31]** County held Mr. Card pursuant to a facially valid court order -- Judge Deehl's evaluation order. While the policies or procedures the County may or may not have adopted or followed are relevant in determining whether Mr. Card may maintain his § 1983 action, they are irrelevant to whether the County falsely imprisoned him under Florida law. Because the County was holding Mr. Card pursuant to a facially valid court order after December 29, 1993, there was no false imprisonment under Florida law.

Mr. Card's situation is distinguishable from that in *Johnson v. Heinrich, 543 So. 2d 831 (Fla. 2d DCA 1989).* In *Johnson,* the plaintiff was held, after being stopped for a traffic violation, pursuant to an outstanding warrant issued in Ohio. *See id. at 832.* The next day, Ohio authorities informed the county authorities that Ohio could not make a positive identification of Mr. Johnson, and he should therefore be released. *See id.* The authorities nevertheless held Mr. Johnson for a day and a half after its receipt of Ohio's message. *See id.* The Second District found that this detention, although pursuant to arrest executed on probable cause, raised **[**32]** a question of fact as to reasonableness that could not be decided on summary judgment. *See id. at 833.* Unlike *Johnson,* there is no evidence here that the County un-

reasonably held Mr. Card after it learned that he should be released. Although the release order for Mr. Card was issued a day before he actually was released, there is no evidence that the delay was anything other than the result of normal administrative delay. n4

n4 Mr. Card was released from custody at approximately 4: 10 p.m. on January 25, 1994. *See* Jail Booking Record at 1. There is no evidence as to when Judge Deehl signed the January 24, 1994, release order, or when the jail received the release order.

V. CONCLUSION

What happened to Mr. Card is regrettable, but not every improper deprivation of liberty amounts to a constitutional violation. Although there are material issues of fact as to whether Mr. Card was deprived of his due process rights, there is no evidence from which a jury could reasonably find that **[**33]** the County's failure to have a policy to ensure timely court-ordered psychological evaluations was deliberately indifferent under § 1983. There is also no false imprisonment under Florida law.

Nevertheless, the County and its officials should not feel good about in this **[*1348]** case. Had the County developed some sort of system to prevent incidents like this one, it is unlikely that Mr. Card would have remained in custody as long as he did. It is also not comforting to have a County official opine that the Department of Corrections would not be responsible even if a court-ordered psychological evaluation was not performed for two years. *Cf. Armstrong, 152 F.3d at 579* ("A policy that ignores whether the jail has the authority for long-term confinement seems to be a policy of deliberate indifference."). The next time around, the result for the County may well be different. *Cf. Lawton v. Cochran, 695 So. 2d 1297, 1298 (Fla. 4th DCA 1997)* (reversing dismissal of § 1983 complaint filed by former detainee who alleged that, as a result of sheriff's policies and procedures, he was held for 20 months before being brought before a judge).

The County's motion for **[**34]** summary judgment [D.E. 91] is GRANTED. A final judgment will be issued by separate order.

DONE and ORDERED in chambers in Miami, Florida, this 24th day of May, 2001.

Adalberto Jordan

United States District Judge

LEXSEE 133 F.3D 1425

Doug RANKIN, Victoria Rankin, Plaintiffs-Appellants, Cross-Appellees, v. Mark EVANS, Richard Willie, Sheriff of Palm Beach County, Palm Beach County Sheriff's Department, Defendants-Appellees, Cross-Appellants.

No. 95-4744.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

133 F.3d 1425; 1998 U.S. App. LEXIS 1256; 39 Fed. R. Serv. 3d (Callaghan) 1139; 11 Fla. L. Weekly Fed. C 1033

January 29, 1998, Decided

SUBSEQUENT HISTORY: [**1] Certiorari Denied October 5, 1998, Reported at: *1998 U.S. LEXIS 4929.*

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Florida. (No. 91-8012-CIV-JAG). Jose A. Gonzalez, Judge.

COUNSEL: ATTORNEY(S) FOR APPELLANT(S): Robert L. Hinkle, Radey Hinkle Thomas, Tallahassee, FL. Donald M. Hinkle, FONVIELLE & HINKLE, Tallahassee, FL.

ATTORNEY(S) FOR APPELLEE(S): Majorie Gadarian Graham, Palm Beach Gardens, FL. Monroe A. Coogler, Jr., David J. Glatthorne, West Palm Beach, FL.

JUDGES: Before BARKETT, Circuit Judge, KRAVITCH, Senior Circuit Judge, and HARRIS, * Senior District Judge.

* Honorable Stanley S. Harris, Senior U.S. District Judge for the District of Columbia, sitting by designation.

OPINIONBY: STANLEY S. HARRIS

OPINION:

[*1428] HARRIS, Senior District Judge:

This case, like some others involving allegations of sexual abuse of a child, inevitably evokes feelings of compassion for all of the participants involved in the long-running dispute. However, obviously the issues must be resolved dispassionately.

Plaintiff-appellant Doug Rankin was arrested in late November of 1988 and charged with the sexual abuse of a child under the age of twelve. Thereafter, [**2] not only did a grand jury not indict him; it affirmatively found that he was "completely innocent." He and his wife, plaintiff-appellant Victoria Rankin, brought an action against the arresting officer, Deputy Sheriff Mark Evans, and the Palm Beach County Sheriff's Department under *42 U.S.C. § 1983,* and also made a state claim for false arrest.

At the conclusion of the evidentiary portion of the civil trial, the district judge denied defendants' motion for a directed verdict and permitted the case to go to the jury, which returned a substantial verdict for plaintiffs. Thereafter, upon defendants' motion, the district court set aside the verdict on the ground that probable cause for Doug Rankin's arrest and detention had existed as a matter of law. That ruling is before us, as is defendants' cross-appeal of the district court's conditional denial of their motion for a new trial and its denial of their motions for remittitur and to alter or amend the judgment on the state count. We affirm the district court's grant of a JNOV and dismiss the cross-appeal as moot. (In light of the cross-appeal, for clarity we often refer to the parties as plaintiffs and defendants).

I. Factual History [**3] n1

n1 In analyzing the factual history, we have viewed all facts in the light most favorable to plaintiffs and have drawn all reasonable inferences in their favor. *See Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d*

DISPOSITION: AFFIRMED. Dismissed the cross-appeal as moot.

1112, 1119 (11th Cir.), *cert. denied, 506 U.S. 832, 113 S. Ct. 98, 121 L. Ed. 2d 58 (1992).* However, this presumption in favor of plaintiffs does not apply where no jury could reasonably conclude that the evidence supported a certain factual finding or inference, despite minor conflicts in the record. *Id.* (stating that a "mere scintilla of evidence does not create a jury question; there must be a substantial conflict in evidence to create a jury question").

Plaintiffs Doug and Victoria Rankin owned and operated the Sugar Plum School House, a pre-school program located in Lake Worth, Florida. Dr. Martha Brake's three-and-a-half-year-old daughter Amber began attending Sugar Plum on November 7, 1988. On November 21, 1988, Amber made a statement to her mother, who is a child [**4] psychologist, indicating that she had been sexually abused. Dr. Brake then made an audio tape of her daughter's statement in which the child again indicated that she had been abused. That evening, Dr. Brake took her daughter to a pediatrician, Dr. Drummond, to be examined for possible evidence of abuse. During the examination, Dr. Drummond found physical signs which were consistent with sexual abuse. The next morning, Dr. Brake went to Amber's prior school--Victory Baptist--and played the tape in an attempt to get Amber readmitted to that school. At approximately nine o'clock that morning, Dr. Brake called the sheriff's department to inform it that she had proof [*1429] that her daughter had been sexually molested. Deputy Mark Evans, who was assigned to the case, called Dr. Brake and scheduled an interview with her and Amber for that morning.

Deputy Evans and a representative from the Florida Department of Health and Rehabilitation Services and Victim's Services (HRS) interviewed Dr. Brake while another officer observed Amber. Dr. Brake informed Evans that: (1) Amber had made a spontaneous statement to her which indicated that she had been molested by a person named Ba Ba Blue; (2) she had [**5] heard Amber refer to Doug Rankin as Ba Ba Blue on several occasions and had never heard her refer to anyone else by that name; (3) a teacher had informed her that children frequently called Doug Rankin Baba Loo; n2 (4) Doug Rankin worked at the school, Sugar Plum, which Amber attended; (5) the only men who had had access to Amber in the recent past were Rankin and one of Dr. Brake's coworkers; (6) she had seen Rankin on the playground with the children; (7) Amber had attended Sugar Plum for about two weeks; (8) Amber started exhibiting behavioral changes starting at the end of her first week at the school; n3 (9) Amber had used the age-inappropriate term "boobies" in reference to her chest after starting school at Sugar Plum; (10) Dr. Brake was so disturbed by Amber's behavioral changes that she tried to get her re-enrolled at her prior school, Victory Baptist; (11) Dr. Brake saw Rankin pick Amber up, and Amber hit him in response, on the day that Amber made her initial statement indicating sexual abuse; (12) it was unusual for Amber to strike an adult; (13) Dr. Brake had had an argument with Rankin regarding what she considered to be insufficient supervision of the children; (14) [**6] she had taken Amber to be examined by Dr. Drummond (their pediatrician) the day Amber made her initial statement, and he told Dr. Brake that there was physical evidence consistent with abuse; and (15) a colleague of hers who was also a child psychologist, Dr. Decharme, had seen Amber on the evening of November 21, 1988, and told Dr. Brake that Amber had indicated that she had been abused.

n2 It is uncontested that Baba Loo was a nickname used for Rankin by the children, and that Amber pronounced this name as Ba Ba Brue or Ba Ba Blue. Accordingly, we use the term "Ba Ba Blue" whenever we refer to Amber's statements regarding Baba Loo. When referring to another party's independent use of the term, we use the term "Baba Loo."

n3 Dr. Brake testified that she told Evans that Amber initially enjoyed school, but that her behavior had changed significantly by the end of the first week. She told Evans that Amber had become more withdrawn, had indicated that she did not want to go to school, had become more clingy, and had begun having nightmares.

[**7]

Dr. Brake also informed Evans that she had made an audiotape of Amber's recounting of her previous statement. Evans listened to that tape. On it, Amber stated that Ba Ba Blue had made "a hole in [her] bottom" and that he put "his fingers in [her] bottom and it pinched and it feels bad." She also indicated that, after Ba Ba Blue was finished with her, he sent her to the playground.

Officer Honholz, who had been with Amber during Evans's interview of her mother, informed Evans and Dr. Brake that Amber made a statement to him regarding the abuse.

Deputy Evans then conducted a videotaped interview with Amber in which she again indicated that a man at school named Ba Ba Blue had abused her. Prior to identifying Ba Ba Blue as her abuser, Amber named two cartoon characters in response to police questioning regarding the identity of her abuser. Baba Loo is the name of a cartoon character from a video the children

watched in school. Rankin used the term as a general nickname to refer to the children. The children, including Amber, also referred to Rankin by this nickname.

Amber also made several improbable or inconsistent statements regarding the timing of the abuse. She indicated that [**8] the abuser had used both his hand and a spoon, taken pictures of her, touched her with his genitalia, and had been naked. She also indicated that the abuse had happened both inside the school and outside on some steps.

Deputy Evans telephoned Dr. Drummond regarding Amber's physical examination. Dr. Drummond told Evans that there were several physical symptoms that could be the result of sexual abuse: (1) a fresh abrasion; [*1430] (2) an enlarged hymenal opening; and (3) a healed notch on the hymen. Dr. Drummond indicated that the first symptom could be consistent with improper sexual conduct such as rubbing, but that there were other possible causes. Dr. Drummond stated that the hymenal notch and the enlargement of the area suggested some form of limited penetration--possibly digital. Dr. Drummond also noted that the notch to the hymen was at least two to three weeks old.

On the morning of November 23, 1988, with the authorization of his superiors, Evans went to Sugar Plum to arrest Doug Rankin for sexual battery on a child under the age of twelve. Rankin was not there. Evans did not inform anyone at the school of the purpose of his visit, nor did he interview anyone at the school regarding [**9] the alleged abuse. Instead, he returned several hours later, when he had been informed Rankin would be present, at which time he arrested Rankin.

During his subsequent interview with police, Rankin repeatedly proclaimed his innocence and informed Evans that he had never been alone with Amber (a fact that he asserted the teachers could corroborate), that he was physically unable to fit on or reach into the playground equipment on which the police stated that the abuse occurred, that Baba Loo was the name of a cartoon character, that he was not the only person at the school who was called Baba Loo, and that Amber had attended the school for only two weeks.

During his interview, Rankin also conceded that he was the only male who worked at the school, that the children referred to him as Baba Loo, that he had access to the entire schoolhouse, and that he had been at school on November 21, 1988. He also made numerous specific comments regarding Amber's personality and behavior during the two weeks she had been at school, even though he stated that there were 120 students at the school and that he had relatively little contact with the children. Furthermore, he made progressively more [**10] critical comments regarding Dr. Brake as the interview proceeded.

Following the interrogation, Rankin formally was charged with sexual battery of a child under the age of twelve pursuant to *Fla. Stat. 794.011(2)*. He subsequently was released on bond with no opposition from Deputy Evans. A grand jury later exonerated Rankin, specifically stating that he was "completely innocent."

II. Procedural History

Following those events, plaintiffs Doug Rankin and his wife Victoria filed a complaint asserting both state and federal claims. The claims resolved by the jury at trial were as follows. n4 Count I stated a claim pursuant to *42 U.S.C. § 1983* alleging that defendant Mark Evans, as a Deputy Sheriff of Palm Beach County, while acting under the color of state law, arrested and seized plaintiff Doug Rankin without a warrant or probable cause in violation of the Fourth and Fourteenth Amendments of the United States Constitution. Count II alleged that defendant Richard Wille, as Sheriff of the Palm Beach County Sheriff's Department, acting through its agents and employees, falsely arrested and imprisoned plaintiff Doug Rankin. n5 At trial, defendants made a motion for a directed verdict [**11] both at the close of plaintiffs' case and at the close of all evidence. n6 At neither time did defendants [*1431] specifically state their grounds for the motion for a directed verdict. The trial court denied both motions, and the case went to the jury, which found defendants liable on both counts. n7

> n4 It should be noted that Sheriff Richard Wille was originally named as a defendant in Count I, but was dismissed prior to trial. The Sheriff's Department was named as a defendant in both Counts I and II. However, summary judgment was entered in the Department's favor on Count I, and thus it remained as a defendant only in Count II. Richard Wille subsequently was substituted for the Palm Beach County Sheriff's Department in Count II. Accordingly, at trial, Deputy Mark Evans was the defendant in Count I and Richard Wille, as the Sheriff, was the defendant in Count II.
>
> n5 Although Count II alleges both false arrest and false imprisonment, we refer to the claim as one for false arrest because under Florida law "false arrest and false imprisonment are different labels for the same cause of action." *Weissman v. K-Mart Corp., 396 So. 2d 1164, 1164 n. 1 (Fla. 3d DCA 1981).*

[**12]

n6 We note that the 1991 Amendments to *Rule 50 of the Federal Rules of Civil Procedure* changed the terminology used to describe the relevant actions taken. Instead of using the term "directed verdict" for a motion for a judgment as a matter of law when the motion is made prior to the verdict, and the term "judgment notwithstanding the verdict" when the motion is made after the verdict is returned, Rule 50 now refers to both motions as motions for a judgment as a matter of law. However, since one issue on appeal turns on the timing of the motion for the judgment as a matter of law, we use the older terms "directed verdict" and "judgment notwithstanding the verdict" for convenience and clarity.

n7 The jury awarded Doug Rankin $ 1,000,000 for intangible damages, damage to personal reputation, and loss of past income and earning potential. Victoria Rankin was awarded $ 500,000 as damages for loss of consortium. The Rankins also were awarded $ 500,000 as business damages.

On January 4, 1995, defendants filed motions for a judgment notwithstanding the verdict, for remittitur, to alter or amend [**13] the judgment on the state count, and alternatively for a new trial. Defendants based their motion for a JNOV on the asserted existence of probable cause for the arrest. n8 The motion also asserted that defendants were entitled to a JNOV on the § 1983 claim because plaintiffs failed to demonstrate that Deputy Evans acted with deliberate or callous indifference to Doug Rankin's constitutional rights, as required to support a § 1983 claim. On May 15, 1995, the district court granted defendants' motion for a JNOV on both the state and federal claims on the ground that probable cause for Rankin's arrest and detention existed and constitutes an absolute bar to plaintiffs' claims. The Order also conditionally denied defendants' motion for a new trial and denied their other motions as moot.

n8 Plaintiffs contend that defendants failed properly to raise probable cause as the ground for a JNOV on the § 1983 claim because they did not assert that ground until their reply to plaintiffs' opposition to the motion for a JNOV. We reject this argument.

On January 4, 1995--the date on which defendants' motions for a JNOV, for remittitur, to alter and amend the judgment on the state claim, and for a new trial were filed--defendants also filed a motion for an extension of time in which to file addenda to those motions. Confusion as to the district court's position regarding this request for an extension of time prompted the district court to treat defendants' February 28, 1995, reply to plaintiffs' opposition as an addendum to defendants' original motion for a JNOV. *See* March 16, 1995, Order (detailing the procedural history regarding this matter). The Order explicitly stated that plaintiffs were entitled to respond pursuant to the Local Rules to defendants' February 28, 1995, submission. Certainly, it was well within the district court's discretion to treat defendants' reply as an addendum to its original motion in an attempt to remedy any procedural confusion resulting from its Orders. Accordingly, we reject the assertion by plaintiffs that probable cause was not raised in defendants' motion for a JNOV as a ground for relief.

[**14]

Plaintiffs appeal the grant of a JNOV in favor of defendants on both counts. Defendants appeal the conditional denial of the motion for a new trial and the denial of their other motions as moot.

III. Analysis

A. The Grant of a JNOV Was Not Procedurally Barred

The first question we decide is whether the district court's grant of a JNOV in favor of defendants was procedurally barred. The Rankins correctly assert that *Federal Rule of Civil Procedure 50(b)* requires that a party moving for a JNOV first must have made a timely and proper motion for a directed verdict. *See Wilson v. Attaway, 757 F.2d 1227, 1237 (11th Cir.1985). Federal Rule of Civil Procedure 50(a)(2)* states that such a motion "shall specify ... the law and the facts on which the moving party is entitled to the judgment." *See also National Indus., Inc. v. Sharon Steel Corp., 781 F.2d 1545, 1548 (11th Cir.1986).* The Rankins note that defendants failed to state specifically any ground for their motions for a directed verdict--much less the ground on which the Court later granted a JNOV, *i.e.*, the existence of probable cause. Therefore, the Rankins contend that defendants' motions for a directed verdict [**15] did not satisfy the specificity requirement of Rule 50(a)(2), and that defendants' motion for a JNOV should have been denied as technically deficient. *See, e.g., Piesco v. Koch, 12 F.3d 332, 340-41 (2d Cir.1993)* (defendant's motion for a directed verdict failed to specify any grounds and thus was not sufficiently informative to preserve defendant's right to move for a JNOV); *Purcell v. Seguin State Bank &* [*1432] *Trust Co., 999 F.2d 950, 956-57 (5th*

Cir.1993) (issue raised in a JNOV motion that was not specifically raised in motion for a directed verdict at close of evidence held waived); *McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1555-56 (7th Cir.1987)* (same).

Defendants argue that a rigid application of Rules 50(b) and 50(a)(2) is inappropriate where motions for a directed verdict were timely made and the judge and opposing counsel were aware of the legal and factual bases of the motion despite the moving party's failure to state them explicitly. *See, e.g., Stewart v. Thigpen, 730 F.2d 1002, 1006-07 n. 2 (5th Cir.1984)* (stating that plaintiff's failure specifically to identify the grounds for his motion for a directed verdict did not preclude a JNOV in his favor where **[**16]** the trial court and defendants had actual notice of the basis of the motion); *Clarke v. O'Connor, 140 U.S. App. D.C. 300, 435 F.2d 104, 113 n. 15 (D.C.Cir.1970)* (concluding that although defendant's motion for a directed verdict did not explicitly assert the applicability of the statutory provision on which a JNOV later was based, it provided the court and opposing counsel with sufficient notice to satisfy Rule 50). Defendants assert that the trial court and opposing counsel were aware that defendants' motions for a directed verdict were based upon the ground that probable cause for Rankin's arrest existed as a matter of law and constituted an absolute defense to plaintiffs' claims.

In support of this contention, defendants stress that it was obvious throughout trial that the existence of probable cause was the central issue in the case. Defendants note that on the day before they made their motions for a directed verdict, they submitted a trial memorandum briefing the issue of probable cause. The trial judge referred to this memorandum and specifically alluded to a probable cause case that was discussed therein in denying defendants' motion for a directed verdict at the close **[**17]** of plaintiffs' case. The trial judge subsequently denied defendants' motion for a directed verdict at the close of all evidence "on the basis previously announced at the close of the plaintiffs' case in chief." Accordingly, defendants argue, since it was apparent to all involved that the existence of probable cause was the basis for its motions for a directed verdict, the district court did not err in granting defendants' motion for a JNOV on that ground.

This Circuit has looked to the purpose of Rule 50(b) in determining what constitutes a motion for a directed verdict sufficient thereafter to support a JNOV. *See National Indus., 781 F.2d at 1549-50* (noting that where Rule 50(b)'s purpose--providing notice to the court and opposing counsel of any deficiencies in the opposing party's case prior to sending it to the jury--has been met, the Circuit "has taken a liberal view of what constitutes a motion for directed verdict"). n9 *See also Scottish Heritable Trust v. Peat Marwick Main & Co., 81 F.3d 606, 610* (5th Cir.) (stating that "technical noncompliance with Rule 50(b) may be excused in situations in which the purposes of the rule are satisfied"), *cert. denied, U.S. , **[**18]** 117 S. Ct. 182, 136 L. Ed. 2d 121 (1996); Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691 (3rd Cir.1993)* (concluding that defendants' motions for a directed verdict were sufficient to support a JNOV where the court and opposing counsel had actual notice of the basis of the motion even though it was only implicitly raised by defendants' motions). A party is obliged to make a motion for a directed verdict at the close of the evidence as a prerequisite to a motion for JNOV to ensure that neither the court nor the opposing party is "lulled into complacency" concerning the sufficiency of the evidence. *National Indus., 781 F.2d at 1549. See also Scottish Heritable, 81 F.3d at 610* (stating that "the two basic purposes of [Rule 50(b)] **[*1433]** are "to enable the trial court to re-examine the question of evidentiary sufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury' ") (internal citation omitted). Requiring a motion for a directed verdict prior to submitting the case to the jury ensures that the court and the opposing party will **[**19]** be alerted to any sufficiency problems at a stage when such deficiencies might be remedied.

> n9 The Rankins cite *Austin-Westshore Constr. Co. v. Federated Dep't Stores, Inc., 934 F.2d 1217, 1222-23 (11th Cir.1991),* in support of their contention that Rules 50(b) and 50(a)(2) should be strictly applied to bar the grant of a JNOV in this case. In *Austin,* however, the ground on which the motion for a JNOV was based had never been raised at trial. Thus, the trial court could not rely upon the standard articulated in *National Industries* in support of a grant of a JNOV because opposing counsel and the trial court did not have actual notice as to any "flaw" in the case prior to sending it to the jury. Unlike in *Austin,* the grant of a JNOV in this case is justified by the fact that the moving parties substantially complied with the requirements of Rules 50(a)(2) and (b) because the court and opposing counsel unquestionably had actual notice at trial of the ground upon which the JNOV ultimately was granted.

[20]**

The same purpose underlies the specificity requirement of Rule 50(a)(2). Accordingly, where the trial court and all parties actually are aware of the grounds upon

which the motion is made, strict enforcement of the specificity requirement of Rule 50(a)(2) is unnecessary to serve the purpose of the rule.

The record shows that the trial court and plaintiffs' counsel were aware that the asserted existence of probable cause formed the basis of defendants' motions for a directed verdict. That issue was the central question in the case; defendants submitted a trial memorandum on that issue on the day prior to making their motions for a directed verdict; and the trial judge referred to that memorandum, and more specifically to a particular probable cause case, in making his rulings on defendants' motions for a directed verdict. Accordingly, we conclude that defendants' motions for a directed verdict were sufficient to support their subsequent motion for a JNOV.

B. Probable Cause as the Ground for the Entry of a JNOV

1. The Relevance of the Arresting Officer's Subjective Belief in the Arrestee's Guilt to the Existence of Probable Cause

We now turn to plaintiffs' argument that Florida **[**21]** law requires an arresting officer to believe subjectively in the guilt of an arrestee in order to have probable cause for the arrest. Under this view of the law, the Rankins contend that a reasonable jury could have concluded that Deputy Evans did not subjectively believe in Rankin's guilt and, thus, that he did not have probable cause to arrest Rankin. They further argue that such an arrest would have exceeded state authority, thus violating Rankin's Fourth Amendment rights and rendering defendants liable for that violation pursuant to *42 U.S.C. § 1983.* Defendants counter that no such subjective belief requirement exists under Florida law. We conclude that neither Florida nor federal law requires that a police officer actually have a subjective belief in the guilt of the person arrested.

This Circuit has concluded that the standard for determining the existence of probable cause is the same under both Florida and federal law--whether " "a reasonable man would have believed [probable cause existed] had he known all of the facts known by the officer.' " *United States v. Ullrich, 580 F.2d 765, 769 (5th Cir.1978)* (quoting *State v. Outten, 206 So. 2d 392, 397 (Fla.1968)).* n10 **[**22]** *See also United States v. McDonald, 606 F.2d 552, 553 n. 1 (5th Cir.1979) (per curiam)* (stating that "Florida's standard of probable cause for a lawful arrest is the same as that required by the Fourth Amendment"); *Wright v. State, 418 So. 2d 1087, 1094 (Fla. 1st DCA 1982)* (concluding that the Florida standard for probable cause is no more restrictive than the federal standard and is in effect a mirror image of that standard). Furthermore, prior to its adoption of the proposition that the state and federal probable cause standards are identical, this Circuit explicitly rejected the idea that the subjective belief of the arresting officer is relevant to the determination of whether probable cause exists. *See United States v. Clark, 559 F.2d 420, 425* (5th Cir.) (stating that "even if the officers felt that probable cause was lacking, an objective standard would still be applicable"), *cert. denied, 434 U.S. 969, 98 S. Ct. 516, 54 L. Ed. 2d 457 (1977); United States v. Resnick, 455 F.2d 1127, 1132 (5th Cir.1972)* (concluding that probable cause existed and "the scope of the Fourth Amendment is not determined by the subjective conclusion of the law enforcement officer"). **[**23]** n11 Finally, relying on its own **[*1434]** precedent dating back to 1973, the Supreme Court recently stated: "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." n12 *Whren v. United States, 517 U.S. 806, 135 L. Ed. 2d 89, 116 S. Ct. 1769, 1774 (1996).* Thus, when this Circuit concluded that state and federal probable cause standards are identical, it was clearly established under federal law that there was no subjective belief requirement. No subjective belief requirement exists under either state or federal law. n13

n10 All decisions issued by the former Fifth Circuit prior to October 1, 1981, have been adopted as binding precedent for the Eleventh Circuit. *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).*

n11 We here address plaintiffs' citation of several decisions which they contend establish that an officer must subjectively believe that a crime has been committed and that the suspect committed it in order for probable cause to exist. *See Spicy v. City of Miami, 280 So. 2d 419, 421 (Fla.1973)* (stating that an officer "must have ... "substantial reason' and must "believe' from observation and evidence at the point of arrest" that the person was guilty); *Osborne v. State, 87 Fla. 418, 100 So. 365, 366 (1924)* (officer has probable cause to arrest "any person whom such officer has reasonable ground to believe, and does believe, has committed any felony"); *City of Hialeah v. Rehm, 455 So. 2d 458, 461 (Fla. 3d DCA 1984)* (reversing a directed verdict in favor of defendant on false arrest and imprisonment claims, because "jury issues were presented as to a) whether, when he placed [the suspect] under arrest, [the arresting officer] in fact himself believed that the offense ... had been committed ...; and b) whether, if so, there was a reasonable basis for that belief in the circumstances he observed"); *Donner v. Hetherington, 399 So. 2d 1011, 1012 (Fla. 3d DCA 1981)* (same).

We note that *Osborne* and *Spicy* were decided prior to the Eleventh Circuit authority described in the text above which rejects the proposition that there is a subjective element to a probable cause analysis. We must therefore presume that this Circuit considered *Osborne* and *Spicy* in the decisions which collectively rejected that proposition. We are bound by this precedent because "a prior decision of the circuit (panel or en banc) [cannot] be overruled by a panel but only by the court sitting en banc." *Bonner, 661 F.2d at 1209.*

Both *Donner* and *Rehm,* which are state appellate-level decisions decided after the referenced Eleventh Circuit authority, cite *Spicy* as their sole authority for the proposition that there is a subjective element to the state probable cause analysis. *Donner, 399 So. 2d at 1012; Rehm, 455 So. 2d at 461.* As noted, this Circuit has concluded that *Spicy* does not stand for the proposition for which plaintiffs cite it.

However, even if we were not so bound, we would not conclude that the cases cited by plaintiffs establish that there is a subjective element to the probable cause analysis under Florida law. Our research indicates that no other Florida appellate jurisdiction has joined the Third District's adoption of an explicit two-part probable cause analysis requiring an officer subjectively to believe that probable cause exists and have a reasonable basis for that subjective belief. The other jurisdictions appear to rely on an objective standard: probable cause exists when "the totality of the facts and circumstances within the officer's knowledge would cause a reasonable person to believe that an offense has been committed and that the defendant is the one who committed it." *Revels v. State, 666 So. 2d 213, 215 (Fla. 2d DCA 1995); see also Florida Game and Freshwater Fish Comm'n v. Dockery, 676 So. 2d 471, 474 (Fla. 1st DCA 1996); Millets v. State, 660 So. 2d 789, 791 (Fla. 4th DCA 1995); LeGrand v. Dean, 564 So. 2d 510, 512 (Fla. 5th DCA 1990). But see LeGrand, 564 So. 2d at 513* (Griffin, J., specially concurring) (citing *Donner* and *Spicy* for the proposition that an officer must "actually have a belief that a crime was committed and that the people he proposes to arrest perpetrated the crime"). Finally, the Florida Supreme Court again defined the test for probable cause in objective terms after *Donner. See Blanco v. State, 452 So. 2d 520, 523 (Fla.1984)* ("The probable cause standard for a law enforcement officer to make a legal arrest is whether the officer has reasonable grounds to believe the person has committed a felony."), *cert. denied, 469 U.S. 1181, 105 S. Ct. 940, 83 L. Ed. 2d 953 (1985).* Thus, *Donner* and *Rehm* do not represent any significant shift in Florida law that would affect this Circuit's conclusion that the subjective belief of the arresting officer plays no role in a probable cause analysis under either Florida or federal law.

[24]**

n12 The Court also stated: "Not only have we never held, outside the context of inventory search or administrative inspection ..., that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." *Whren,* 517 U.S. at , 116 S. Ct. at 1774; *see also United States v. Villamonte-Marquez, 462 U.S. 579, 584 n. 3, 103 S. Ct. 2573, 2577 n. 3, 77 L. Ed. 2d 22 (1983)* (rejecting the contention that an ulterior motive might strip officers of their legal justification for an otherwise lawful warrantless boarding of a ship); *Scott v. United States, 436 U.S. 128, 136-38, 98 S. Ct. 1717, 1723, 56 L. Ed. 2d 168 (1978)* (rejecting the contention that the Fourth Amendment required the exclusion of certain wiretap evidence and accepting the government's position that "subjective intent alone ... does not make otherwise lawful conduct illegal or unconstitutional"); *United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)* (characterized by *Scott, 436 U.S. at 136-38, 98 S. Ct. at 1723,* as holding that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action").

[25]**

n13 Plaintiffs also cite *Tillman v. Coley, 886 F.2d 317, 321 (11th Cir.1989),* as providing support for the existence of a subjective element to the probable cause analysis. In that case we concluded that a reasonable officer would investigate serious doubts regarding the identity of a suspect prior to arrest, and held that no "reasonable law enforcement officer may conclude that ... an arrest [may be] made for the sole purpose of identifying a suspect." *Id.* Plaintiffs' use of this limited holding in support of a subjective belief require-

ment is unpersuasive in light of Eleventh Circuit and Supreme Court precedent.

[*1435] 2. The Existence of Probable Cause

The Rankins assert that the trial court erred in granting a JNOV in favor of defendants because a reasonable jury could have concluded that the arresting officer, Deputy Evans, did not have probable cause to arrest or detain Doug Rankin. Defendants contend that the trial court was correct in ruling that Evans had probable cause to arrest Rankin as a matter of law. We conclude that probable cause to arrest Rankin existed as a matter [**26] of law, and, accordingly, we affirm the trial court's grant of a JNOV in favor of defendants.

In determining whether a JNOV was properly granted, we apply the same standard as the district court. *Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir.1989).* Resolving all the factual disputes and drawing all logical inferences in favor of the nonmoving party, we determine whether these facts and inferences so strongly favor one party "that reasonable people, in the exercise of impartial judgment, could not arrive at a contrary verdict." *Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d 1112, 1119* (11th Cir.), *cert. denied, 506 U.S. 832, 113 S. Ct. 98, 121 L. Ed. 2d 58 (1992).* If so, the motion was properly granted. We must also keep in mind, however, that a "mere scintilla of evidence does not create a jury question; there must be a substantial conflict in evidence to create a jury question." *Id.*

As noted, the trial court granted a JNOV in favor of defendants on the ground that the arresting officer had probable cause to arrest Rankin as a matter of law. Since probable cause constitutes an absolute bar to both state and § 1983 claims alleging false arrest, [**27] the remaining question for us to address is whether the trial court correctly concluded that probable cause did exist as a matter of law. *Ortega v. Christian, 85 F.3d 1521, 1525 (11th Cir.1996)* (probable cause constitutes an absolute bar to a § 1983 claim alleging false arrest); *Bolanos v. Metropolitan Dade County, 677 So. 2d 1005, 1005 (Fla. 3d DCA 1996)* ("Probable cause is a complete bar to an action for false arrest and false imprisonment.") (*per curiam*). Accordingly, "we ... must evaluate [the] facts and inferences according to the legal standard for probable cause." *Bailey, 956 F.2d at 1119.*

As has been discussed, the standard for determining whether probable cause exists is the same under Florida and federal law. *McDonald, 606 F.2d at 553 n. 1.* In order for probable cause to exist, "an arrest [must] be objectively reasonable under the totality of the circumstances." *Bailey, 956 F.2d at 1119; see also State v. Scott, 641 So. 2d 517, 519 (Fla. 3d DCA 1994).* This standard is met when "the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under [**28] the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Williamson v. Mills, 65 F.3d 155, 158 (11th Cir.1995); see also Elliott v. State, 597 So. 2d 916, 918 (Fla. 4th DCA 1992).* "Probable cause requires more than mere suspicion, but does not require convincing proof." *Bailey, 956 F.2d at 1120; see also Scott, 641 So. 2d at 519* ("The facts necessary to establish probable cause need not reach the standard of conclusiveness and probability as the facts necessary to support a conviction."). In determining whether probable cause exists, " "we deal with probabilities ... [which] are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Revels, 666 So. 2d at 215* (quoting *Illinois v. Gates, 462 U.S. 213, 229-31, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527 (1983)).*

An arresting officer is required to conduct a reasonable investigation to establish probable cause. *See Tillman, 886 F.2d at 321; see also Harris v. Lewis State Bank, 482 So. 2d 1378, 1382 (Fla. 1st DCA 1986)* ("Where it would appear to a "cautious man' that further investigation [**29] is justified [*1436] before instituting a proceeding, liability may attach for failure to do so, especially where the information is readily obtainable, or where the accused points out the sources of the information."). An officer, however, need not take "every conceivable step ... at whatever cost, to eliminate the possibility of convicting an innocent person." *Tillman, 886 F.2d at 321; see also State v. Riehl, 504 So. 2d 798, 800 (Fla. 2d DCA 1987)* ("In order to establish the probable cause necessary to make a valid arrest, ... it is not necessary to eliminate all possible defenses."). Furthermore, once an officer makes an arrest based upon probable cause, he "need not "investigate independently every claim of innocence.' " *Tillman, 886 F.2d at 321* (internal citation omitted). Probable cause is "judged not with clinical detachment but with a common sense view to the realities of normal life." *Marx v. Gumbinner, 905 F.2d 1503, 1506 (11th Cir.1990)* (internal citation omitted); *see also Revels, 666 So. 2d at 215.*

The only difference in the probable cause analysis applicable to the state and federal claims at issue here is which party carried the burden of proving whether [**30] probable cause existed. The existence of probable cause constitutes an affirmative defense to the claims of false arrest and imprisonment under Florida law. *See Bolanos, 677 So. 2d at 1005* (probable cause bars a state claim for false arrest or false imprisonment); *DeMarie v. Jefferson Stores, Inc., 442 So. 2d 1014, 1016*

n. 1 (Fla. 3d DCA 1983) ("The existence of probable cause is a part of the defense to a false arrest action which must be shown by the defendant."). Accordingly, defendants had the burden of demonstrating the existence of probable cause as a defense to the state claim. However, plaintiffs had the burden of demonstrating the absence of probable cause in order to succeed in their § 1983 claim. *Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir.1997)* ("In order to establish a Fourth Amendment violation, [plaintiff] must demonstrate that a seizure occurred and that it was unreasonable."); *see also Rivas v. Freeman, 940 F.2d 1491, 1496 (11th Cir.1991)* ("To successfully litigate a lawsuit for deprivation of constitutional rights under *42 U.S.C. section 1983,* a plaintiff must show violation of a constitutionally protected liberty or property interest and **[**31]** deliberate indifference to constitutional rights."). We conclude that probable cause existed as a matter of law and that the existence of such probable cause defeats both the federal and state claims.

The Rankins first assert that the evidence on which Deputy Evans relied in making the arrest either exonerated Doug Rankin or was not sufficiently trustworthy or reliable to support a finding of probable cause. They assert that the medical evidence of which Evans was aware compelled the conclusion that Rankin was not Amber's abuser because it suggested that the charged conduct had occurred prior to Rankin's first contact with the child. They also contend that the physical evidence exonerated Rankin because he could not physically have committed the acts of which he was accused in the location identified by the victim. Additionally, the Rankins contend that Rankin's lack of access to Amber defeated probable cause for his arrest, especially in light of the fact that Evans knew that another male, one of Dr. Brake's coworkers, had had access to Amber during a time frame consistent with the medical evidence suggesting penetration.

The Rankins also contend that Evans should not have relied **[**32]** on Amber's or Dr. Brake's statements about possible abuse when determining probable cause. They claim that Amber's statements regarding abuse were unreliable because of: (1) her age; (2) inconsistencies regarding the identity of the abuser, the number of times the abuse occurred, and the location and timing of the abuse; (3) the possibility that Dr. Brake, a child psychologist, concocted the story that Amber spontaneously told her about the abuse and that Dr. Brake's coaching resulted in Amber's subsequent statements; and (4) the possibility that the police officers' questions during their interview with Amber led her into making statements that she would not otherwise have made. They further contend that Evans should have viewed Dr. Brake's statements with considerable skepticism because he should have known that Dr. Brake was biased against Rankin due to their argument regarding the school's supervision of the children under its care. They also seem to suggest that Evans **[*1437]** should have considered the possibility that either Dr. Brake or somebody she was protecting committed the abuse. Accordingly, they conclude that Evans should have placed little weight on Dr. Brake's comments regarding **[**33]** Amber's behavior and statements.

Finally, the Rankins argue that, at the very least, the information available to Evans at the time of the arrest should have created doubts as to the existence of probable cause and should have prompted further investigation. The Rankins claim that Evans should have examined the playground equipment to determine whether Rankin could have abused Amber on the steps of that equipment as her statements indicated. They also argue that Evans should have interviewed the teachers regarding Amber's behavior at school and Rankin's degree of access to Amber. Although the Rankins contend that this investigation should have been done prior to arresting Rankin, they further assert that it certainly should have been done after Rankin raised concerns regarding these issues during his interview with the police. Plaintiffs contend that such additional investigation was especially important here because time was not of the essence in making an arrest since the school was going to be closed over the Thanksgiving holidays, limiting Rankin's access to the children.

Defendants counter that Evans's conclusion that probable cause existed to arrest Rankin was well-supported **[**34]** by the evidence available to him at the time of Rankin's arrest and detention. Defendants note that Evans interviewed Amber, Dr. Brake, and Dr. Drummond, all of whom provided information supporting the conclusion that Rankin had abused Amber.

Defendants also contend that Evans's interviews with Amber and her mother, his conversation with Dr. Drummond, and his interrogation of Rankin in which Rankin made several damaging statements constituted a reasonable investigation and provided trustworthy and reliable information from which he could conclude that probable cause existed both at the time of arrest and during Rankin's subsequent detention. They further contest plaintiffs' assertion that time was not of the essence in making the arrest. They note that had Rankin not been arrested on the morning of November 23, he would have had access to the children at the school for the entire day.

We conclude that the investigation conducted by Evans was reasonable and that the evidence on which he based his decision to arrest Rankin was sufficient to create probable cause as a matter of law. We also conclude that the statements made by Rankin after his arrest did

not defeat the existence of [**35] probable cause or necessitate immediate further investigation.

a. The Medical Evidence

We now address plaintiffs' assertion that the medical evidence available to Evans precluded the existence of probable cause to arrest Rankin for the crime with which he was charged. The Rankins note that penetration is an element of the crime of sexual abuse of a child under twelve. *See § 794.011 Fla. Stat.* (1987). Resolving all factual disputes in favor of the plaintiffs, we must conclude that Evans knew that the injury suggesting such penetration had been incurred at least two weeks before the date of Dr. Drummond's examination and that Evans knew that Amber had attended Sugar Plum for just two weeks. We also must conclude that Dr. Brake told Evans that Amber had told her that abusive behavior had occurred on November 21, 1988, a date which seemingly conflicts with the medical evidence that penetration (if only partial) had occurred at least two weeks prior to that date. n14 Accordingly, the question to be answered is whether a prudent person faced with such information could reasonably have believed that Rankin committed the offense.

n14 The parties disputed this at trial. Evans testified that Dr. Brake told him that the date on which Amber told her about the incident with Ba Ba Blue was November 21, but that Dr. Brake gave him a time frame of November 7 to November 21 during which the actual incident or incidents of abuse could have occurred. Plaintiffs confronted Evans at trial with his arguably conflicting deposition testimony in which he indicated that Dr. Brake told him that Amber said that the abuse occurred on November 21, 1988. In light of this conflicting evidence, we must accept plaintiffs' assertion as true.

[**36]

[*1438] In addition to that information, however, Deputy Evans also knew that Amber had sustained a fresh abrasion within 24 hours of the November 21, 1988, medical examination which could have been caused by a fingering of the genital area. During her videotaped interview, Amber indicated that abusive incidents occurred on more than one occasion. Thus, Amber's statements and the medical evidence both suggested that more than one instance of abuse occurred, and a prudent officer reasonably could have concluded that a single individual, rather than two separate individuals, was responsible for the alleged abuse. Furthermore, an officer reasonably could have concluded that Rankin was that individual.

Evans knew that Amber consistently had called her alleged abuser Ba Ba Blue and repeatedly linked the alleged abuse to the school. He knew that Rankin was the only person whom Amber called by that name. Amber repeatedly referred to her abuser as a "he," and Dr. Brake told Evans that Rankin was the only male who had access to Amber during the approximately two-week period which was consistent with all of the medical evidence. n15 Dr. Brake also informed Deputy Evans that, after Amber started school [**37] at Sugar Plum, her behavior and language had changed in ways which Evans knew to be consistent with sexual abuse.

n15 Amber attended Sugar Plum for two weeks, and Dr. Drummond indicated that the injury suggesting penetration was at least two weeks old. Thus, accepting as true that Evans knew of Dr. Drummond's time line, an overlap of approximately a day existed during which a cautious officer reasonably could have concluded that Rankin could have committed the charged offense. We further note that an officer reasonably could have concluded that the time frame given by the doctor was an estimate and not necessarily a strict cut-off point, thus possibly expanding the window of opportunity by a reasonable period of time.

Plaintiffs assert that even if the abuse could have occurred on the first day on which Amber attended Sugar Plum, which would have placed the incident involving penetration within a time frame consistent with Rankin's guilt, Evans knew that Amber had stated that abuse had occurred on November 21, [**38] 1988, which was clearly inconsistent with the medical time frame for the act of penetration. However, the relevant question is whether a prudent officer reasonably could have believed that Rankin committed the offense in light of the medical evidence suggesting that any penetration had to have happened significantly before November 21, 1988, and Dr. Brake's statement that Amber indicated that the abuse occurred on November 21, 1988.

In light of the evidence suggesting multiple incidents of abuse, a prudent officer reasonably could have believed that, in recounting her story to her mother, Amber might not have distinguished between penetration and simple fingering or rubbing. Thus, in recounting the abuse she could have conflated the incidents or confused the dates, or, in talking to her mother, she could have been referring to the conduct which may have resulted in the abrasion. A cautious officer, therefore, reasonably could have believed that multiple incidents of abuse occurred and that the abuse with which Rankin was

charged occurred within the first few days of school--which was within the medically permissible time frame. Accordingly, a reasonable jury could not have concluded [**39] that the medical evidence defeated probable cause to arrest Rankin.

b. Access

The Rankins next assert that, even if the medical evidence does not conclusively defeat probable cause, Rankin's lack of access to Amber while she was at school does. They contend that, had Evans interviewed any of the teachers before arresting Rankin, he would have realized that Rankin was never alone with Amber and, thus, could not have abused her. Plaintiffs further note that it is uncontested that Rankin informed Evans of his lack of access to Amber during questioning after he was arrested. They thus contend that Evans knew or should have known that Rankin was never alone with Amber and that he therefore lacked the opportunity to have committed the crime charged.

Defendants counter that Deputy Evans knew that Rankin was present at the school during the relevant time frame and that he moved freely throughout the school. Evans [*1439] also knew that Dr. Brake had observed what she perceived to be a lack of adequate supervision of the children. Finally, defendants contend that a reasonable officer could have concluded that the abuse--partial penetration by a finger and rubbing of Amber's genitalia--could [**40] have occurred with others in the room if the abuser had his body between any other adult and the child and he simply slipped his hand down the front of Amber's pants or skirt. n16

n16 The Rankins note that, in Amber's videotaped interview, she indicated that Ba Ba Blue touched her with both a finger and a plastic spoon. The Rankins assert that a reasonable officer could not possibly believe that Rankin could penetrate Amber with a spoon with other adults in the same room, since such an action undoubtedly would have been painful and caused Amber to make some sort of outcry. However, a cautious officer could have reasonably concluded that the facts available to him at the point of arrest supported at least Amber's contention that Rankin digitally penetrated her. Although further investigation may have been required in order to determine whether the spoon incident could be verified, a reasonable officer could conclude that he had sufficient evidence to proceed on the digital penetration allegation and that time was of the essence considering Rankin's position as the owner of a day care center. Furthermore, a prudent officer could reasonably conclude that Amber's statements regarding digital penetration--which she made on several separate occasions and stated in her own words--were more reliable than her single reference to possible penetration by a spoon--which she referred to only in response to a question by Evans.

[**41]

Additionally, the teachers whom Rankin argues that Evans should have interviewed were employed by Rankin and thus would have been of questionable credibility. n17 A cautious officer certainly could have reasonably concluded that, even if the teachers were to have stated that Rankin had no access to Amber, such testimony would be so undercut by the witnesses' bias in favor of their employer and their own self-interest in asserting that they were always aware of Amber's movements--such supervision being one of their job responsibilities--that it would not defeat the existence of probable cause in light of the other evidence suggesting Rankin's guilt. Finally, interviewing those witnesses prior to picking up Rankin might have alerted him to his possible arrest and, conceivably, precipitated his flight. In light of all of these considerations, a reasonable jury could not have concluded that a prudent officer could not have reasonably believed that Rankin had sufficient access to Amber to have committed the crime charged.

n17 Rankin also asserts that one of the teachers would have told Evans that she saw Amber rubbing her vagina on November 21. However, we note that a prudent officer who had such information reasonably could have believed that a child would not have rubbed herself so hard as to cause an abrasion. Thus, such information, even had it been credible and had Evans known it, would not have defeated the existence of probable cause.

[**42]

The Rankins further assert that the physical evidence contradicted Amber's account of events and that those contradictions defeated probable cause. The Rankins argue that Amber's contention that she was abused by Ba Ba Blue on the steps of playground equipment at the school simply could not have been true because Rankin physically could not have performed the actions she described at that location. They contend that a reasonable jury could have concluded that the playground equipment steps were too small for a man of Rankin's size to enter and that the slats on the sides of the equipment were too narrow to permit him to reach into the equipment from the outside. The Rankins also assert that a

reasonable jury could have determined that Evans did not examine the playground equipment to determine whether Amber's account of the abuse was consistent with the physical evidence. Assuming this to have been true, the question is whether a prudent officer reasonably could have believed, in light of all the evidence known to him, that Rankin was guilty of sexually abusing Amber.

We conclude that a cautious officer reasonably could have believed that, even if Amber's story was inaccurate as to [**43] the precise location of the abuse, the core of her story regarding the abuse and the identity of the abuser was trustworthy and reliable, especially in light of the medical and other evidence corroborating her story. *See Easton v. City of Boulder, 776 F.2d 1441, 1449-50 (10th Cir.1985), cert. denied, 479 U.S. 816, 107 S. Ct. 71, 93 L. Ed. 2d 28 (1986).*

Furthermore, a prudent person reasonably could have believed that the abuse happened [*1440] in the approximate area of the playground equipment, if not actually on it. Amber stated on the audiotape that, after Ba Ba Blue made "a hole in [her] bottom," he put her "back on the playground." In the videotaped interview, she said that the abuse took place outside the school. In response to a question from Evans asking whether it was on the playground, she said "yeah." In response to the question of whether it was on a piece of a toy, she said "no." She said that the incident took place on the steps. Interpreting the physical evidence in light of the statements by the victim, it would not be unreasonable for a prudent person to conclude that a three-and-a-half-year-old might either unclearly articulate the location of the abuse or conflate [**44] the idea of being put back on the playground after being abused with the idea of where the abuse actually occurred. Additionally, since Amber did not actually state that the abuse occurred on the steps of the playground equipment, there is no reason why a reasonable officer would have to have concluded that Rankin's inability to commit the alleged act on the playground equipment obviated probable cause. Finally, we note that Amber stated that the abuse occurred both inside and outside the schoolhouse, so the fact that Rankin apparently could not have abused Amber on the playground equipment does not affect the possibility that he abused her in the schoolhouse. In light of all of the evidence, we conclude that a reasonable jury could not have concluded that Rankin's alleged lack of access to Amber defeated probable cause.

c. The Victim's Statements

Next, we address the Rankins' contentions that the only information available to Deputy Evans suggesting that Rankin was the perpetrator of any abuse ultimately was based upon statements made by Amber, and that those statements were not sufficiently reliable and trustworthy to support the existence of probable cause. Defendants contend [**45] not only that Amber's statements were sufficiently reliable and trustworthy to support probable cause, but also that Evans was prohibited from simply disregarding such statements based upon the age of the victim. We conclude that evidence other than Amber's statements supported the conclusion that Rankin likely was the perpetrator of the charged conduct. We also conclude that Evans was entitled to rely to a meaningful degree on Amber's statements in determining the existence of probable cause, and that those statements supported probable cause.

As noted, Amber's statements did not constitute the only evidence suggesting that Rankin was the person who had abused her. The medical evidence was consistent with two separate episodes of abuse--partial penetration which dated back at least two weeks prior to November 21, and either rubbing or fingering of the genitalia which occurred within 24 hours of Dr. Drummond's examination of Amber. Dr. Brake indicated to Evans that she and the school staff were the only people with access to Amber during the two-week period covering both potential incidents of abuse.

Furthermore, a cautious person reasonably could have believed that Dr. Brake was [**46] unlikely either to have been the abuser or to have been protecting someone else whom she knew to be the abuser since she--at a point at which no one else knew that any abuse might have occurred--told a friend that she thought that Amber had been abused, took her to a pediatrician to have her examined for abuse, and promptly informed the police of the suspected abuse. A prudent person reasonably could have concluded that one who was guilty of, or complicit in, abusive conduct would not spontaneously decide aggressively to volunteer information to people in a position to take prosecutorial action regarding potential abuse and insist that such action be taken.

Thus, having concluded that Dr. Brake was unlikely to have been responsible for the alleged abusive incidents, a cautious person reasonably could have believed that the perpetrator was someone at the school. n18 This conclusion was further supported by Dr. [*1441] Brake's statement that Amber started exhibiting behavioral changes within a week of beginning her attendance at Sugar Plum. These behavioral changes included unusual clinginess, an abnormal aversion to attending school, and atypical shyness. A seasoned officer reasonably could [**47] have concluded that these behavioral changes were consistent with sexual abuse and linked that abuse to the school. n19

n18 Although Evans knew that a male coworker of Dr. Brake's had had access to Amber

approximately three weeks prior to the medical examination, that person had not had access to her during the two-week period potentially covering the occurrences resulting in both the damage to the hymen and the fresh abrasion.

n19 The Rankins contend that if Evans had interviewed the teachers, they would have told him that Amber exhibited no behavioral changes, appeared to be happy at school, and even started to misbehave at the end of the day when she had to leave school. However, a cautious officer reasonably could have concluded that any potential statements by the teachers regarding Amber's behavior would not have been particularly probative considering their limited experience with Amber, particularly in light of the fact that her mother, who clearly knew her very well, indicated that such changes had occurred.

The Rankins also contend that Evans knew that Amber and her family had just moved, that she had been repeatedly moved to new preschools, and that her mother had been paying a lot of attention to Amber's younger brother because of his severe illness. They argue that--knowing about those family circumstances--a cautious officer would not have given significant weight to any behavioral changes. However, we conclude that a cautious officer reasonably could have believed, in light of the knowledge that Amber had frequently moved to new preschools and that her brother's health problems were apparently chronic, that Amber had faced such strains before and that her mother was presumably aware of her child's typical reactions to such ongoing problems. Dr. Brake, however, had nonetheless concluded that Amber's behavior was unusual and reported that conclusion to Evans. A reasonable officer acting cautiously could have given significant weight to her evaluation of her child's behavior.

[48]**

Having narrowed the class of likely suspects to the school house, information provided by Dr. Brake suggested that Rankin was the guilty party. Dr. Brake told Evans that, on the day Amber informed her of the abuse, she saw Rankin pick up Amber and that Amber hit him. A prudent officer reasonably could have found this information to be relevant to the probable cause determination in two ways: (1) as Evans testified, an abuser often shows a special interest in a child whom he is abusing, and Rankin's particular attention to Amber in a class of approximately 120 might indicate such a special interest; and (2) the hostility Amber demonstrated towards Rankin by striking him was not typical of her behavior towards adults, as indicated by her mother, suggesting that Rankin had done something to prompt such a reaction.

In addition to this independent evidence linking Rankin to the abuse, Evans relied on Amber's statements to both her mother and the police in determining that probable cause existed to arrest Rankin. As noted above, the essential question regarding Amber's statements is whether they were sufficiently reliable and trustworthy to support a determination of probable [**49] cause. We conclude as a matter of law that a prudent person reasonably could have believed that the fundamental information provided by Amber's statements was sufficiently reliable and trustworthy to consider in determining the existence of probable cause.

Generally, an officer is entitled to rely on a victim's criminal complaint as support for probable cause. *See Singer v. Fulton County Sheriff, 63 F.3d 110, 119 (2d Cir.1995), cert. denied, 517 U.S. 1189, 116 S. Ct. 1676, 134 L. Ed. 2d 779 (1996).* The Rankins assert that Evans was not entitled to so rely here because the victim's age and inconsistencies rendered her statements unreliable. We conclude that, although a child victim's statements must be evaluated in light of her age, Amber's statements--considered along with the other supporting evidence--were sufficiently reliable and trustworthy at their core to form the basis for probable cause to arrest Rankin. *See Marx, 905 F.2d at 1506* (indicating that, although a four-year-old's age affected the weight due her statements, the arresting officer could not simply disregard her statements in determining whether probable cause existed); *Myers v. Morris,* [**50] *810 F.2d 1437, 1456-57* (8th Cir.), *cert. denied, 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987); Easton, 776 F.2d at 1450-51.*

Next, we address the Rankins' contention that Amber never explicitly stated that Rankin or Mr. Doug abused her. Instead, they note that she merely referred to her abuser as Ba Ba Blue. However, they do [*1442] not dispute that Evans knew at the time of Rankin's arrest that Rankin was referred to by the children as Baba Loo. They also do not contest that Amber in particular called Rankin Ba Ba Blue, which was her pronunciation of Baba Loo. Amber identified Ba Ba Blue as the culprit in both her first statement regarding the abuse made to her mother and the subsequent audiotaped statement. Dr. Brake told Evans that Amber also had identified her alleged abuser as Ba Ba Blue to Dr. Drummond. Furthermore, in the videotaped interview of Amber, she ultimately responded "Ba Ba Blue" to questions regarding the identity of her abuser. n20 In addition, Amber consistently referred to her abuser as "he," indicating that the offending individual was a male. As noted above, the only people beside Amber's mother who appeared to have access to her were the staff at Sugar [**51] Plum.

In addition, Amber indicated that all of her teachers were female, suggesting that Rankin was the only male at Sugar Plum (a fact which Rankin subsequently conceded during questioning). Accordingly, we conclude that Amber's statements provided sufficient information for a cautious person reasonably to believe that Amber was abused by someone called Ba Ba Blue, and that other evidence indicated that Ba Ba Blue was Rankin.

n20 The Rankins assert that the videotaped statement in which Amber identified "Ba Ba Blue" as her abuser demonstrates the unreliability of her statements because she initially answered "Donald Duck" and "Pluto" in response to the question of who did the things to her which she described. The Rankins assert that her identification of two cartoon characters followed immediately by her identification of Ba Ba Blue as her abuser, precluded Evans from relying on her statements for probable cause to arrest Rankin. However, a prudent officer reasonably could conclude that Amber was merely playing when she answered "Donald Duck" and "Pluto," but was being serious when she ultimately responded Ba Ba Blue because: (1) she had repeatedly identified Ba Ba Blue as the abuser in past statements and had never before mentioned the first two characters; (2) she actually knew someone who was referred to as Ba Ba Blue, unlike the other characters; (3) she repeatedly referred to the person who abused her as "he" and the person referred to as Ba Ba Blue was a male; and (4) other corroborating evidence was consistent with abuse by the individual identified as Ba Ba Blue. Thus, a cautious officer reasonably could have concluded that Amber, when referring to Ba Ba Blue, was referring to a real person as opposed to a cartoon character. In light of the other evidence, such an officer also reasonably could have concluded that Rankin was Ba Ba Blue.

[52]**

The Rankins also assert that inconsistencies in Amber's videotaped statement indicated that her statements as a whole were unreliable. For instance, they note that when Amber was questioned regarding the timing of any abusive incidents, she stated that she had been abused "today"--the date of the interview--but not on the day before, the date on which she reported the incidents to her mother and on which Dr. Brake told Evans that Amber had indicated the abuse had occurred. n21 However, an officer as seasoned in the field of child abuse as Deputy Evans reasonably could have discounted Amber's statements regarding the timing of the abuse because of the fact that young children do not have a particularly strong grasp of the concept of time, although they are able to articulate more concrete concepts such as events that have occurred or things that have happened to them. n22

n21 The Rankins also note the varying times which Amber gave Dr. Drummond for the dates of the abuse as evidence that Evans should not have relied on Amber's statements. The Rankins, however, have pointed to no evidence indicating that Dr. Drummond relayed that information to Evans.

[53]**

n22 For example, Dr. Drummond testified that, in his experience, children who were unable to fully grasp temporal concepts were able accurately to describe more concrete events such as physical pain. A police officer such as Evans, with formal training and extensive practical experience in child abuse cases, would be aware of children's difficulties with time, and reasonably could have discounted those inconsistencies.

The Rankins also point to several other comments by Amber which they assert fatally undermine the reliability of her statements. n23 Although we acknowledge that a stronger statement by the victim would be preferable prior to arrest, we cannot conclude **[*1443]** that a prudent officer could not have reasonably relied on the fundamental allegation consistently made by Amber: that a male named Ba Ba Blue made a hole in her bottom at school. n24 She made statements to this effect on at least four separate occasions of which Evans was aware: to her mother, to Dr. Drummond, on audiotape, and to him during the videotaped interview. n25 In light of the medical evidence supporting the conclusion **[**54]** that abuse had occurred, Dr. Brake's observations regarding Amber's behavioral changes, and her statements regarding the limited number of people who had access to Amber during the relevant time period, we conclude that Evans properly relied on Amber's statements in establishing the existence of probable cause to arrest Rankin. n26 *See Marx, 905 F.2d at 1506; Myers, 810 F.2d at 1456-57.*

n23 For instance, they note that Amber stated in the videotaped interview that Dr. Drummond stuck a thermometer in her bottom and that the testimony at trial showed that he did not do so.

However, the Rankins point to no evidence indicating that Evans knew or should have known of this inconsistency at the time of the arrest.

n24 The Rankins contend that Amber's assertion that the abuser had stuck a finger in her bottom undercut the reliability of her statement regarding the abuse because it was inconsistent with the medical evidence which showed vaginal penetration, but no anal contact. However, we note that, in the videotaped interview, Amber referred to her genitals as her bottom. We also note that it is not surprising that a three-year old would not have separate words for her vagina and bottom. Accordingly, a reasonable officer could conclude that Amber intended to refer to her vagina.

[**55]

n25 Defendants assert that Amber also made such statements to Officer Honholz and Dr. Decharme. Plaintiffs assert that a reasonable jury could have concluded that such statements were never made to these individuals. We conclude that a prudent officer reasonably could have relied upon Dr. Brake's assertion that Amber had made such a statement to Dr. Decharme and on Officer's Honholz's representation to Evans and Dr. Brake that Amber had made such a statement to him in evaluating the existence of probable cause. However, even disregarding these additional statements, probable cause existed as a matter of law.

n26 We note that under *Fla. Stat. 794.022(1)* (West Supp.1990), "the testimony of the victim need not be corroborated in a prosecution under s. 794.011 [commission of a sexual battery of a child under twelve]." However, we do not need to address the question of how this statutory section would apply when the victim is a young child and the statement is merely being used to establish probable cause, rather than as the sole basis for a conviction, because Evans had evidence in addition to Amber's statements which incriminated Rankin at the time of arrest.

[**56]

Conclusion

In sum, we conclude that the trial court was not procedurally barred by *Federal Rule of Civil Procedure 50* from granting a JNOV in favor of defendants on the ground that probable cause existed. Although we note with regret the undoubted hardship caused to plaintiffs by Doug Rankin's arrest and detention, especially in light of his subsequent complete exoneration by the grand jury, we conclude that the district court correctly determined that probable cause existed as a matter of law. Accordingly, we affirm the district court's grant of a JNOV in favor of defendants and dismiss the cross-appeal as moot.

AFFIRMED.

LEXSEE 19 SO.2D 699

RAYMOND JOHNSON, v. MEYER WEINER also known as M. WEINER

[NO NUMBER IN ORIGINAL]

Supreme Court of Florida, Division B

155 Fla. 169; 19 So. 2d 699; 1944 Fla. LEXIS 500

November 17, 1944

PRIOR HISTORY: [***1]

An appeal from the Circuit Court for Hardee County, D. O. Rogers, Judge.

DISPOSITION:

Reversed and remanded.

COUNSEL:

Leitner & Leitner, for appellant.

W. W. Whitehurst, for appellee.

JUDGES:

Brown, J. Buford, C.J., Thomas and Sebring, JJ., concur.

OPINIONBY:

BROWN

OPINION:

[**699] [*170] The appellant, who was plaintiff below, filed a declaration alleging that the defendant, a merchant operating a large mercantile business in Wauchula, Hardee County, sued out a warrant for the arrest of one Jack Johnson. The warrant was placed in the hands of the sheriff, and that shortly thereafter, while the plaintiff, his relatives and friends, were in said mercantile establishment, buying or attempting to buy merchandise, the defendant, in some manner, advised the sheriff that the Jack Johnson for whom the said sheriff had the said warrant, was then in defendant's store. That the sheriff and one of his deputies immediately arrived upon the scene and the defendant pointed out this plaintiff to the sheriff and told the sheriff that plaintiff was the man for whom the sheriff had the warrant, whereupon [**700] the officers immediately in a boisterous manner arrested plaintiff and took him in [***2] custody and locked him up in the county jail, where plaintiff had to remain for something over thirty minutes before his wife procured his release on bond. That the defendant was acquainted with plaintiff, or should have been, as he had bought merchandise from plaintiff for a number of years; that plaintiff had not committed any crime and was not the said Jack Johnson, and that defendant maliciously, and wrongfully had plaintiff arrested and put in jail, for which he claims damages.

The defendant interposed a demurrer, among the grounds of which were the following: That defendant is not charged with participation in or causing the arrest of plaintiff except by making a mere erroneous identification of him. That the allegations of the declaration show no more than that the defendant pointed out the plaintiff and identified him as the person for whom the warrant had been issued, but does not show that the defendant participated in or directed the arrest of the plaintiff. And that the allegations do not show that [*171] the defendant had deceitfully and wantonly identified the plaintiff as the person for whom the warrant had been issued.

The circuit judge, in his order, [***3] stated that the declaration did not charge that the defendant had wrongfully, wilfully, maliciously, or knowingly misrepresented that the plaintiff was in fact the person named in the warrant of arrest, and that for that reason the declaration did not state a cause of action. The demurrer to the declaration was sustained and the plaintiff declining to amend, judgment was entered in favor of the defendant, and the plaintiff took this appeal.

Our view is that this declaration does state a cause of action for false imprisonment. The action for false imprisonment is usually distinguishable in terminology only from the action for false arrest (22 Am. Jur. 352).

The declaration in this case does not state a good cause of action for malicious prosecution, and it is quite possible that this was the form of action which the trial judge had in mind.

False imprisonment is the unlawful restraint of a person against his will, the gist of which action is the unlawful detention of the plaintiff and deprivation of his liberty. *Fisher v. Payne, 93 Fla. 1085, 113 So. 378.* In the case of *Kress & Co. v. Powell, 132 Fla. 471, 180 So. 757,* we quoted from 25 C.J. 444, with approval, the following **[***4]** statement:

"Although not always observed, the distinction between malicious prosecution and false imprisonment is fundamental. But briefly, the essential difference between a wrongful detention for which malicious prosecution will lie, and one for which false imprisonment will lie, is that in the former the detention is malicious but under the due forms of law, whereas in the latter the detention is without color of legal authority. In malicious prosecution plaintiff must allege and prove malice and want of probable cause and the termination of the proceeding favorably to plaintiff, whereas in false imprisonment the allegation of want of probable cause is not essential, and the burden is on defendant to prove probable cause as a defense or in mitigation. Malice is material only on the issue of damages, and the termination of the proceeding is not material. If the imprisonment is under legal authority it may be malicious but it cannot be false. **[*172]** This is true where legal authority is shown by valid process, even if irregular or voidable. Void process will not constitute legal authority within this rule."

To like effect, see *Dodson v. Solomon, 134 Fla. 284, 183 So.* **[***5]** *825.* See also 11 R.C.L., 791 et seq and 22 Am. Jur. 353 et seq. On page 358 of the last cited authority, it is said:

"A person is not liable for false imprisonment unless his act is done for the purpose of imposing a confinement, or with knowledge that such confinement will, to a substantial certainty, result from it."

And on page 369 it is said that:

"Actual malice or bad motive is not an element essential to sustain an action for false imprisonment."

Further on, at page 405, it is stated that when the warrant contains the name of the person, the officer executing it must rely on the name alone and cannot justify the arrest of a person whose name is other than that appearing on the warrant, even though he is the one intended, but that the officer's honest mistake may reduce the damages to be assessed against him to the actual damages suffered by the plaintiff. Cases are cited in support of these propositions.

[701]** To be liable in an action for false imprisonment, one must have personally and actively participated therein, directly or by indirect procurement. All those who, by direct act or indirect procurement, personally participate in or proximately cause the **[***6]** false imprisonment and unlawful detention are liable therefor. See 22 Am. Jur. pages 371-374, where numerous authorities are cited.

It appears from the allegations of this declaration that the sheriff did not have in his hands a warrant for the arrest of this appellant and we think the declaration is sufficient in its allegations to show that the defendant, by swearing out the warrant and then making his alleged statement to the sheriff that plaintiff was the man for whom the warrant was issued, was instrumental in procuring the arrest and imprisonment of the plaintiff.

Reversed and remanded.

LEXSEE 180 SO. 757

S. H. KRESS & COMPANY v. DOROTHY POWELL, a minor, by her next friend, MARY POWELL

[NO DOCKET NUMBER]

SUPREME COURT OF FLORIDA, Division B

132 Fla. 471; 180 So. 757; 1938 Fla. LEXIS 1771

April 25, 1938

PRIOR HISTORY: [***1]

A writ of error to the Circuit Court for Escambia County, L. L. Fabisinski, Judge.

COUNSEL:

Watson & Pasco & Brown, for Plaintiff in Error;

Coe & McLane, for Defendant in Error.

JUDGES:

BROWN, J., WHITFIELD, P.J., and CHAPMAN, J., concur; ELLIS, C.J., and TERRELL and BUFORD, J.J., concur in the opinion and judgment.

OPINIONBY:

BROWN

OPINION:

[**759] [*474] BROWN, J.

Dorothy Powell, a minor, by her next friend, Mary Powell, brought an action at law against S. H. Kress & Company to recover for false imprisonment and malicious prosecution. The declaration consisted of two counts Demurrer to the declaration was overruled. Pleas were then filed, and the court sustained a demurrer to the third, fifth and seventh pleas to the first count, and the third, fifth, seventh, eighth, ninth and eleventh pleas to the second count of the declaration. Trial was had, and the jury found for the plaintiff and assessed her damages at $650.00. [*475] From the judgment entered upon that verdict, the defendant took this writ of error.

The first count of the declaration reads:

"The plaintiff, Dorothy Powell, a minor, by her next friend, Mary Powell, by her attorneys, sues the defendant, [***2] S. H. Kress & Company, a Corporation, for that heretofore, to-wit, on and prior to the 24th day of December, A.D. 1934, the defendant was engaged in the operation of a retail chain store in the City of Pensacola, Escambia County, Florida, and therein employed as manager one Faircloth, whose duty it was to manage and conduct the business and to guard its interests against theft, pilferage, passing of spurious coin and other misdemeanors liable to result in monetary loss to his employers and on the said date, the plaintiff, a minor female of the age of seventeen (17) years, entered said store as a customer to purchase goods and tendered in payment thereof a five dollar bill, lawful money of the United States, but the said Faircloth, acting in his capacity, as manager aforesaid, inspected the said five dollar bill and falsely declared the same to be counterfeit, and then and there caused the plaintiff to be detained in said store, gave her into the custody of a policeman and caused her to be falsely imprisoned in the police station of the City of Pensacola, from which imprisonment she was duly discharged upon subsequent inspection of the said five dollar bill by the proper officers of [***3] said city, it being apparent that the same was genuine. And the detention and delivery of the plaintiff to said policeman occurred in the presence of a large number of persons in the store of the defendant during the busy hours of Christmas eve, and plaintiff was embarrassed, humiliated and greatly damaged thereby and by the imprisonment consequent thereon; for all of which she sues and claims one thousand five hundred ($1,500.00) dollars damages."

[*476] It is contended that the demurrer to the declaration should have been sustained, because even though it be admitted that Faircloth, the manager of the

Kress store in Pensacola, had the duty of protecting the interests of the Kress Company from theft, pilferage, and the passage of spurious coin, yet such duty did not carry with it implied authority to do the alleged acts complained of so as to bind the defendant; that the declaration does not allege any express authority to do those acts, and there is no allegation of ratification by the defendant of them.

Each count alleges that Faircloth had the express duty "to manage and conduct the said business, and to guard its interests against theft, pilferage, passing of spurious [***4] coin and other misdemeanors liable to result in monetary loss to his employers." The first count alleges that Faircloth "then and there caused plaintiff to be detained in said store, gave her into the custody of the policeman and caused her to be falsely imprisoned in the police station in the City of Pensacola." The second count alleges that Faircloth, acting as defendant's agent, "commenced a criminal proceeding for the passage of counterfeit money against the plaintiff by then and there summoning a policeman and delivering the plaintiff to his custody and informing the said policeman that the said plaintiff had attempted to pass a counterfeit five dollar bill and by causing the said policeman to take the said plaintiff into his custody upon the said charge and conduct her to the police station of the City of Pensacola, which said prosecution was terminated in favor of this plaintiff upon the inspection of the five dollar bill by the proper officers of the City of Pensacola, who determined the same to be genuine."

There have grown up in this country large businesses, which usually have their principal offices in some large city [**760] with numerous branches or units of that [***5] business in many [*477] other states in the Union. The principal officers of the corporation are to the found only at the home office of the corporation. In each unit or branch of the business is placed in authority one who is generally designated as the "manager" of the local unit, and who usually has the authority to select and to discharge his employees, to place orders for merchandise with the parent organization, and in some businesses to purchase merchandise from other corporations. The "manager" is responsible in a general way for the prosperity and welfare of the local unit of that particular business. He is not to be classed with a mere clerk or employee; he is a vice-principal. To permit a corporation of this type to escape liability for the acts of its "manager" on the ground that he is not one of the principal officers of the corporation and that he must have actual express authority to do the particular thing in question would be going entirely too far afield from the realities, because for all practical purposes, the "manager" is the head of the corporation so far as the local unit of the business is concerned, and wrongful acts of the "manager" which are done [***6] in behalf of the corporation's interests there, if they cause injury or damage to another, will make the corporation liable. *Hotel Tutwiler Operating Co. v. Evans, 208 Ala. 252, 94 So. 120,* also *35 A.L.R. 695, et seq.,* and *77 A.L.R., 927, 936,* where cases pro and con are cited.

"The term 'manager' applied to an officer or representative of a corporation, implies the idea that the management of the affairs of the company has been committed to him with respect to the property and business under his charge. Consequently his acts in and about the corporation's business so committed to him, is within the scope of his authority. 5 Words & Phrases, First Series, p. 4319; *Sullivan v. Evans-Morris-Whitney Co., 54 Utah 293, 180 P.* [*478] *435.* The designation 'manager' implies general power, and permits a reasonable inference that he was invested with the general conduct and control of the defendant's business and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company." *Newark Shoe Co., 190 N.C. 406, 130 S.E. 32,* citing numerous authorities.

The acts alleged in the first count to have been done by Faircloth, the "manager" [***7] of the Kress store in Pensacola, were impliedly authorized by the defendant, if done in pursuance of any of the express duties alleged. There is a very close relation between the duty of protecting the interests of the defendant against the passage of spurious coin and other misdemeanors liable to result in monetary loss to the company, and the alleged act of the "manager" in causing the detention or false imprisonment of the plaintiff because of an erroneous belief that a five dollar bill she attempted to pass in the Kress store was counterfeit.

The alleged act of the "manager" in causing plaintiff to be taken to the police station was not necessarily done solely for the purpose of vindicating public justice, which is generally not actionable; *Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214;* but may also have been done to prevent the plaintiff from later passing or attempting to pass the same five dollar bill in the defendant's store in exchange for merchandise, which the "manager" may have believed would result in financial loss to his company, as well as to prevent others from doing similar acts. See *United Cigar Stores Co. v. Young, 36 App. D.C. 390; Hostettler* [***8] *v. Carter, 73 Okla, 125, 175 Pac. 244.* Whether the allegations of the first count were proven was, under the evidence adduced, and such reasonable inferences as might be drawn therefrom, a question for the jury.

[*479] The general principle for which plaintiff in error contends, as applied to mere servants, or clerks, has been recognized by this Court in the case of *Winn &*

Lovett Grocery Co. v. Archer, supra, wherein this Court, speaking through Mr. Justice DAVIS, said:

"There is a marked distinction between a false imprisonment or arrest caused by an agent for the purpose of protecting property, or recovering it back, and an arrest or imprisonment caused for the purpose of punishing an offender for an act already done. Ordinarily there is no implied authority in a servant having the custody of property, to take such steps as the thinks fit to punish a person who he erroneously supposes has committed a crime against the property, and the trend of decision is against holding the master liable when the arrest has been made after the supposed crime has been committed, and not for the protection of his property or interests. In such cases the agent is presumed to have [***9] [**761] acted on his own account, for the vindication of justice, since his agency relates solely to the property, and the act of punishing the offender is not anything done with reference to it." (Citing authorities.) "However, there is clearly an implied authority to do all things that may be proper and necessary for the protection of the property (*Carter v. Howe Mach. Co. [1879], 51 Md. 290, 34 Am. Rep. 311);* and it has been held that where a servant has reason to believe that property has actually been stolen, and that he can recover it by taking the supposed thief into custody, and the evidence shows beyond question that the object which the servant had in view in procuring the arrest of the plaintiff was not to vindicate public justice, but to recover the property, or charges due thereon, the servant is acting within the scope of his employment and the limits of the implied authority, and the master is liable, however erroneous, mistaken, or malicious [*480] the act may be. *Cameron v. Pacific Exp. Co. (1892), 48 Mo. App. 99.* See *Allen v. London & S.W.R. Co. (1870), L.R. 6 Q.B. (Eng.) 65, 40 L.J.Q.B.N.S. 55, 23 L.T. N.S 612, 19* Week, Rep 127, 11 Cox. C.C. 621. For [***10] other cases holding that the employer is liable when an employee falsely arrests a person in protecting the property of the principal or corporation when the person falsely arrested had none of the property, see *Field v. Kane, 99 Ill. App. 1; Knowles v. Bullene, 71 Mo. App. 341; Ataples v. Schmid, 18 R.I. 224, 26 Atl. Rep. 193, 19 L.R.A. 824.*"

In the case from which this quotation is taken, the defendant corporation was sued for damages for false imprisonment alleged to have been caused by one of the clerks in defendant's grocery store. In the case at bar we are dealing with the acts and conduct of the manager of the store, and while the declaration omits any allegation to the effect that the acts and conduct of said manager were done in pursuance of any effort to recover possession of any property which the plaintiff had obtained from the store in exchange for the five dollar bill which the plaintiff had tendered in payment of goods purchased or attempted to be purchased, it does allege that it was the duty of said manager to guard the interests of the defendant corporation against the passing of spurious coin and other misdemeanors liable to result in monetary loss to his employers, [***11] and that, acting in his capacity as such manager, he inspected the five dollar bill tendered by the plaintiff, falsely pronounced it to be counterfeit, and caused the plaintiff to be detained in the store and given into the custody of a policeman, etc. Our conclusion is that neither of the counts of the declaration were subject to demurrer on the ground that the same failed to show that Faircloth was acting within the scope of his authority as manager of the store, and that, under the facts alleged, the declaration failed to [*481] show that the defendant corporation was legally liable for any damage caused by the acts of said manager which the declaration complains of.

The second count of the declaration purported to be a count for malicious prosecution. However, the demurrer interposed thereto was upon practically the same grounds as those upon which the demurrer to the first count was based. We have already dealt with those grounds dealing with the question of the defendant's liability for the acts of its store manager, which are common to both counts. But the demurrer to the second count also contained this ground: that "said count states no cause of action against [***12] this defendant." Such a general ground of demurrer is not a compliance with the statute, which requires the substantial matters of law intended to be argued to be stated, and will not avail, unless, upon a bare inspection of the pleading demurred to, it should be found so faulty and defective as to constitute no cause of action, or defense, as the case may be. *Heathcote v. Fairbanks, Moss & Co., 53 So. 950, 60 Fla. 97; Wauchula Development Co. v. Peoples Stockyards Bank, 86 Fla. 298, 98 So. 220.* The fact is that the second count contains allegations of specific facts, which are substantially the same as the allegations of facts contained in the first count, and hence these allegations, if extricated from the legal conclusions of the pleader to which they are attached, might be sufficient to substantially charge *false imprisonment,* but they were not, under our decisions, on even a cursory examination thereof, sufficient to state a cause of action for *malicious prosecution,* which was the purported purpose of this count. The "summoning of a policeman and delivering the plaintiff to his custody and informing the policeman that the plaintiff had attempted to pass a counterfeit [***13] five dollar bill" was not the commencement of a judicial proceeding, and did not involve [*482] the issuance [**762] of legal process, so as to constitute malicious prosecution; not did the additional allegations that this was done maliciously and without probable cause, and that this so called "prosecution terminated in favor of the plaintiff upon inspection of the five dollar bill by the

proper officers of the City of Pensacola who determined the same to be genuine," supply the defect, or show that any *judicial proceeding* was terminated in plaintiff's favor.

In the case of *Tatum Bros. Real Estate & Inv. Co. v. Watson, 92 Fla. 278, 109 So. 623,* this court held that:

"The gist of the action of malicious prosecution is that plaintiff has been without probable cause and maliciously made the subject of legal process resulting in his damage.

"An action for maliciously putting the law in motion lies in all cases where there is a concurrence of the following elements; (1) The commencement or continuance of an original criminal or civil judicial proceeding. (2) Its legal causation by the present defendant against plaintiff who was defendant in the original proceeding. [***14] (3) Its *bona fide* termination in favor of the present plaintiff. (4) The absence of probable cause for such proceeding. (5) The presence of malice therein. (6) Damage conforming to legal standards resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action."

To like effect see *Duval Jewelry Co. v. Smith, 102 Fla. 717, 136 So. 878,* 38 C.J. 386-387; and *Fisher v. Payne, 93 Fla. 1085, 113 So. 378.* In the last cited case, this Court dealt with some of the distinctions between false imprisonment and malicious prosecution, in the course of which it was said that "False imprisonment is the unlawful restraint of a person contrary to his will," to recover damages for which an action of trespass must be brought, the gist of which is the unlawful detention of the plaintiff. See [*483] also 11 R.C.L. 791-793, and Crandall's Fla. Common Law Prac., Section 115.

In 25 C.J. 444-447, it is well said:

"Although not always observed, the distinction between malicious prosecution and false imprisonment is fundamental. But briefly, the essential difference between a wrongful detention for which malicious prosecution will lie, and one for which [***15] false imprisonment will lie, is that in the former the detention is malicious but under the due forms of law, whereas in the latter the detention is without color of legal authority. In malicious prosecution plaintiff must allege and prove malice and want of probable cause and the termination of the proceeding favorably to plaintiff, whereas in false imprisonment the allegation of want of probable cause is not essential, and the burden is on defendant to prove probable cause as a defense or in mitigation. Malice is material only on the issue of damages, and the termination of the proceeding is not material. If the imprisonment is under legal authority it may be malicious but it cannot be false. This is true where legal authority is shown by valid process, even if irregular or voidable. Void process will not constitute legal authority within this rule."

By overruling the demurrer to this defective count, which ruling we deem to have been erroneous, the element of malice, which was not mentioned in, nor essential to, the first count, was expressly injected into the pleadings in the case, and this issue with regard to malicious prosecution, without probable cause, was submitted [***16] to the jury, and charged upon by the court. Thus one of the grounds of the motion for new trial was the giving by the Court of charge No. 1 requested by the plaintiff, which was:

"The court charges you that the malice charged in the second count of the declaration does not necessarily mean [*484] personal malevolence or ill-will, but merely means that state of mind wherein one willfully or recklessly does a wrongful act to the injury of another, and the jury in such cases may in their discretion infer the existence of malice from the institution of a criminal proceeding when probable cause so to do does not exist."

The court also refused to direct a verdict in favor of the defendant on this second count, made when the taking of testimony was closed, although the evidence was not sufficient to prove a malicious prosection as thereby attempted to be charged, nor indeed was it sufficient to prove actual malice under the first count, even if it had been expressly charged therein.

The court sustained demurrers to certain of defendant's pleas, but those pleas which were held good against demurrer were sufficient to permit the defendant to present to the court and jury all defenses [***17] which it endeavored to present by evidence offered, including the defenses attempted to be set up in the pleas which went out on [**763] demurrer. We have carefully considered these pleas, the demurrers thereto, and the court's rulings thereon, and our conclusion is that no harmful or reversible error appears.

Defendant in error contends that where the verdict is general, as it is here, it will not be set aside on motion for a new trial if one sufficient count of the declaration was sustained by the evidence; citing 46 C.J. 192, and cases therein cited; also citing Section 4501 of the Compiled General Laws of 1927. This later section, and the one preceding it, relate to motions in arrest of judgment. Said Section 4501 provides, among other things, that no judgment after the verdict of the jury, shall be stayed or reversed for any faulty count in the declaration where the same declaration contains one count which is good, or for any imperfection, omission, defect or lack of form in any pleading, [*485] not affecting the merits of the cause; unless the party making the objection was injured

by the irregularity, or unless the objection was made before the returning of the [***18] verdict.

As above shown, there was a demurrer interposed to the second county, also a motion for a directed verdict in favor of the defendant on that count, and an exception taken to certain charges which were given with relation to that count which were not applicable to the first count, and which tended to the prejudice of the interest of the defendant to a trial of the issues raised by the first count and the pleas interposed thereto.

It is quite generally held that if defects or insufficiencies of the pleadings do not affect the determination of the case upon the merits or prejudice the substantial rights of the opposite party, they afford no basis for a reversal. 5 C. J.S. page 846.

And on page 861 of the same work it is said that: "Error in overruling a demurrer is harmless only where there are circumstances which show that the fact that the pleading was permitted to stand could have had no effect on the final result." Numerous cases are cited in support of this general principle, which principle appears to be recognized by the language of the latter part of Section 5401 C.G.F.

Applying these principles to the rulings above referred to, relating to the second count [***19] of the declaration, our conclusion is that harmful error was committed in overruling the demurrer to, and later declining to instruct a verdict for defendant on said second count, and the giving of charges relating to malice based thereon, which requires a reversal of this case.

Generally speaking, there are but two kinds, of damages which are recoverable in actions of tort -- compensatory and punitive.

[*486] In an action for malicious prosecution, exemplary or punitive (sometimes called vindictive) damages are recoverable where actual malice and want of probable cause are shown, or where the legal proceedings complained of were commenced under circumstances of oppression, wantonness, or a reckless disregard of plaintiff's rights. 38 C.J. 448-449.

In an action for false imprisonment, which may be brought regardless of whether there was, or was not, malice, the elements of recoverable *compensatory* damages may include bodily injuries or physical suffering, which are the proximate result of the unlawful imprisonment, or illness caused thereby; physical inconvenience and discomfort suffered by reason of the conditions of the place of confinement; loss of time, and losses [***20] sustained in the business or employment of the plaintiff; expenses incurred as a result of the unlawful imprisonment; mental suffering endured because thereof, such as embarrassment, humiliation, deprivation of liberty, disgrace and injury to the feelings, of the person unlawfully imprisoned, as well as injury to his reputation, resulting therefrom. 25 C.J. 556-560. In this case the elements charged are embarrassment, humiliation and deprivation of liberty. In the case of *Smith v. Bagwell, 19 Fla. 117,* this Court held:

"Compensatory damages are defined as such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses, and bodily pain and suffering. Exemplary, vindictive or punitory damages are such as blend together the interests of society and of the aggrieved individual, and are not only a recompense to the sufferer but also a punishment to the offender and an example to the community."

In the case of *Winn & Lovett Grocery v. Archer, 126 Fla. 308,* [*487] *171 So. 214,* this Court, speaking through Mr. Justice DAVIS, said:

[**764] "Exemplary damages are given solely as a punishment where torts are committed with fraud, actual [***21] malice or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. Exemplary or punitive damages are therefore damages *ultra* compensation, and are authorized to be inflicted when the wrong done partakes of a criminal character, though not punishable as an offense against the State, or consists of aggravated misconduct or a lawless act resulting in injury to plaintiff, when sought to be redressed by a civil action for the tort.

"Exemplary or punitive (sometimes called vindictive) damages are assessable dependent on the circumstances showing moral turpitude or atrocity in the defendant's conduct in causing an injury that is wanton and malicious or gross and outrageous to such an extent that the measured compensation of the plaintiff should have an additional amount added thereto as 'smart money' against the defendant, by way of punishment or example as a deterrent to others inclined to commit similar wrongs." * * *

"In order to recover exemplary or punitive damages the declaration must allege some general facts and circumstances of fraud, malice, gross negligence or oppression [***22] tending to show plaintiff's right to recover such damages in addition to damages by way of compensation. But punitive or exemplary damages need not be described or demanded in the declaration by that name, in order to be recoverable." (Citing many authorities.)

See also 25 C.J. 562, where it appears that circumstances of aggravation attending the tort sued for, may form the [*488] basis for enhancing the allowance of compensatory damages which are otherwise recoverable, which principle was recognized in *Winn & Lovett Gro-*

cery v. Archer, supra. The reason for this rule perhaps is that the aggravated character of the wrongful conduct, when attended for instance, by harsh or insulting language, or needlessly violent and oppressive measures, may well cause greater humiliation or mental pain. There was no evidence of such circumstances of aggravation in this case.

See also 11 R.C.L. 819-821.

It is not necessary to go into a discussion of the evidence in this case, except to say that there is no evidence of any express or actual malice shown. While the plaintiff did not make out a strong case by any means, there was enough evidence to submit the case to the jury upon the [***23] first count in the declaration. But the amount of the verdict is probably larger than would have been allowed if the case had been tried on that count alone. While the store manager may have been overzealous in his conduct, when the suspicious looking five dollar bill was brought to his attention, and the taking of the young lady plaintiff to the police station for the bill to be inspected was not justifiable, the conduct of neither the manager nor the policeman was discourteous nor attended by "circumstances of aggravation," and the court's charge with relation to that element of enhancement of damages was not justified by the evidence.

For the reasons above pointed out the judgment of the court below will be reversed and the cause remanded.

"Caldwell, Jr. , Dick" <dcaldwell@rumberger.com>
02/06/2006 08:34 PM

To "Lucy Chernow Brown" <LCBROWN@co.palm-beach.fl.us>, "Price, Terry \(Legal\)" <Terry.Price@anheuser-busch.com>, "Gunn, Tracy" <tgunn@fowlerwhite.com>,
cc <SMakar@coj.net>, <grose@flabar.org>
bcc
Subject Abuse of Process

Attached is a first attempt at an abuse of process instruction. Look it over and see what you think.

I'd like to be able to present fairly complete versions of the malicious prosecution and false imprisonment instructions to the whole committee at the upcoming meeting, as we've kicked those around before. If there's enough consensus that something like this draft can be readied for initial discussion, it would be great to present this also.

What are the possibilities for a conference call maybe noon Thursday 2/9?

[attachment "abuseprocess.doc" deleted by Gerry Rose/The Florida Bar]

MI ___

ABUSE OF PROCESS

a. Issues:

The issues you must decide on the claim of (claimant) against (defendant) are:

1. Whether (defendant) [describe nature of process utilized];

2. Whether (defendant) willfully and intentionally made [an] illegal, improper or perverted use[s] of (process); and

3. Whether (defendant) had an ulterior motive or purpose in exercising this illegal, improper or perverted (process); and

4. Whether Plaintiff was injured as a result of (defendant's) actions.

[Note: these elements seem well established in Florida law. See, Hardick v. Homol, 795 So.2d 1107, 1111 (Fla. 5th DCA 2001). "Abuse of process" has been distinguished from malicious prosecution, in that there is no requirement to show a favorable termination of the prior action in plaintiff's favor, nor to prove lack of probable cause. Blue v. Weinstein, 381 So.2d 308, 310 (Fla. 3d DCA 1980). However, the two claims have been often confused, even by appellate courts. Id. at 311. The cases don't seem to require a specific showing of malice. Bothmann v. Harrington, 458 So.2d 1163, 1169 (Fla. 3d DCA 1984) states in fn. 7 that "'[l]egal malice' is presumed to be present if the plaintiff establishes that the process has been used for an improper purpose."

The actual use of the process involved will seldom be at issue, so the instruction could be reworded to omit sub-paragraph a.1.

The words "willfully and intentionally" are set forth in probably the most-cited case in this area, Cline v. Flagler Sales Corp., 207 So.2d 709, 711 (Fla. 3d DCA 1968). Later cases don't use those words, but seem to perceive them as subsumed as part of the act of making an improper use of process for an ulterior motive. Note that Cline, on p. 711, uses the phrase "willful or intentional misuse" in one sentence, then in the very next sentence talks about "willful and intentional misuse." There seems to be a distinction there which the case doesn't address – would "or" be a better conjunctive?

With respect to sub-paragraph a.2, the cases indicate that the "abuse" "consists not in the issuance of process, but rather in the perversion of the process after its issuance." Peckins v. Kaye, 443 So.2d 1025 (Fla. 2d DCA 1983). The claim requires proof of an act which constitutes the misuse of the process after it issues; the issuance itself of the process is not

the heart of the tort. Whether the underlying cause of action has any basis in fact or law is not particularly relevant to an abuse of process claim. Cazares v. Church of Scientology, 444 So.2d 442 (Fla. 5th DCA 1983).

The word "perverted" seems a little odd in today's usage, but several of the cases use it, and it's been included in this preliminary draft.

The cases also state that neither the aspects of the tort set forth in a.2 or a.3 are sufficient by themselves. There must be a showing of both aspects (together with a damages showing, of course). Della-Donna v. Nova University, Inc., 512 So.2d 1051, 1055 (Fla. 4th DCA 1987). "An ulterior motive in itself is not sufficient. There must be an improper willful act during the course of the proceedings to constitute an abuse of process." Peckins v Kaye, supra at 1026. Scozari v. Barone, 546 So.2d 750 (Fla. 3d DCA 1989), states this principle thusly: "There is no abuse of process ... when the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior purpose." One leading case remarked that typically some form of extortion is involved. Bothmann v. Harrington, supra at 1169 . In other words, there must be BOTH some improper act during a legal proceeding, and an ulterior motive in doing so. Do we need a specific sub-paragraph of this instruction to that effect?]

b. Process used for its intended purpose

If you find that (process) was used to accomplish the result for which it was created (describe result), then there is no abuse of process, regardless of an incidental or concurrent motive of [spite] [ulterior purpose] [other motive].

[NOTE: this sub-paragraph may address the question posaed in the last sentence of the note above. It's from Rothmann v. Harrington at 1169.]

c. Burden of proof on claim:

If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant). However, if the greater weight of the evidence does support the claim of (claimant), [then your verdict should be for claimant and against (defendant)] [then you shall consider the defense[s] raised by (defendant)].

[NOTE: I did not see any discussion of particular affirmative defenses to a claim of abuse of process in the cases. Would comparative fault be a defense?]

d . Burden of proof on defense

If the greater weight of the evidence supports the defense, your verdict should be for (defendant). However, if the greater weight of the evidence does not support the defense, and does support the claim of (claimant), your verdict should be for (claimant).

e. Greater weight of the evidence defined:

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence.

"Caldwell, Jr. , Dick"
<dcaldwell@rumberger.com>
02/08/2006 05:45 PM

To "Terry Lewis" <TerryLe@leoncountyfl.gov>, "Lucy Chernow Brown" <LCBROWN@co.palm-beach.fl.us>
cc <SMakar@coj.net>, <grose@flabar.org>, "Tracy Gunn" <tgunn@fowlerwhite.com>, <reajr@robertaustinlaw.com>
bcc
Subject RE: Abuse of Process

Thx. Folks, the Monday noon conference call is definitely on. The call-in number is 407-839-4598. There is no pass code required - I think it just says to state your name, and you're patched in. I reserved a couple of hours in an abundance of caution, but I know we will only have an hour or less, so be prepared to talk fast!

I circulated the initial draft to the Plain English Subcommittee, and Gary Farmer suggested something like "The issues you must decide...." I like that better than "The issues for your determination..." but there may be even a better way to do it.

Your definition of "without legal authority" is better than what I had, but you're right, it's still a little circular.

I think we will need to deal with the potential existence of a negligence issue in 6.1. As you point out, almost by definition this is an intentional tort. However, most of the complaints I've seen plead a cause of action for negligence in the alternative, in order to trigger insurance coverage, and we need to figure out something on that type of claim.

Thx. Again. Talk to everybody next week.
-----Original Message-----
From: Terry Lewis [mailto:TerryLe@leoncountyfl.gov]
Sent: Wednesday, February 08, 2006 4:09 PM
To: Lucy Chernow Brown; Caldwell, Jr. , Dick
Cc: SMakar@coj.net; grose@flabar.org; Tracy Gunn; reajr@robertaustinlaw.com
Subject: RE: Abuse of Process

Dick,
I've read over the 5.1 and 6.1 drafts. Thanks for your efforts to keep this going. A couple of observations :

As I said before, I don't like the basic format that starts with "The issues for your determination..." At any rate, both could benefit from a "Plain English" makeover. I did a draft once before. I'll pull it out in the next couple of days, tweak it and send it along for your consideration.

As to the 6.1, I would define "without legal authority" as meaning that the D did not have a legal right to restrain the D. It is a bit circular as well but I think is more understandable than "color of law". As a practical matter, in most cases it will be a premptive charge situation. That is, the judge will determine that element as a matter of law. ANd when it's not, the parties will have narrowed the issues so it is clear on what basis the D may claim to have had lawful authority.

I have not put my plain english pen to this but will give it a try as well in the next couple of days.

The negligence issue is interesting. It is an intentional tort, and there's nothing in the current instruction suggesting or defining negligence, though the cases, as pointed out in the two memos in my file, talk about the detention being unreasonble and unmarranted under the circumstances. Perhaps what is meant by that is simply that if you don't have lawful authority (which would be an affirmative defense it seems), then it would be an unreasonable and unwarranted restraint.

I am forwarding this to my JA to make sure she knows about the meeting on the 13th @ noon. That is still on, right?

"Robert E. Austin, Jr." <reajr@robertaustinlaw.com>
02/09/2006 04:20 PM

To "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com>, <lcbrown@co.palm-beach.fl.us>, <terryle@mail.co.leon.fl.us>, "Gunn, Tracy"
cc "Scott Makar" <smakar@coj.net>, "Gerry B. Rose" <grose@flabar.org>
bcc
Subject Re: Abuse of Process

Thank you. It seems appropriate that the instruction should define "process" and what is contemplated by the term, i.e. notice of taking deposition, etc. When I ran a West Law search, I was surprised to find that some of the appellate courts, in an appellate setting, are seemingly equating "abuse of process" with frivolous assertions.

Bob

----- Original Message -----
From: Caldwell, Jr. , Dick
To: Robert E. Austin, Jr. ; lcbrown@co.palm-beach.fl.us ; terryle@mail.co.leon.fl.us ; Gunn, Tracy
Cc: Scott Makar ; Gerry B. Rose
Sent: Thursday, February 09, 2006 3:51 PM
Subject: RE: Abuse of Process

Thx. I think you were the one who circulated some of the California instructions before. I looked at SJI 1520, and that's one of the sources which pointed out that for this cause of action there must be BOTH some improper use of some aspect of the legal system, AND an ulterior motive.

-----Original Message-----
From: Robert E. Austin, Jr. [mailto:reajr@robertaustinlaw.com]
Sent: Thursday, February 09, 2006 1:48 PM
To: Caldwell, Jr. , Dick; lcbrown@co.palm-beach.fl.us; terryle@mail.co.leon.fl.us; Gunn, Tracy
Cc: Scott Makar; Gerry B. Rose
Subject: Re: Abuse of Process

Dick:

For your information and consideration, attached is California Standard Jury Instruction 1520.

Bob

"Caldwell, Jr. , Dick"
<dcaldwell@rumberger.com>
02/09/2006 12:34 PM

To "Robert E. Austin, Jr." <reajr@robertaustinlaw.com>
cc <lcbrown@co.palm-beach.fl.us>, <terryle@mail.co.leon.fl.us>, "Gunn, Tracy" <tgunn@fowlerwhite.com>, "Scott Makar"
bcc
Subject RE: Abuse of Process

You're correct. The cases make it pretty clear that the initial "process," i.e, summons/complaint, are not really within the scope of the cause of action. Rather, it's what happens thereafter that can lead to the claim. It can be depositions, whatever.

-----Original Message-----
From: Robert E. Austin, Jr. [mailto:reajr@robertaustinlaw.com]
Sent: Thursday, February 09, 2006 12:23 PM
To: Caldwell, Jr. , Dick
Subject: Re: Abuse of Process

Thank you. I look forward to receiving it. I am interested in the definition of "process" and what might be included. From several cases that I have seen, it does not appear to be limited to traditional "process" and could include various notices and pleadings.

Bob

MI 6.1

FALSE IMPRISONMENT

a. Issues on claim:

In order to recover on his claim for False Imprisonment, Plaintiff must prove by the GWOTE all of the following :

1. Plaintiff was completely restrained [deprived of his freedom of movement by use of physical barriers/force, threat of force, fraud, deceit, unreasonable duress];
2. Defendant intentionally caused the restraint;
3. The restraint was without legal authority;
1. 4.Plaintiff did not consent to the restraint~~These are the issues you must decide on the claim of (claimant) against (defendant): whether (defendant) intentionally caused (claimant) to be completely restrained against [his] [her] will in a manner unreasonable and unwarranted under the circumstances, and that (defendant) had no lawful authority to do so.~~

~~1.~~

~~In telling you the issues, I have used five terms which you must understand. They are:~~

~~Aintentionally restrained,@~~

~~Acaused restraint,@~~

~~Acompletely restrained,@~~

~~Arestrained against (claimant=s) will,@ and~~

~~Awithout lawful authority.@~~

~~I will explain those terms now:~~

5. Plaintiff was harmed as a result of the restraint.

b.AIntentionally ~~restrained~~@ means that (defendant) acted ~~restrained (claimant)~~ with the ~~very~~ purpose of causing such restraint, or with the knowledge that such restraint would, to a substantial certainty, result ~~from (defendant=s) acts~~.

c. ACaused restraint@ means that (defendant=s) actions directly and in a natural and continuous sequence produced or contributed substantially to producing the restraint, so

that it can reasonably be said that, but for those acts, the restraint would not have occurred. [A person who makes a mistake in reporting or identifying another person to law enforcement officers is not liable for causing the other person to be restrained, if the person making the mistaken report or identification acts in good faith and does not instigate, persuade, or request the officers to restrain the other person.]

d. ACompletely restrained@ means that (claimant), at the time of the incident, was not free, or reasonably believed [he] [she] was not free, to leave a place to which [he] [she] had been confined. However, a person is not Acompletely restrained@ when there is a reasonable means of escape which is apparent or known to the person.

~~e. Arestrained against (claimant=s will)@ means that (claimant) did not consent to the restraint.~~

~~f.~~ AW~~w~~ithout lawful authority@ means that the restraint was unreasonable and unwarranted under the circumstances and that the (defendant) had no legal right to restrain the plaintiff~~ did not act under color of law~~.

[Note: this definition has given me considerable trouble. I have not found a case which gives a definition of Alawful authority,@ or Awithout lawful authority,@ so the above is really nothing more than circular reasoning, and tells the jury very little. The cases do say, though, that lack of Alawful authority@ is one of the elements of false imprisonment. See, Everett v. Florida Inst. of Technology, 503 So.2d 1382 (Fla. 5th DCA 1987), and the absence of this factor from the current instruction has been one of the criticisms voiced. Maybe we don=t even need a definition of that phrase, in absence of case law or statutory circumscription.
Several of the cases do point up that there is a difference between an arrest by a law enforcement officer, and a Acitizen=s arrest,@ or the detention or procurement of an arrest by a civilian. In the case of an arrest or detention by a law enforcement officer, this phrase would almost seem meaningless, as long as the officer was acting within his jurisdiction. This draft does not get into this distinction, just as the current instruction does not.
I invite any thoughts on this issue.]

g. Burden of proof on claim:

If the plaintiff has not proven his claim by the greater weight of the evidence,~~ does not support the claim of (claimant), your~~ then your verdict~~v edict~~ should be for (defendant). If, on the other hand, plaintiff has proven his claim, then you shall consider the affirmative defense(s) claimed by defendant. An affirmative defense is one that asserts that even if what the plaintiff claims is true, defendant is still not liable for plaintiff=s loss. The affirmative defense asserted here is [name it]. In order for defendant to be relieved of liability based on this affirmative defense, he must prove all of the following

by the GWOTE.

Elements of defense (see eg., proable cause)

If defendant has proven this defense, your verdict should be for defendant. If not, your verdict should be for plaintiff and you should determine an amount of money that the GWOTE shows will fairly and adequately compensate him for the loss caused by the false imprisonment.~~However, if the greater weight of the evidence does support the claim of (claimant), [then your verdict should be for (claimant) and against (defendant)] [then you shall consider the defense[s] raised by (defendant)]~~ [see malicious prosecution draft for additional language]

h. Probable cause*:

On the [first] defense, the issue you must decide is whether [(defendant) had probable cause to restrain (claimant)] [whether (name), a [merchant] [merchant=s employee] had probable cause to believe that goods held for sale by the merchant were unlawfully taken by (claimant) and could be recovered by restraining (claimant) for a reasonable time and in a reasonable manner.] AProbable cause@ means that the facts and circumstances known to (defendant) [in existence] at the time [of the incident] were sufficient to cause a reasonably cautious person [officer] to believe that (claimant) had committed a crime [an offense?].

* Example only. See Comment on other potential defenses.

[What, if any, additional defenses should be added in here? If the complaint were phrased in terms of negligence, to invoke insurance coverage, comparative negligence might lie as a defense, for example. The * comes out of the existing instruction, but if there are other defenses which could be laid out here, is it helpful to do so?]

~~i. Burden of proof on defense:~~

~~If the greater weight of the evidence supports this defense, your verdict should be for (defendant) and against (claimant). If, however, the greater weight of the evidence does not support this defense, and does support the claim of (claimant), your verdict should be for (claimant) and against (defendant).~~

[the wording of 6.1i above, as with current 6.1h, is predicated upon probable cause as a complete defense. If there are in fact additional defenses which should be mentioned which are not a complete bar to the claim, should we insert a comparative negligence type of Aburden of proof@ instruction?]

j. AGreater weight of the evidence@ defined

[Same as current 6.1i]

k. Damages

[Same as current 6.1j]

Comments on MI 6.1

[No change made here, except that the subsections will need to be re-numbered. We probably do need to find some more recent case cites in lieu of the older references set forth in the current instructions.]

ABUSE OF PROCESS

In order to recover on his/ claim of abuse of process, plaintiff must prove by the GWOTE all of the following :

1. Defendant [describe the legal procedure alleged to have been abused, e.g. caused criminal proceedings to be filed against plaintiff];

2. Defendant intentionally used this legal procedure for an improper purpose [describe the improper purpose, e.g., to coerce the payment of a civil debt];

3. Defendant had an ulterior motive for using this legal procedure, [describe the ulterior motive, e.g., to coerce the payment of a civil debt];

4. Defendant's action caused harm to plaintiff.

[definition of GWOTE]

If there is an affirmative defense :

If you find that plaintiff has not proven his claim by the GWOTE, then your verdict shall be for Defendant. If, on the other hand, you find that plaintiff has proven his claim, you should consider Defendant's affirmative defense. An affirmative defense is one that asserts that even if what the plaintiff claims is true, he is still not liable for plaintiff's harm. The affirmative defense asserted here is [name it]. In order for Defendant to be relieved of liability based on this affirmative defense, he must prove by the GWOTE the following :

[list the elements]

If no affirmative defense ; [see malicious prosecution for this and damages]

Damages [see malicious prosecution]

Malicious Prosecution

In order to recover on his claim of malicious prosecution, [Plaintiff] must prove by the GWOTE all of the following :

1. [Defendant] caused a [criminal] [civil] proceeding to be started or continued against [Plaintiff].

2. [Defendant] acted maliciously and without probable cause.

3. The proceeding was terminated in favor of [Plaintiff].

4. [Plaintiff] was harmed as a result of [Defendant's] actions.

[Defendant] caused the proceeding to be started or continued if such is the direct and natural result of his actions, so that without those actions, the proceedings would not have started or continued. [Defendant did not cause the criminal proceeding to start or continue if he, in good faith, made a full and fair disclosure of what he knew to the proper authorities and left the decision to start or continue the proceeding entirely in the judgment of the authorities].

[Defendant] acted without probable cause if the facts and circumstances known to [Defendant or other person whose knowledge is at issue] at the time [defendant acted] were not sufficient to cause a reasonably cautious person to believe that [Plaintiff committed a crime] [the civil claim

against Plaintiff was meritorious].

[Defendant] acted maliciously if he acted with the primary purpose of injuring [Plaintiff], or he acted recklessly and without regard for whether the [charge] [claim] was justified, or if his primary purpose was anything other than to pursue what he considered to be a meritorious [charge] [claim]. In determining whether [Defendant] acted maliciously, you may consider all the circumstances at the time, including any lack of probable cause to start or continue the proceeding..

Definition of GWOTE

If there is an affirmative defense :

If you find that [Plaintiff] has not proven his claim by the GWOTE, then your verdict should be for [Defendant].If, on the other hand, he has proven his claim by the GWOTE, then you should consider [Defendant]'s affirmative defense. An affirmative defense is one that asserts that even if what the plaintiff claims is true, the defendant is still not liable for plaintiff's harm or loss. The affirmative defense asserted here is [name it]. In order for [name of defendant] to be relieved of liability based on this affirmative defense, he/she must prove by the GWOTE the following :

[list the elements]

If Defendant proves this defense by the GWOTE, then your verdict should be for the Defendant. If not, your verdict is for Plaintiff and you should determine the amount of money that the GWOTE shows will fairly and adequately compensate him for any harm caused by Defendant's action. The money awarded for such harms is called damages. You should consider the following categories of damages:

[insert categories of damages as appropriate]

If no affirmative defense:

If you find that [Plaintiff] has not proven his claim by the GWOTE, then your verdict should be for [Defendant].If, on the other hand, he has proven his claim by the GWOTE, then you should determine the amount of money that the GWOTE shows will fairly and adequately compensate him for any harm caused by Defendant's action. The money awarded for such harm is called damages. You should consider the following categories of damages:

[insert categories as are appropriate]

"Caldwell, Jr. , Dick"
<dcaldwell@rumberger.com>
02/21/2006 01:03 PM

To "Judge Gary M. Farmer" <FarmerG@flcourts.org>, "Gunn, Tracy" <tgunn@fowlerwhite.com>, "Lucy Chernow Brown" <LCBROWN@co.palm-beach.fl.us>, "Judge Terry P. Lewis"
cc <SMakar@coj.net>, <grose@flabar.org>, <bberman@mwe.com>, <farmerg@4dca.org>, <gjf@goldresnick.com>, "Lynn Wells" <WellsL@flcourts.org>
bcc
Subject RE: MI 6.1 revisions

Thanks for the reply. I now see that the better procedure would have been to let you and Terry Lewis wrestle with these revisions, rather than trying to mess around with it myself. We would have come out with a better work product for discussion at the meeting. A couple of quick thoughts:

1. Your point in 6.1 a re: "without lawful authority..." is valid, and seems to be part of the conceptual and linguistic difficulty in enunciating exactly what this is. As mentioned in my initial draft, I found no really satisfactory definition of this term. Maybe we can get some ideas at the meeting.

The same difficulty rears its head in the definition of "without lawful authority" in f. The definition, whatever it winds up being, should be broad enough to encompass the store employee who perceives shoplifting and detains the suspect. Restricting the definition to one acting as a police/law enforcement officer or other official may not be sufficient to cover this situation. It would be very difficult for such an employee to qualify as such an officer or official, which would basically mean automatic liability.

2. My concern with the proposed revisions to the definitions of "intentional restraint" and "caused restraint" is that they may be too narrow. The definitions should be broad enough to cover a situation in which the defendant did not personally restrain claimant, but through his/her actions "caused" the restraint to occur. This could happen if a store manager ordered other employees (or a security guard) to do the deed, or defendant made a false report to a law enforcement officer which resulted in the restraint.

I would be reluctant to omit entirely the "good faith escape clause" set forth in the last sentence of the proposed definition of "Caused restraint." The good faith provision really isn't an affirmative defense, as it goes to the heart of the cause of action in the first place, which is intentional, unreasonable, etc., restraint.

Maybe the way to go about this is to dump the format of the current instruction altogether. I can't think of another instruction off the top of my head which goes point by point through a series of definitions. My draft tried to follow the current format, and update/clarify the language there, and the more I think about it, the more it seems this may not be the best way to go. It's always difficult to start over from scratch, but obviously we need to get this right.

By copy of this e-mail to Gerry Rose, I'm requesting that your revisions be included as an addition to the materials on these instructions if possible. Gerry, if this won't work, let me know and I'll bring enough copies to the meeting to distribute around.

-----Original Message-----
From: Judge Gary M. Farmer [mailto:FarmerG@flcourts.org]
Sent: Tuesday, February 21, 2006 11:28 AM
To: Caldwell, Jr. , Dick; Gunn, Tracy; Lucy Chernow Brown; Judge Terry P. Lewis; reajr@robertaustinlaw.com
Cc: SMakar@coj.net; grose@flabar.org; bberman@mwe.com; farmerg@4dca.org; gjf@goldresnick.com; Lynn Wells

Subject: RE: MI 6.1 revisions

Dick:

I have taken a run at your false imprisonment charge. I simply took your MS Word document and, using the "track changes" program, made some additions and deletions. I had in mind more of a simplification than legal correctness, but in the margin I made some notes of things whose correctness seemed questionable to me. I attach to this email my marked up version.

Gary

From: Caldwell, Jr. , Dick [mailto:dcaldwell@rumberger.com]
Sent: Friday, February 03, 2006 6:31 PM
To: Gunn, Tracy; Lucy Chernow Brown; Judge Terry P. Lewis; reajr@robertaustinlaw.com
Cc: SMakar@coj.net; grose@flabar.org; bberman@mwe.com; Judge Gary M. Farmer; gjf@goldresnick.com; Lynn Wells
Subject: MI 6.1 revisions

Attached in a draft of MI 6.1, False Imprisonment. A couple of notes:

I added language that the arrest must be unwarranted and unreasonable under the circumstances, and without lawful authority. Neither of these two criteria are contained in the current instruction, although clearly set forth in the case law. I really struggled with the definition of "without lawful authority," finding no meaningful definition in the cases.

We need to look at whether there are additional defenses which need instructions, and what if any new comments should be inserted.

I tried to format the instruction so that it might be a little easier to read from the bench.

I've CC'd Bruce Berman's Plain English subcommittee, for any comments they have.

I'll try to prepare an abuse of process instruction which we talked about before, and get it circulated.

MI 6.1

FALSE IMPRISONMENT

a. Issues on claim:

These are the issues you must decide on the claim of (claimant) against (defendant):

whether (defendant) intentionally and completely imprisoned, restrained, or confined (claimant) against [his] {her] will in a manner unreasonable and unwarranted under the circumstances, and without lawful authority to do so.

Deleted: caused (claimant) to be

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Comment: Frankly I doubt the correctness of this. It implies that a defendant could without lawful authority reasonably confine or imprison someone.

Deleted: that (defendant) had no

In telling you the issues, I have used five terms which you must understand. They are:

"intentionally restrained,"

"caused restraint,"

"completely restrained,"

"restrained against (claimant's) will," and

"without lawful authority."

I will explain those terms now:

b. "*Intentionally restrained*" means that (defendant) knowingly and purposefully imprisoned, confined or restrained (claimant).

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c. "*Caused restraint*" means that (defendant's) actions directly and in a natural and continuous sequence produced or contributed substantially to producing the restraint, so that it can reasonably be said that, but for those acts, the restraint would not have occurred. [A person who makes a mistake in reporting or identifying another person to law enforcement officers is not liable for causing the other person to be restrained, if the person making the mistaken report or identification acts in good faith and does not instigate, persuade, or request the officers to restrain the other person.]

Deleted: with the very purpose of causing such restraint, or with the knowledge that such restraint would, to a substantial certainty, result from (defendant's) acts.

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Comment: I would eliminate this whole concept of causing restraint and subsume it within the general definition.

d. An imprisonment, restraint or confinement is *complete* if the person has a reasonable means of escape that is known or reasonably apparent.

e. "*restrained against (claimant's) will*" means that (claimant) did not consent to the restraint.

f. "*without lawful authority*" means that (defendant) was not lawfully acting as a police or peace officer or other official authorized by law to confine or imprison persons.

[Note: this definition has given me considerable trouble. I have not found a case which gives a definition of "lawful authority," or "without lawful authority," so the above is really nothing more than circular reasoning, and tells the jury very little. The cases do say, though, that lack of "lawful authority" is one of the elements of false imprisonment. See, Everett v. Florida Inst. of Technology, 503 So.2d 1382 (Fla. 5th DCA 1987), and the absence of this factor from the current instruction has been one of the criticisms voiced. Maybe we don't even need a definition of that phrase, in absence of case law or statutory circumscription.
Several of the cases do point up that there is a difference between an arrest by a law enforcement officer, and a "citizen's arrest," or the detention or procurement of an arrest by a civilian. In the case of an arrest or detention by a law enforcement officer, this phrase would almost seem meaningless, as long as the officer was acting within his jurisdiction. This draft does not get into this distinction, just as the current instruction does not.
I invite any thoughts on this issue.]

g. *Burden of proof on claim*:

If the greater weight of the evidence does not support the claim of (claimant), your v edict should be for (defendant). However, if the greater weight of the evidence does support the claim of (claimant), [then your verdict should be for (claimant) and against (defendant)] [then you shall consider the defense[s] raised by (defendant)]

h. *Probable cause**:

On the [first] defense, the issue you must decide is whether [(defendant) had a reasonable factual basis to believe that goods held for sale by the merchant were unlawfully taken by (claimant) with a purpose or intent not to pay for them.

* Example only. See Comment on other potential defenses.

[What, if any, additional defenses should be added in here? If the complaint were phrased in terms of negligence, to invoke insurance coverage, comparative negligence might lie

Deleted: "Completely restrained" means that (claimant), at the time of the incident, was not free, or reasonably believed [he] [she] was not free, to leave a place to which [he] [she] had been confined. However, a person is not "completely restrained" when there is a reasonable means of escape which is apparent or known to the person.

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Deleted: did not act under color of law

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Deleted: probable cause to restrain (claimant)] [whether (name), a [merchant] [merchant's employee] had probable cause to believe that

Deleted: and could be recovered by restraining (claimant) for a reasonable time and in a reasonable manner.] "Probable cause" means that the facts and circumstances known to (defendant) [in existence] at the time [of the incident] were sufficient to cause a reasonably cautious person [officer] to believe that (claimant) had committed a crime [an offense?].

Formatted: Justified

as a defense, for example. The * comes out of the existing instruction, but if there are other defenses which could be laid out here, is it helpful to do so?]

i. Burden of proof on defense:

If the greater weight of the evidence supports this defense, your verdict should be for (defendant) and against (claimant). If, however, the greater weight of the evidence does not support this defense, and does support the claim of (claimant), your verdict should be for (claimant) and against (defendant).

[the wording of 6.1i above, as with current 6.1h, is predicated upon probable cause as a complete defense. If there are in fact additional defenses which should be mentioned which are not a complete bar to the claim, should we insert a comparative negligence type of "burden of proof" instruction?]

j. "Greater weight of the evidence" defined

[Same as current 6.1i]

k. Damages

[Same as current 6.1j]

Comments on MI 6.1

[No change made here, except that the subsections will need to be re-numbered. We probably do need to find some more recent case cites in lieu of the older references set forth in the current instructions.]

Deleted: ¶
¶
¶
¶

"Robert E. Austin, Jr." <reajr@inetw.net>
02/16/2008 04:38 PM

To "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com>, "Lucy Chernow Brown" <LCBROWN@co.palm-beach.fl.us>
cc <grose@flabar.org>, <tgunn@fowlerwhite.com>, <reajr@robertaustinlaw.com>
bcc
Subject Re: "Probable Cause" instructions in malicious prosecution and false imprisonment instructions

Dick:
My notes indicate that we previously considered Daniel v. Village of Royal Palm Beach, 889 So. 2d 988 (4th DCA Fla. 2004), a copy of which is attached. Please compare your language with that appearing at page 990 (Page 3 of attached).

Bob
----- Original Message -----
From: Caldwell, Jr. , Dick
To: Lucy Chernow Brown
Cc: grose@flabar.org ; tgunn@fowlerwhite.com ; reajr@robertaustinlaw.com
Sent: Thursday, February 14, 2008 3:56 PM
Subject: RE: "Probable Cause" instructions in malicious prosecution and false imprisonment instructions

OK, thx.

With the subcommittee's permission, I'll send the following to Gerry Rose:

406.4 LACK OF PROBABLE CAUSE

One acts without probable cause in [instituting] [or] [continuing] a [criminal] [civil] proceeding against another if the facts and circumstances are not sufficient to cause a reasonably cautious person to believe that [(the accused)(Claimant) committed a crime] [[the claim made] [proceeding] is justified].
OR:

Probable cause is a reasonable ground of suspicion, supported by facts and circumstances, known to [(defendant) (name of other person whose knowledge is at issue)] [in existence at the time of the incident],
strong enough to cause a reasonably cautious person to believe that the [(accused) (claimant) committed an offense] [(the claim made)(proceeding) was justified].]

Judge Brown, in the 2d version above, I added a little bit to your language as follows: (1) the phrase about knowledge in existence *at the time* probably needs to be in there,

at least for discussion purposes; (2) the word "reasonably" is added in front of "cautious;" (3) the last phrase, about the claim/proceeding being justified was added so the instruction can cover matters arising out of underlying civil litigation as well as criminal proceedings. Also, the phrase "...an offense..." is more appropriate than "...the offense..." because the 4th DCA *Daniels* case makes it pretty clear that the offense for which the Claimant was arrested need not be the same as the one he/she ultimately was charged with.

407.8 DEFENSE ISSUES

On the [first] defense, the issue[s] you must decide are whether (Defendant) (Defendant's employee) had probable cause to believe that goods held for sale by (Defendant) had been unlawfully taken by (Claimant) and could be recovered by restraining (Claimant) for a reasonable time and in a reasonable manner [had probable cause to restrain (claimant)].

"Probable cause" is a reasonable ground of suspicion, supported by facts and circumstances known to (Defendant) (Defendant's employee) [in existence] at the time [of the incident] strong enough to cause a reasonably cautious person [officer] to believe that (Claimant) had committed an offense.

Is the above OK with everybody? I'd like to get this to Gerry by tomorrow a.m., so it can be included in the materials handed out on CD at the meeting.

Thx.

From: Lucy Chernow Brown [mailto:LCBROWN@co.palm-beach.fl.us]
Sent: Thursday, February 14, 2008 11:18 AM
To: Caldwell, Jr. , Dick
Cc: grose@flabar.org; tgunn@fowlerwhite.com; reajr@robertaustinlaw.com
Subject: RE: "Probable Cause" instructions in malicious prosecution and false imprisonment instructions

Dick and subcommittee members:

Here is a stab at a first draft of a plain English definition of probable cause, adapted from a definition in the malicious prosecution case of Fee, Parker & Lloyd, P.A. v. Sullivan, 379 So. 2d 412 at 417:

Probable cause is a reasonable ground of suspicion, supported by facts and circumstances strong enough to cause a cautious person to believe that the accused person has committed the offense of which that person has been accused.

We may be able to develop this into a definition less hampered by parentheses and brackets than our current version, if you all think that is a good approach.. Lucy

>>> "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com> 2/12/2008 10:38 AM >>>

I tend to agree. However, because the substantive law in malicious prosecution operates in terms of LACK of probable cause (thus negative by definition), my thought was to present the draft revision to the Committee in both the affirmative and negative phrasings. This will facilitate discussion on the issue, as it has in the past. We'll be covering plowed ground to some extent, but this may not be a bad thing, because there are a number of members of the Committee who have come on board since this last arose in 2006.

Does anyone have any thoughts on this approach?

From: Lucy Chernow Brown [mailto:LCBROWN@co.palm-beach.fl.us]
Sent: Tuesday, February 12, 2008 8:29 AM
To: Caldwell, Jr. , Dick
Subject: RE: "Probable Cause" instructions in malicious prosecution and false imprisonment instructions

I just think that, from a plain English perspective, it is always easier to understand sentences without negatives. Where is Alan Campo when you need him? LCB

>>> "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com> 2/11/2008 5:44 PM >>>

Bruce Berman in particular was emphatic that, wherever possible, the instructions should not be phrased negatively, i.e., the absence of something, or something the jury doesn't find. We wrestled with this concept for a couple of meetings before the Committee decided not to move forward with the revisions.

From: Lucy Chernow Brown [mailto:LCBROWN@co.palm-beach.fl.us]
Sent: Monday, February 11, 2008 5:38 PM
To: tgunn@fowlerwhite.com; reajr@robertaustinlaw.com; Caldwell, Jr. , Dick
Cc: Ramkissoon, Zita
Subject: Re: "Probable Cause" instructions in malicious prosecution and false imprisonment instructions

Dick and committee, My best recollection is that we decided to define probable cause in the positive, rather than defining lack of pc. I will try to go over this and get back to you tomorrow. Lucy

>>> "Caldwell, Jr. , Dick" <dcaldwell@rumberger.com> 2/11/2008 5:09 PM >>>

All: at the last meeting, the Malicious Prosecution/False Imprisonment subcommittee was tasked with harmonizing the probable cause definitions in the new sections 406.4 (malicious prosecution) and 407.8 (false imprisonment). The attachment represents an attempt to do just that, based largely on work this subcommittee did two+ years ago, before it was decided by the full Committee not to go forward with the effort.

Please review the attachment ASAP, as we need to get our work product up to Gerry Rose for inclusion in the agenda and Committee materials. Does anyone think we need to schedule a quick conference call, or can we take care of everything by e-mail exchange? I would vote for the latter, but let me know any thoughts.

Thx. much.

©Daniel v. Village of Royal Palm Beach
Fla.App. 4 Dist.,2004.

District Court of Appeal of Florida,Fourth District.
Felicia H. DANIEL, Appellant,
v.
VILLAGE OF ROYAL PALM BEACH, Florida, Stacy Preece, and Daniel Fellows, Appellees.
No. 4D04-688.

Dec. 22, 2004.

Background: Motorist, who was arrested but who was later acquitted of reckless driving, brought action against arresting officer and others for malicious prosecution and false arrest. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Elizabeth T. Maass, J., granted final summary judgment in favor of defendants. Motorist appealed.

Holdings: The District Court of Appeal, Gross, J., held that:

(1) arresting officer had probable cause to arrest motorist for reckless driving;

(2) under the fellow-officer rule, observations of sheriff deputy could be imputed to arresting officer to justify arrest; and

(3) in determining whether there was probable cause to arrest motorist for reckless driving, it did not matter that officer actually arrested motorist for aggravated assault.

Affirmed.

West Headnotes

[1] Malicious Prosecution 249 ⚿15

249 Malicious Prosecution
249II Want of Probable Cause
249k15 k. Necessity. Most Cited Cases
In a malicious prosecution case, the plaintiff must establish an absence of probable cause as an element of the tort.

[2] False Imprisonment 168 ⚿13

168 False Imprisonment
168I Civil Liability
168I(A) Acts Constituting False Imprisonment and Liability Therefor
168k9 Defenses
168k13 k. Probable Cause. Most Cited Cases
In a false arrest case, the existence of probable cause is an affirmative defense.

[3] Malicious Prosecution 249 ⚿20

249 Malicious Prosecution
249II Want of Probable Cause
249k17 Criminal Prosecutions
249k20 k. Belief in Guilt of Accused. Most

Cited Cases
For purposes of establishing lack of probable cause as element of malicious prosecution, probable cause exists when the circumstances are sufficient to cause a reasonably cautious person to believe that the person arrested is guilty of a criminal offense.

[4] False Imprisonment 168 ⚿13

168 False Imprisonment
168I Civil Liability
168I(A) Acts Constituting False Imprisonment and Liability Therefor
168k9 Defenses
168k13 k. Probable Cause. Most Cited Cases
For purposes of proving existence of probable cause as affirmative defense to false arrest, probable cause exists when the circumstances are sufficient to cause a reasonably cautious person to believe that the person arrested is guilty of a criminal offense.

[5] Automobiles 48A ⚿349(2.1)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(2.1) k. In General. Most Cited Cases
Arresting officer had probable cause to arrest motorist for reckless driving; evidence indicated that motorist pulled in front of deputy sheriff, who was driving unmarked police car, and stopped very quickly in middle of road, and motorist purposefully slowed vehicle to harass deputy sheriff. West's F.S.A. § 316.192(1).

[6] Automobiles 48A ⚿349(2.1)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(2.1) k. In General. Most Cited Cases
Under the fellow-officer rule, observations of sheriff deputy, who was driving unmarked police car while observing motorist, could be imputed to arresting officer to justify motorist's warrantless arrest for reckless driving. West's F.S.A. §§ 316.192(1), 901.15(5).

[7] Automobiles 48A ⚿349(2.1)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(2.1) k. In General. Most Cited Cases
In determining whether arresting officer had probable cause to arrest motorist for reckless driving, it did not matter that officer actually arrested motorist for aggravated assault; validity of arrest did not turn on offense announced by officer at time of arrest. West's F.S.A. §§ 316.192(1), 901.15(5).

[8] Arrest 35 ⚿63.4(2)

35 Arrest
35II On Criminal Charges
35k63 Officers and Assistants, Arrest Without

Warrant

35k63.4 Probable or Reasonable Cause

35k63.4(2) k. What Constitutes Such Cause in General. Most Cited Cases

Validity of an arrest does not turn on the offense announced by the officer at the time; if there is a valid charge for which a person could have been arrested, probable cause exists.

*989Patrick B. Flanagan of Flanagan, Maniotis, Berger & Ryan, P.A., West Palm Beach, for appellant.

Richard H. McDuff and Scott D. Alexander of Johnson, Anselmo, Murdoch, Burke, *990 Piper & McDuff, P.A., Fort Lauderdale, for appellee Village of Royal Palm Beach.

Stephanie Deutsch of Weiss, Serota, Helfman, Pastoriza, Guedes, Cole & Boniske, P.A., Fort Lauderdale for appellees Stacy Preece and Daniel Fellows.

GROSS, J.

Felicia Daniel appeals a final summary judgment entered against her on her claims for false arrest and malicious prosecution. We affirm, because the record evidence conclusively demonstrated that there was probable cause to arrest Daniel for reckless driving, a charge for which she was later tried and acquitted.

To prevail on a motion for summary judgment, the moving party must conclusively demonstrate that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. *See* Fla. R. Civ. P. 1.510(c); *Holl v. Talcott*, 191 So.2d 40, 43 (Fla.1966). "The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party." *Holl*, 191 So.2d at 43. The correctness of summary judgment is a question of law which is reviewed de novo by this court. *See Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla.2000).

[1][2][3][4] The existence of probable cause is crucial to both false arrest and malicious prosecution. In a malicious prosecution case, the plaintiff must establish an absence of probable cause as an element of the tort; in a false arrest case, the existence of probable cause is an affirmative defense. *See Jackson v. Navarro*, 665 So.2d 340, 342 (Fla. 4th DCA 1995). "[P]robable cause exists when the circumstances are sufficient to cause a reasonably cautious person to believe that the person [arrested] is guilty of" a criminal offense. *Mailly v. Jenne*, 867 So.2d 1250, 1251 (Fla. 4th DCA), *review denied*, 884 So.2d 23 (Fla.2004).

[5] Here, the arresting officer had probable cause to arrest Daniel for reckless driving. Section 316.192(1), Florida Statutes (2003), provides that "[a]ny person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving."

Three witnesses gave the arresting officer information that supported the reckless driving charge. First, civilian witness Nancy Leach gave a written statement at the scene. She observed a near accident between Daniel's station wagon and an unmarked police car driven by Deputy Sheriff April Sovich. She saw Daniel "swerving in and out of traffic," and believed that Daniel purposely slowed her vehicle to "harass" Deputy Sovich. A second civilian witness, Michael Arbarchuk, saw Deputy Sovich swerve to avoid a crash. He told the arresting officer that Daniel passed Deputy Sovich's car and "gave the lady [Deputy Sovich] the finger." He indicated that Daniel pulled in front of Deputy Sovich and "stopped very quickly in the middle of the road causing" her to hit the stopped car.

Third, Deputy Sovich told the arresting officer that she had "swerved to avoid" Daniel's station wagon. Daniel "threw her hands in the air and appeared to be yelling" at Deputy Sovich. Daniel changed lanes, "threw up the middle finger of her hand" at Deputy Sovich while speeding by, and "pulled directly in front" of her. Once in front of Deputy Sovich, Daniel "kept hitting her brakes

and then speeding up."

[6] This information justified the arresting officer in making the arrest. Reckless driving is a misdemeanor. Section 901.15(5), Florida Statutes (2003), authorizes a warrantless misdemeanor arrest ***991** for violations of Chapter 316 that occur within an officer's presence. Under the "fellow officer rule," Deputy Sovich's observations could be imputed to the arresting officer to justify the arrest under the statute. *See State v. Adderly*, 809 So.2d 75, 76-77 (Fla. 4th DCA 2002); *Huebner v. State*, 731 So.2d 40, 44 (Fla. 4th DCA 1999).

[7][8] For the purpose of finding probable cause, it does not matter, as Daniel argues, that the arresting officer placed her under arrest for aggravated assault. The validity of an arrest does not turn on the offense announced by the officer at the time; if there is a valid charge for which a person could have been arrested, probable cause exists. *See State v. Cote*, 547 So.2d 993, 996 (Fla. 4th DCA 1989); *Jernigan v. State*, 566 So.2d 39, 40 (Fla. 1st DCA 1990); *Gasset v. State*, 490 So.2d 97, 98 (Fla. 3d DCA 1986).

Daniel points to the existence of many factual disputes concerning her encounter with Deputy Sovich. However, these disputes are not material to the existence of probable cause. That the civilian witnesses provided certain information to the arresting officer was not in dispute; this information justified the arrest, even if Daniel had a different version of the events.

WARNER, J., and SILVERMAN, SCOTT, Associate Judge, concur.
Fla.App. 4 Dist.,2004.
Daniel v. Village of Royal Palm Beach
889 So.2d 988, 30 Fla. L. Weekly D2

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