

# Malicious Prosecution: A Continuing Concern

Elizabeth M. Terrill, Esq.

*Zamos v. Stroud* (2004) 32 Cal.4th 958

In *Zamos v. Stroud* (2004) 32 Cal.4th 958, the California Supreme Court ruled that an attorney who files a suit with probable cause to bring the suit may nevertheless be liable for malicious prosecution if he continues to prosecute the litigation after learning it is not supported by probable cause and the other elements of a cause of action for malicious prosecution are established.

*Zamos* was a malicious prosecution action based upon a fraud claim brought by Patricia Brookes against Jerome Zamos. Brookes was not a party to the malicious prosecution action. Zamos originally represented Brookes in an action relating to the foreclosure of Brooke's house ("foreclosure action"). This matter went to trial, but settled in advance of the jury reaching a verdict. Brookes accepted \$250,000 as damages for emotional distress from the settling defendants. As part of the settlement of the foreclosure

action, Brookes released all claims to her house.

Approximately two years later, Brookes sued Zamos for fraud, among other claims ("fraud action"). Brookes alleged Zamos told her he would continue to represent her (to judgment) against the non-settling defendants, would represent Brookes in a malpractice claim against her former attorneys, would have her house returned to her and would withdraw from her representation in the foreclosure matter if Brookes did not accept the settlement. Brookes alleged Zamos never intended to proceed with the promises he made. Stroud represented Brookes in the fraud action.

In defense of the fraud action, early in the litigation, Zamos provided Stroud with transcripts for various hearings held in the foreclosure action. In those transcripts, Brookes was advised and acknowledged she was releasing all claims to her house and Zamos would not be substituting into her malpractice action. At the third hearing, Zamos advised the court he had submitted all the necessary paperwork for entry of default against the non-settling defendants. At that hearing, the trial court explained to Brookes that Zamos would be relieved as counsel and that she would be responsible for bringing the defaults to judgment. At the time of that hearing, Brookes confirmed she understood that

Zamos would no longer be representing her. Despite receiving these transcripts, Brookes and Stroud refused to dismiss the fraud action.

Zamos attempted to bring a Motion for Summary Judgment, but it was denied based upon the question of fact raised by Brookes' declaration restating her claims in the fraud action. At the time of trial, Stroud was warned several times to advise Brookes of her Fifth Amendment rights as the Court would contact the district attorney's office to the extent her testimony contradicted the transcripts. Brookes failed to appear in order to testify at the time of trial. The trial court granted Zamos' motion for non-suit and Zamos then filed an action for malicious prosecution.

The California Supreme Court acknowledged it had previously characterized malicious prosecution as "commencing, bringing or initiating an action without probable cause." (*Zamos*, 32 Cal.4th at 965-966, citing *Bertero v. National General Corp* (1974) 13 Cal.3d 43, 50 and others). The Court however, extended this definition to continuing an action that is baseless stating that, "[c]ontinuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset." *Id* at 969. Defendants attempted to argue the Court's holding would

be “unworkable and therefore contrary to public policy” as it would “divert an attorney’s attention away from zealous representation of his or her client by causing the attorney (1) continually to second guess the merits of the litigation and (2) to fear retaliation for malicious prosecution.” *Id* at 970. The Court disagreed. Rather, the Court stated that “[o]nly those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution suit,” citing *Wilson v. Parker Covert & Chidester* (2002) 28 Cal.4th 811, 817. The Court stated this same standard would be applied to the continuation of a lawsuit.

Thus, an attorney who brings a complaint or cross-complaint and, later discovers there is no basis for the same, he or she may be held personally responsible for the attorney’s fees of the defendant/cross-defendant.

**ABOUT THE AUTHOR:**

Elizabeth Terrill is an associate at Tyson & Mendes. Elizabeth specializes in the areas of construction defect and construction injury claims. Contact Elizabeth at 858.263.4113 or [eterrill@tysonmendes.com](mailto:eterrill@tysonmendes.com).