MALICIOUS PROSECUTION

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This session will provide an overview of the law on malicious prosecutions under 42 U.S.C. §1983. We will examine the elements of the claim and the nuances. We will also discuss strategies on how to properly defend against a claim for malicious prosecution and provide some useful practice tips.

I. Introduction/Overview/Elements of the Claim

A. Background

1. The essence of a malicious prosecution claim is not merely the wrongfulness of the prosecution, but some perversion of proper legal procedures for illegitimate ends.

2. That opens the door for malicious prosecution claims against prosecutors as well as law enforcement officers.

3. In the realm of §1983 claims, malicious prosecution is a hybrid – a combination of the state law tort of malicious prosecution and civil rights action for constitutional violations. Thus, it borrows from the state law tort of the particular state.

4. Malicious prosecution as a state law tort has an old history. There are reported cases in the 19th Century. *Stewart v. Sonneborn*, 98 U.S. 187 (1878), 8 Otto 187, 25 L. Ed. 116.

5. The common law tort has four elements:

a. Criminal proceeding against plaintiff brought or continued by defendant

b. Termination in plaintiff's favor

c. Absence of probable cause for the prosecution

d. Point of the prosecution being other than justice.

6. The civil rights cause of action has a more recent origin and an additional element – violation of a constitutional protection.

B. Fourth Amendment

1. *Albright v. Oliver* 510 U.S. 266, 273-75 (1994) (the various criminal procedure protections of the Fourth Amendment were intended to protect against arbitrary exercises of prosecutorial power; thus, only those claims of malicious prosecution that implicate Fourth Amendment rights are appropriate bases for malicious prosecution claims brought under § 1983). We have in the past noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions. *See Gerstein v. Pugh,* 420 U.S. 103, 114, 95 S.Ct. 854, 862, 43 L.Ed.2d 54 (1975) *Albright*, at 274, 114 S.Ct. 807.

C. Elements

1. the defendant initiated a prosecution against the plaintiff;

2. the defendant lacked probable cause to believe the proceeding could succeed;

3. the defendant acted with malice;

4. the prosecution was terminated in the plaintiff's favor; and

5. a post-arraignment deprivation of liberty sufficient to implicate the plaintiff's Fourth Amendment rights.

II. Practical Application of the case law and how to defend against the claim

A. Applicable Law: Although Section 1983 provides a federal cause of action, courts look to the law of the state in which the cause of action arose when analyzing numerous elements, e.g. statutes of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007).

B. Statute of Limitations: length is what the state provides for personal injury torts, but the accrual date is governed by federal rules, in conformance with common law tort principles. *Wallace*, 549 US at 388.

1. Accrual Date: the date that the criminal proceedings terminate in plaintiff's favor. *Heck v. Humphrey*, 512 U.S. 477 (1994).

2. Favorable Termination: termination in which, *inter alia*, the plaintiff is acquitted, the charges are dismissed for lack of evidence, or, if already convicted, "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-487.

a. Practice Note: If a plaintiff commences an action for malicious prosecution before obtaining a favorable termination - which plaintiffs often do by including a claim for malicious prosecution action when they file a complaint alleging false arrest - the plaintiff fails to state a claim for malicious prosecution.

C. Closer look at the elements of the claim – Keep in mind that analysis of these issues may vary between states.

1. Initiation of Proceedings

a. *See generally Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (initiation is by way of "formal charge, preliminary hearing, indictment, information, or arraignment."); *Murphy v. Lynn*, 118 F. 3d 938, 944 (2d Cir. 1997).

b. Is swearing out the criminal complaint enough? Usually, yes, especially if the officer is an eyewitness to the crime.

c. If officer obtained information from a civilian witness or if civilian swears out, the argument can be made that the witness "initiated" the prosecution and not the officer.

2. Personal involvement still a prerequisite to liability

3. District attorney intervening cause – prosecutorial discretion

a. Available defense if prosecutor exercised independent judgment in deciding whether to bring criminal proceedings

4. Probable cause

a. Absent egregious prosecutorial misconduct,[1] the existence of probable cause is an absolute defense to a malicious prosecution claim. *Maron v. County of Albany*, 166 Fed. Appx. 540, 541-42 (2d Cir. 2006) (affirming summary judgment in favor of defendants against plaintiff's malicious prosecution claim on grounds that there was probable cause for the prosecution based on totality of circumstances of underlying arrest, including the video and still photographs).

b. Probable cause does not demand the type of certainty associated with formal trials, and does not require police officers to be convinced, beyond a reasonable doubt, of a suspect's guilt prior to prosecution. *Illinois v. Gates*, 462 U.S. 213, 246 (1983). An officer's reasonable belief that an individual has engaged in unlawful activity, notwithstanding the individual's protestations of innocence, is sufficient to establish probable cause. *Espada v. Schneider*, 522 F.Supp.2d 544, 554-55 (S.D.N.Y. 2007). See also *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997)(officer is not required to make a full investigation into plaintiff's state of mind and eliminate every theoretically plausible claim of innocence prior to taking action).

c. Dissipation of Probable cause - Although a finding of probable cause ordinarily defeats a malicious prosecution claim, the claim is viable if the plaintiff can demonstrate that, at some point subsequent to the arrest, additional facts came to light that negated probable cause. *Soto v. City of New York*, No. 04 Civ. 4559 (DC), 2005 U.S. Dist. LEXIS 465 (S.D.N.Y. Jan. 10, 2005). This is often referred to as the dissipation of probable cause.

[1] As contemplated by *Ricciuti v. N.Y. Transit Authority*, 124 F.3d 123 (2d Cir. 1997), and *Jocks v. Tavernier*, 316 F.3d 128 (2d Cir. 2003).

d. Under New York law, the fact that a grand jury indicts a person of a crime creates a presumption of probable cause for the purposes of defending against a malicious prosecution claim. *Green v. Montgomery*, 219 F.3d 52, 60 (2d Cir. 2000) (citing *Marshall v. Sullivan*, 105 F.3d 47, 54 n2 (2d Cir. 1996)). For a plaintiff to succeed on a malicious prosecution claim after being indicted by a grand jury, he must demonstrate that the indictment was produced by "fraud, perjury, the suppression of evidence by the police or other police conduct undertaken in bad faith." Meaning, that an officer can be liable for mal pros if he/she fails to forward evidence to the prosecutor.

- If, however, plaintiff cannot proffer any evidence and seeks to rely solely on his/her own version of the events to rebut the presumption, courts will find such evidence to be nothing more than 'mere conjecture and surmise that [the plaintiff's] indictment was procured as a result of conduct undertaken by the defendants in bad faith,' which is insufficient to rebut the presumption of probable cause.

5. Malice

a. The Second Circuit defines malice for purposes of a malicious prosecution claim as a "wrong or improper motive, something other than a desire to see the ends of justice served." *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 573 (2d Cir. 1996). "In most cases, the lack of probable cause – while not dispositive – 'tends to show that the accuser did not believe in the guilt of the accused, and malice may be inferred from the lack of probable cause.'" *Lowth*, 82 F.3d at 573.

b. Plaintiff, however, cannot rely on conclusory allegations and speculations to support a claim of malice, but must offer "hard evidence." *See Grossman v. City of New York*, No. 07 Civ. 2764 (RMB), 2008 U.S. Dist. LEXIS 19065, at **8-9 (S.D.N.Y. Feb. 38, 2008) (citation and internal quotation omitted). In cases where a defendant officer is the eyewitness to the crime and swears out the criminal complaint on that basis, plaintiffs often claim that the defendant officer provided false information that will generally make the element of malice an issue of fact.

6. Favorable Termination

a. In order to maintain an action for malicious prosecution, a plaintiff must establish that the prosecution terminated in his favor. *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995).

b. In a case where the prosecution does not result in a trial, the proceedings are not considered terminated in plaintiff's favor

unless the disposition indicates innocence. The test is whether the final disposition of the proceeding involves the merits and indicates the accused's innocence. *Murphy v. Lynn*, 118 F.3d 938 (2d Cir. 1997).

c. When a termination is inconclusive because it does not address the merits of the charge, the facts surrounding termination must be examined to determine "whether the failure to proceed implies a lack of reasonable grounds for the prosecution." *Janetka v. Dabe*, 892 F.2d 187, 189 (2d Cir. 1989); *Vincent Carr aka Tyrone Harris v. City of New York*, No. 11 Civ. 6982 (SAS), 2013 U.S. Dist. LEXIS 57545 (S.D.N.Y. Apr. 19, 2013).

d. Although a criminal proceeding must terminate in plaintiff's favor, charges must be analyzed separately. *Janetka*, 892 F.2d. at 190

- Practice Tip: it is critical that you obtain the criminal court transcripts
- Analyze the disposition – certain types of dispositions that do not result from adjudications on the merits have generally been held not to be indicative of innocence but rather leave open the question of the accused's guilt. Some examples of dispositions that are not inconsistent with innocence:
    - Lack of subject matter jurisdiction
    - Legal insufficiency
    - Adjournment in Contemplation of Dismissal
    - In the interests of justice
    - Speedy trial
    - Lack of cooperation/failure to appear on the part of a complaining victim (but see *Jovanovic v. City of New York*, 2010 U.S. Dist. LEXIS 144388, *16-18 (S.D.N.Y. Sept. 28, 2010), aff'd, 2012 U.S. App. LEXIS 12521 (2d Cir. Jun. 20, 2012) (reversal of conviction and subsequent decision to drop charges because complaining witness would not cooperate, in sex crimes case, satisfied favorable termination requirement).
    - Guilty plea – even to lesser charge, is not favorable.

e. *Janetka v. Dabe*, 892 F.2d 187, 190, 29 Fed. R. Evid. Serv. 612, 1989 WL 153107 (2d Cir.1989)

- When the plaintiff is prosecuted on multiple charges, the inquiry is whether the criminal charges are distinct from one another or whether the charges for which the plaintiff was prosecuted stem from the same criminal activity?

- Second Circuit has held that the acquittal on one charge was favorable for purposes of the malicious prosecution claim even though the plaintiff was convicted on the other charge.

7. Post- Arraignment Deprivation of Liberty

a. Was the plaintiff subject to a seizure or other "perversion of proper legal procedures" implicating his personal liberty and privacy interests under the Fourth Amendment? See generally *Albright v. Oliver,* 510 U.S. 266, 274 (1994); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

b. This seizure must be effected "pursuant to legal process." *Heck v. Humphrey,* 512 U.S. 477, 484 (1994).

c. Even where a plaintiff is not in custody, "[b]eing compelled to attend criminal proceedings suffices as a post arraignment deprivation of liberty." *Carter v. Port Auth. of New York and New Jersey*, No. 03 Civ. 8751 (DLC), 2004 U.S. Dist. LEXIS 25633, at *23 (S.D.N.Y. Dec. 20, 2004). Additionally, the Second Circuit has held that restriction of a citizen's constitutional right to travel and the requirement to appear in court periodically are conditions "appropriately viewed as seizures within the meaning of the Fourth Amendment". See Murphy v. Lynn, 118 F.3d 938, 946-47 (2d Cir. 1997) (plaintiff, who had been conditionally released with restriction against travel outside of New York State, was arraigned and appeared in court eight times during the year in which his criminal proceeding was pending).

- Questions to ask:
  - Was plaintiff arraigned?
  - Were any court appearances made?
  - Was plaintiff issued a summons or desk appearance ticket (DAT)?
    - If so, you may be able to argue that plaintiff cannot show a post-arraignment deprivation of liberty. See *Burg v. Gosselin*, 591 F.3d 95, 97 (2d Cir. 2010) ("the issuance of a pre-arraignment, non-felony summons requiring a later court appearance, without further restrictions, does not

constitute a Fourth Amendment seizure," to establish a malicious prosecution claim); *Katzev v. Newman*, No. 96-cv-9138, 2000 U.S. Dist. LEXIS 187 at *14 (S.D.N.Y. Jan. 12, 2000)

8. Effect of Rehburg on Malicious Prosecution Claims

a. *Rehberg v. Paulk*, 566 U.S. 356, 132 S. Ct. 1497 (2012) – A grand jury witness, including a law enforcement officer, has absolute immunity from any §1983 claim based on the witness' testimony, *even if* that testimony is perjurious.

b. Post-*Rehberg* - law enforcement officers who testify at grand jury proceedings can no longer be sued if their testimony at the grand jury is the basis for the claim (*i.e.*, the claim that the officer provided false testimony at the grand jury). This does NOT mean that they cannot be sued at all for mal pros – just not for their testimony.

c. You may also be able to use *Rehberg* to oppose a motion to unseal grand jury minutes.

D. Damages

1. Damages for malicious prosecution are recoverable for all injuries connected to the prosecution and the duration of the confinement, including, for example, damages incurred subsequent to arraignment, such as lost earnings, emotional distress, injury to reputation, attorney's fees, and any other expenses incurred in defending the criminal prosecution. See *Avildsen v. Prystay*, 204 A.D.2d 154 (1st Dept. 1991); *Loeb v. Teitelbaum*, 77 A.D.2d 92 (2d Dept. 1980).

III. Who can be sued?

A. Officers entitled to qualified immunity for a malicious prosecution claim.

B. In addition to police officers, plaintiffs often bring malicious prosecution claims against prosecutors.

1. Absolute Immunity: Prosecutors are entitled to absolute immunity for actions done "in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State . . . ." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 277 (1993). This encompasses prosecutorial actions that are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); see also *Van de Kamp v. Goldstein*, 555 U.S. 335, 349 (2009)).

2. Line drawn between prosecutorial actions and other actions. *Kalina v. Fletcher*, 522 U.S. 118 (1997), 118 S.Ct. 502, 139 L. Ed. 2d

3. Key test is what function is the prosecutor engaged in. *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991) and cases cited there.

a. Absolute immunity

- Initiating a criminal proceeding. *Burns*.
- Failure to adequately train prosecutors. *Van de Kamp v. Goldstein*, 555 U.S. 335, 129 S.Ct. 855, 172 L.Ed.2d 706 (2009).

b. Only qualified immunity if not acting as "officer of the court" *Imbler*.

- Acting as complaining witness. *Kalina v. Fletcher*,
- Speaking at press conference. *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed2d 209 (1993)
- Advising police during an investigation. *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.#d.2d 547 (1991).
- Performing investigative functions. *Buckley*.