

EXAMINERS' ANALYSIS OF QUESTION NO. 14

The legal theory pursued by Smith is malicious prosecution, as he is seeking damages against Jones for his filing of a frivolous lawsuit against him. To prove malicious prosecution in Michigan, a plaintiff must prove:

(1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. [Matthews v Blue Cross/Blue Shield, 456 Mich 365, 378 (1998).]

Additionally, "under Michigan law special injury remains an essential element of the tort cause of action for malicious prosecution of civil proceedings." *Friedman v Dozor*, 412 Mich 1, 31 (1981). "A complaint for malicious prosecution must allege interference with the plaintiff's person or property, such as through arrest or attachment, sufficient to constitute special injury." *Pauley v Hall*, 124 Mich App 255, 261 n 1 (1983); *Friedman*, 412 Mich at 34, 40-42. (A special injury is an arrest, seizure of property, or other direct injury to one's person or property.)

Based on the facts provided, it is clear that the first element is satisfied, as Jones initiated a case against Smith, and that a civil suit suffices, as it does not need to be an actual criminal prosecution. See *Pauley*, 124 Mich App at 267; *Friedman*, 412 Mich at 48. As for the second element, the prior proceedings terminated in favor of Smith. With respect to probable cause to bring the prior district court suit, there clearly was no probable cause to institute the district court proceeding. Jones knew all along that Fido never entered his property, and that his evidence in support of the district court case was fabricated. Clearly, Jones lacked probable cause to initiate the district court suit against Smith. There is also no question but that Jones acted maliciously in bringing the district court action. Malice may be inferred from the lack of probable cause, *Matthews*, 456 Mich at 378 n 14, and Jones did not have probable cause to initiate the case. Additionally, the

evidence shows that Jones had an ulterior purpose in bringing the suit: he did not actually believe that Fido was on his property, he was instead fabricating a case in hopes of invoking an inapplicable ordinance to have Fido removed because of his barking. Thus, malice is established. *Pauley*, 124 Mich App at 266.

Finally, though it is not as clear, it is reasonable to conclude that Smith has alleged a special injury. As a result of the district court proceedings, Smith was deprived of his property--Fido--when it was seized for a period of three months, until the proceedings were terminated.

Although the question only reasonably raises a malicious prosecution claim, because emotional distress was a form of damage sought, applicants may raise the validity of an intentional infliction of emotional distress claim. Though not recognized by the Supreme Court, *Van Vorous v Burmeister*, 262 Mich App 467, 481 (2004), the elements of this tort are:

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Hayley v Allstate Ins Co*, 262 Mich App 571, 572; 686 NW2d 273 (2004)].

Under these facts, Smith would likely not prevail. Although intent and recklessness may be established, nothing in the facts reveal that Smith suffered severe emotional distress, nor is the filing of a frivolous lawsuit necessarily an act that goes beyond all bounds of decency in a civilized society. This tort is very difficult to establish, and the better analysis would be that it cannot be met under these facts.