

# OREGON LAW UPDATE

## Suing When You Shouldn't? Can Be Costly and Tough to Prove

case in point ...

**From the Desk of Robert Smith:** In this case the Oregon Court of Appeals clarified the elements necessary for proving that a lawsuit was wrongfully initiated. Those elements differ from the elements required to prove that a party is entitled to enhanced prevailing party fees. While both methods of recovery are intended to punish parties which abuse the court system, the factors for proving the conduct are distinct.

**Claims Pointer:** Insurers should be aware that a party who sues out of malice may be subject to a claim for wrongful initiation of a civil action. However, proving a wrongful initiation can be a challenge. Oregon courts will apply a distinct set of criteria for determining whether a party should have brought a lawsuit and those criteria are distinct from the standards used to determine if a party is entitled to an enhanced prevailing party fee.

SPS of Oregon, Inc. v. GDH, LLC, in the Court of Appeals of the State of Oregon, A147516 (August 21, 2013).

In 1995 Hansen loaned Garnett \$170,000 in order to cover farming expenses. Garnett defaulted on the loan and Hansen obtained a foreclosure judgment against Garnett, which included a lien on Garnett's cattle. In the foreclosure proceedings Hansen was represented by Mark Comstock, an attorney.

Garnett attempted to sell his cattle to Spaur. When Spaur realized that Hansen held a lien on Garnett's cattle, Spaur contacted Hansen to confirm that the cattle would have clear title. After much back-and-forth, Hansen and Spaur agreed to sell the cattle at a private sheriff's sale. But, before the sale could take place, Garnett contacted Comstock, telling him that the cattle belonged to Garnett's daughter and thus were not subject to Hansen's lien.

Comstock, acting on behalf of Hansen, sued Spaur for conversion. Spaur ultimately won that lawsuit and then filed an action against Hansen and Comstock, alleging that they had wrongfully initiated the conversion action. Before trial, Spaur filed a motion *in limine* seeking a determination that previous findings from the conversion case that Hansen "did not act in good faith" and was "malicious" conclusively established that Hansen's claim was wrongfully initiated. Noting that the standards cited by Spaur are usually used in determining whether a prevailing party is entitled to an enhanced prevailing party fee due to the misconduct of the losing party, the trial court denied the motion.

The trial court ultimately dismissed Spaur's action for wrongful initiation, finding that

neither Comstock nor Hansen had acted with malice in bringing the conversion lawsuit against Spaur. Spaur appealed, arguing that Hansen and Comstock did not have probable cause for bringing the conversion action, but instead acted in malice, filing the lawsuit out of spite.

The Court of Appeals began its analysis by reviewing the meanings of "probable cause" and "malice," in the context of wrongful initiation. In such circumstances, "probable cause" means that the person suing reasonably believes that he or she had a good chance of prevailing. "Malice" in such situations means "the existence of a primary purpose other than that of securing an adjudication of the claim." The Court found that these standards are entirely different than the determination of "reckless and malicious" necessary for a judgment of prevailing party fees. Drawing a fine line, the court went on to summarize the difference between the standards used in assessing prevailing party fees and wrongful initiation. "Probable cause" in prevailing party cases is a question of whether a claim is objectively reasonable. In wrongful initiation cases, a litigant's belief in the merits of the claim must be reasonable.

Similarly, in prevailing party cases, the conduct of the parties that gave rise to the litigation must be malicious. In contrast, in an action for wrongful initiation of a civil proceeding, the plaintiff must prove that the underlying action was commenced with malice.

With these formulations in mind, the court held that Spaur's motion *in limine* was properly denied by the trial court, as it did not properly state the appropriate elements of a wrongful initiation claim.



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