

***Bertero v. National General Corp.* : Drawing the Line Between an Aggressive Defense and Malicious Prosecution**

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Introduction

The California Supreme Court has long recognized that a person who maliciously and without probable cause initiates and prosecutes a civil action will be liable in a subsequent lawsuit for the damages suffered by the defendant.¹ Thus, while a successful defendant is not always made whole under California law, the same party in a suit brought maliciously and without probable cause is at the very least compensated for any monetary losses incurred in defending the suit. The court's rationale for the recognition of this tort has been explained as follows:

[W]hen the action is brought and prosecuted maliciously, and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such cases the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff, in such case, has no legal or equitable right to claim that the rule of law which allows a suit to be brought and prosecuted in good faith without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But where the damages sustained by the defendant in defending a suit maliciously prosecuted without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action on the case.²

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1. *See, e.g.*, *Grant v. Moore*, 29 Cal. 644 (1866).

2. *Eastin v. Bank of Stockton*, 66 Cal. 123, 127, 4 P. 1106, 1109 (1884) (quoting *Closson v. Staples*, 42 Vt. 209, 220-21 (1869)).

In addition to making the original defendant whole, the legal system now permits punitive damage awards against persons who bring and prosecute malicious actions.³

Conversely, the law has historically sanctioned the pursuit of an aggressive defense to insure that the plaintiff proves his case. This attitude stems in part from the fact that the defendant does not invoke the protection of the judicial system; he most often comes before the court involuntarily. In the first California case to reject the restrictive English rule of civil malicious prosecution, *Eastin v. Bank of Stockton*,⁴ the court actually denied the existence of a tort of malicious defense. In so doing, the court distinguished between the initiation and the defense of a civil action:

The plaintiff sets the law in motion; if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights—the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege.⁵

In *Bertero v. National General Corp.*,⁶ the California Supreme Court was forced to decide whether an action for malicious prosecution could be maintained against the defendants of a prior lawsuit on the basis of their affirmative cross-pleading in that action, which was based on substantially the same grounds as their previously alleged defenses. The trial court had held that in maintaining the cross-action, the defendants had moved from defense to offense⁷ and, as a result, had damaged plaintiff in the amount of \$1,178,952.77.⁸ After carefully weighing the precedents and policies in this area of the law, an unanimous court affirmed the trial court's holding in an opinion by Chief Justice Donald R. Wright. Although the *Bertero* opinion explored an array of related questions, including the definitions of probable cause⁹ and malice¹⁰ and the methods for calculating compensatory and punitive damages,¹¹ this commentary will primarily explore the relationship

3. California Civil Code § 3294 was enacted in 1872 and amended in 1905 to provide for punitive damages in non-contract cases when the defendant is guilty of express or implied malice. CAL. CIV. CODE § 3294 (West 1970). See, e.g., *Thompson v. Catalina*, 205 Cal. 402, 271 P. 198 (1928).

4. 66 Cal. 123, 4 P. 1106 (1884). The English rule required that the previous civil proceeding include an attachment, seizure of property or the issuance of process, in addition to the summons. Annot., 65 A.L.R.3d 901, 913 (1975).

5. 66 Cal. at 127, 4 P. at 1109-10. See also *Ritter v. Ritter*, 381 Ill. 549, 46 N.E.2d 41 (1943).

6. 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974).

7. *Id.* at 53, 529 P.2d at 615, 118 Cal. Rptr. at 191.

8. *Id.* at 48, 529 P.2d at 612, 118 Cal. Rptr. at 188.

9. *Id.* at 55, 529 P.2d at 617, 118 Cal. Rptr. at 193.

10. *Id.* at 65-66, 529 P.2d at 624-25, 118 Cal. Rptr. at 200-01.

11. *Id.* at 59-66, 529 P.2d at 620-25, 118 Cal. Rptr. at 196-201.

between the early denial of the tort of malicious defense and *Bertero's* recognition of a cause of action based on the malicious prosecution of a cross-action.¹²

I. Facts of the *Bertero* Case

Plaintiff John Bertero was the president of defendant National General Corporation. He resigned that post in 1959 following an internal power struggle, but retained his seat on the board of directors, his previously awarded stock options, and his life and health insurance benefits. Simultaneously, he exchanged his extant employment contract for a new ten-year agreement. The predecessor in interest of defendant NGC Theatre Corporation guaranteed Bertero's new employment contract.

Bertero's relationship with defendant Eugene Klein, National's new president, was less than cordial. In 1962, following Bertero's refusal to surrender certain stock options and to sell the remainder of his employment contract, Klein, acting on behalf of the other defendants, sent a letter to Bertero terminating the latter's salary, stock options, and perquisites. Bertero sued. After an unsuccessful hearing in the Court of Appeal on an arbitration question,¹³ defendants filed their answer alleging that Bertero obtained the employment contract through duress and through undue influence on the board of directors, and that the employment contract was without consideration. Shortly thereafter, defendants filed an amended answer together with a cross-pleading that prayed for the return of over \$100,000 of salary already paid Bertero under the employment contract. The material allegations of the cross-pleading mirrored the affirmative defenses set forth in the defendants' answer to the original complaint. Bertero eventually recovered in excess of \$650,000 on his complaint; the cross-pleading was dismissed with prejudice.¹⁴

Bertero then filed a new action alleging various theories of malicious prosecution, but the case went to the jury solely on the cause of action stemming from the alleged malicious prosecution of the cross-pleading.

12. *Bertero* has often been cited for other propositions including its reaffirmance of the well-settled rule that all presumptions favor the judgment and that courts must uphold damage awards wherever possible. *See, e.g.*, *Merlo v. Standard Life & Accident Ins. Co.*, 59 Cal. App. 3d 5, 17, 130 Cal. Rptr. 416, 424 (1976); *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 950, 122 Cal. Rptr. 470, 493 (1975). The case is also relied upon for its holding that the defendant's wealth is a factor to be considered in the assessment of punitive damages. *See, e.g.*, *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 496, 136 Cal. Rptr. 132, 140 (1976); *Roemer v. Retail Credit Co.*, 44 Cal. App. 3d 926, 937 n.5, 119 Cal. Rptr. 82, 89 n.5 (1975).

13. *Bertero v. Superior Court*, 216 Cal. App. 2d 213, 30 Cal. Rptr. 719 (1963).

14. *Bertero v. National General Corp.*, 254 Cal. App. 2d 126, 62 Cal. Rptr. 714 (1967).

Defendants failed to present any evidence,¹⁵ possibly assuming that no jury would further compensate a litigant who had recently been awarded \$650,000. Nevertheless, Bertero secured a verdict of approximately \$1.2 million, over half of which was punitive damages.

On appeal, defendants asserted that under the *Eastin* ruling, their affirmative defenses could not render them liable; consequently, the repetition of identical allegations in a short cross-pleading could not subject them to tort liability. The issue was one of first impression in California and had been previously discussed in only one other reported decision.¹⁶ Chief Justice Wright attacked the troublesome issue presented in *Bertero* with a logical and incisive analysis.

II. Chief Justice Wright's Analysis

The Chief Justice began his analysis with an enumeration of the elements of the tort of malicious prosecution:

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 malice¹⁷

After identifying the three elements, Chief Justice Wright considered whether the policies underlying this cause of action militated against the recognition of a cross-pleading as a basis for liability. He viewed the malicious prosecution of a civil action as a wrong against the individual, the judiciary, and society as a whole:

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 to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings. The judicial process is adversely affected by a maliciously prosecuted cause not only by the clogging of already

15. *Bertero v. National General Corp.*, 13 Cal. 3d 43, 59, 529 P.2d 608, 620, 118 Cal. Rptr. 184, 196 (1974).

16. *Slee v. Simpson*, 91 Colo. 461, 15 P.2d 1084 (1932); see Annot., 85 A.L.R. 412 (1932). *Slee* held that a cross-pleading that had been filed without probable cause could serve to subject a party to liability for malicious prosecution. *Slee* is discussed in a footnote to the opinion in *Bertero*. 13 Cal. 3d at 52 n.3, 529 P.2d at 615 n.3, 118 Cal. Rptr. at 191 n.3.

17. 13 Cal. 3d at 50, 529 P.2d at 613-14, 118 Cal. Rptr. at 189-90 (citations omitted). This statement of the elements is now standard. See, e.g., *Tool Research & Eng'r Corp. v. Henigson*, 46 Cal. App. 3d 675, 682, 120 Cal. Rptr. 291, 296 (1975); 4 WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS §§ 255, 256A (8th ed. Supp. 1976).

crowded dockets, but by the unscrupulous use of the courts by individuals “. . . as instruments with which to maliciously injure their fellow men.” (citation omitted).¹⁸

He questioned whether the harm resulting from a maliciously prosecuted cross-pleading differed from that caused by the traditional maliciously prosecuted complaint. He found no compelling differences:

The harm to society and to the individual cross-defendant caused by the filing of a cross-pleading without probable cause and with malice is substantially similar to that occasioned by the filing of a complaint or other initial pleading known to be false or meritless. The malicious cross-plaintiff, like the malicious plaintiff, uses the judicial process as a vehicle for harassing or vexing his adversary or as a means of coercing the settlement of a collateral matter. The cross-defendant, like the defendant in an original cause maliciously prosecuted, is compelled to expend attorney's fees in defending against the false charge and may suffer the same mental or emotional distress and possible loss of reputation and standing in the community.¹⁹

Finding no justification in social policy arguments for rejecting Bertero's complaint, the Chief Justice then directed his inquiry to the question of whether a cross-complaint seeking affirmative relief constituted commencement of an action independent of the original complaint. In light of previous holdings that cross-complaints were distinct and independent causes of action that were not extinguished by dismissal of the original complaint, the Chief Justice rejected defendants' contentions that a cross-complaint did not initiate a judicial proceeding.²⁰ He also noted that this position had been codified in 1971.²¹

Defendants had contended that the cross-pleading was a transactional counterclaim they were obligated to assert under penalty of waiver. They argued that if the jury in the first action had agreed with the defendants'

18. 13 Cal. 3d at 50-51, 529 P.2d at 614, 118 Cal. Rptr. at 190.

19. *Id.* at 51, 529 P.2d at 614, 118 Cal. Rptr. at 190.

20. The court stated: "In *Skaff v. Small Claims Court* (1968) 68 Cal. 2d 76 [65 Cal. Rptr. 65, 435 P.2d 825], we acknowledged that the filing of a counter-claim instituted a ' . . . separate, simultaneous action' and reasoned that for purposes of the cross-action, the cross-defendant was a defendant, noting: '[i]n analyzing counterclaims and cross-complaints, this court has recognized that "these cross-actions . . . are still distinct and independent causes of action, so that when properly interposed and stated the defendant becomes in respect to the matters pleaded by him, an actor, and there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant."' (*Pacific Finance Corp. v. Superior Court* (1933) 219 Cal. 179, 182. . . .)' (*Id.*, at pp. 78-79; see also *Case v. Kadota Fig Assn.* (1950) 35 Cal.2d 596, 603 [220 P.2d 912].) In other instances case and statutory law recognize that a cross-pleading creates an action distinct and separate from an initial pleading. Dismissal of the complaint, for instance, does not affect the independent existence of the cross-complaint or counterclaim. (Code Civ. Proc., § 581, subd. 5; *Tomales Bay etc. Corp. v. Superior Court* (1950) 35 Cal. 2d 389, 395 [217 P.2d 968].)" 13 Cal. 3d at 51-52, 529 P.2d at 614-15, 118 Cal. Rptr. at 190-91 (footnote omitted).

21. *Id.* at 52 n.2, 529 P.2d at 615 n.2, 118 Cal. Rptr. at 191 n.2

affirmative defenses, they would have found that Bertero secured his employment contract improperly. Armed with that finding, defendants would have attempted to recover monies already paid under the employment agreement. A suit to recover these monies would have constituted a transactional counterclaim that would have been barred because it was not raised in the first action. The defendants argued they were thus compelled to file the cross-action. Chief Justice Wright was unimpressed with this sophism, recognizing that there was no probable cause either for the affirmative defenses or for the cross-action: "A litigant is never compelled to file a malicious and fabricated action. It is not the assertion of a claim that is actionable but rather the *malicious character* of the assertion."²²

The claim of the defendants that their cross-pleading was merely defensive and that a penalty should not be imposed for aggressively defending against the charges asserted in the complaint was also rejected. Finding that the affirmative relief sought was more than an attempt to repel Bertero's attack, the Chief Justice concluded that they were in fact attempting to prosecute a cause of action of their own. They had shifted from the defensive to the offensive. Thus, the situation differed fundamentally from that in which a defendant was involuntarily brought into court and then conducted a vigorous defense. Because of this fundamental difference, Chief Justice Wright concluded that Bertero's action was not inconsistent with the line of California cases that had thus far refused to recognize a tort of malicious defense. Where affirmative relief is "prompted by malice and is not based on probable cause, it is actionable as in the case of other affirmative, malicious prosecutions."²³

Defendants also sought refuge in the fact that several cases had held that malicious prosecution was not a tort favored by the law.²⁴ Unmoved by labels, Chief Justice Wright opined that public policy does not and should not sanction the abuse of the judicial process. In any event, the disfavored action concept had its origin in public policy pertaining to the enforcement of criminal laws.²⁵

Having discerned no policy or precedential reasons for barring redress to victims of maliciously prosecuted cross-actions, the Chief Justice turned to the question of the proper measure of damages for the malicious prosecution of a cross-complaint. The precise issue facing the court in *Bertero* was whether the plaintiff or the defendant should have the burden of apportioning damages between the harm that flowed from the proceedings on the

22. *Id.* at 52, 529 P.2d at 615, 118 Cal. Rptr. at 191 (emphasis added).

23. *Id.* at 53, 529 P.2d at 615, 118 Cal. Rptr. at 191.

24. *Id.*

25. *Id.* at 53, 529 P.2d at 615-16, 118 Cal. Rptr. at 191-92.

cross-action and the harm that flowed from the proceedings on the affirmative defenses. The facts of *Bertero* confused this issue further because the affirmative defenses raised by defendants charged Bertero with indiscretions identical to those alleged in the cross-pleading. Characteristically, Chief Justice Wright met the problem directly by expressly delineating the dilemma before the court:

The cross-action maliciously pursued, was premised upon the same theories as was a privileged affirmative defense, and common factual and legal matters were asserted and urged in support of each pleading. . . . It was thus difficult if not impossible to apportion the harm which flowed from proceedings had on the cross-action from that which flowed from those had on the affirmative defense.²⁶

In allocating the formidable burden of proving the apportionment of damage suffered, Chief Justice Wright looked to two analogous precedents, *Summers v. Tice*²⁷ and *Singleton v. Perry*.²⁸ In *Summers*, three hunters were stalking quail some distance apart from one another. Simultaneously, both defendants negligently shot and injured the plaintiff. It was impossible to determine which of the defendants had actually wounded the plaintiff, and the court concluded that as between plaintiff and defendants, the burden should, as a matter of policy, fall on the tortfeasors.

Singleton was a logical extension of the reasoning in *Summers*. In that case, the plaintiff was arrested in Ohio and returned to California on the strength of criminal complaints sworn by the defendant. After all criminal charges were dismissed prior to trial, the plaintiff brought two malicious prosecution actions. Plaintiff prevailed in one suit and lost in the other; defendant appealed from the adverse judgment, at which time the issue of apportioning damages was raised. The *Singleton* court placed the burden on the defendant, reasoning that the intentional tortfeasor rather than the victim should suffer.²⁹

As in *Singleton*, the tort in *Bertero* was willful, and the court placed the burden of allocation on defendants, remarking that the alternative would be unconscionable: "To place the burden on the injured party rather than upon the wrongdoer would, in effect, clothe the transgressor with immunity

26. *Id.* at 60, 529 P.2d at 620, 118 Cal. Rptr. at 196 (citation omitted).

27. 33 Cal. 2d 80, 199 P.2d 1 (1948); see Annot., 5 A.L.R.2d 91 (1948).

28. 45 Cal. 2d 489, 289 P.2d 794 (1955).

29. *Id.* at 498, 289 P.2d at 800. In analyzing the *Singleton* case in *Bertero*, Chief Justice Wright also quoted from an analogous decision of the Missouri Supreme Court: ". . . it would seem almost a mockery to hold that, by uniting groundless accusations with those for which probable cause might exist, the defendants could thereby escape liability, because of the injured party's inability to divide his damages between the two with delicate nicety." 13 Cal. 3d at 56, 529 P.2d at 618, 118 Cal. Rptr. at 194 (quoting *Boogher v. Bryant*, 86 Mo. 42, 50 (1885)).

when, because of the interrelationship of the defense and cross-action, the injured party could not apportion his damages.’³⁰

Conclusion

As involuntary participants in the court system, defendants must be afforded every means of self-defense. On the other hand, self-defense can be carried to an extreme; when pursued through a cross-action, that extreme becomes an offensive action. In *Bertero*, the California Supreme Court was faced with a problem that did not lend itself to an easy answer. Predictably, Chief Justice Wright reached a reasonable and equitable result. The *Bertero* decision brings to California law a realistic solution to the problem of a defendant’s malicious counter-attack against an honest plaintiff.

30. 13 Cal. 3d at 60, 529 P.2d at 620, 118 Cal. Rptr. at 196.