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Abuse of Process

A. Definition

"Abuse of process consists in the malicious misuse or perversion of a civil or criminal writ to accomplish some purpose not warranted or commanded by the writ." It is a tort action consisting of some unlawful use of the process to accomplish an end foreign to the purpose for which it may be issued. As one court said: "... when the plaintiff ... wrongfully perverts or abuses the processes of the court to coerce something for which the process was not intended, the court is warranted in granting relief to the victim of such coercion ... by recognizing an action for the tort of abuse of process..." Although ordinarily it is based on prior litigation it may also be founded on such matters as discovery, a temporary restraining order or filing a lis pendens.

Abuse of process is often confused with malicious prosecution, and the two are closely related. Frequently plaintiffs raise both claims in a single action. Indeed, the North Carolina Supreme Court has said the legal theories underlying malicious prosecution and abuse of process parallel one another to a substantial degree and often the facts of a particular case would support a claim under either theory. However, abuse of process concerns improper use of the process after it has been issued and is distinguished from malicious prosecution in that the latter is based on malice in causing the process to issue. In an early case the North Carolina Supreme Court said that "malicious abuse of process" will support an action even if the process was lawfully issued, or in the execution has been illegally used. "If this is not so," said the court, "the law has given two remedies for the same wrong, when one was all-sufficient." "The action for abuse of process is aimed not at insuring the regularity of legal proceedings, but at preventing use of legal process for collateral purposes." Thus, there is no need in an abuse of process action to show malice, want of probable cause or termination of the former action.
B. Elements

The elements required to state a claim for abuse of process are:

1. the existence of an ulterior motive or purpose
2. an act in the use of the legal process that is not proper in the regular prosecution of the proceeding."^{18}

C. Elements Defined

1. An Ulterior Motive or Purpose

Where a proceeding is used only for the purpose for which it was intended there is insufficient evidence to support an action based on abuse of process."^{19} The plaintiff must show an ulterior motive or purpose by the defendant."^{20} It is not necessary to show the defendant initiated the legal process, only that he or she used it to achieve an ulterior motive."^{21} Malice need not be shown to demonstrate an ulterior motive."^{22} The ulterior motive requirement is satisfied when the plaintiff alleges a prior action was initiated or used to achieve a collateral purpose not within the normal scope of the process used."^{23} If the process is used for its true purpose, even if the defendant took action based on a mistake, there is generally no ulterior motive."^{24}

Where it was claimed the appellee abused the legal process by obtaining an injunction merely to allow him to cut timber while the party enjoined was restrained by the court order, a genuine issue of material fact concerning the appellee’s motives in obtaining the injunction was raised and summary judgment was improper on a claim of abuse of process."^{25}

In *Austin v. Wilder*,"^{26} the appellate court found sufficient evidence of ulterior motive to withstand summary judgment. The plaintiff in the case filed an action to recover a debt he alleged was owed him by the defendants and a notice of lis pendens regarding property on which the defendants’ were seeking a loan. That action was settled with the defendants executing a promissory note to the plaintiff. In a subsequent action to recover on the note, the defendants counterclaimed, contending that in the prior action the plaintiff’s motive was to place a cloud on the title to the property subjected to the
notice of lis pendens to prevent defendants from obtaining the loan, thereby subjecting them to financial ruin. The plaintiff, they argued, knew his action in no way affected title to the realty and his claim was unfounded, but hoped to coerce the defendants into meeting his demand for payment of the alleged debt.

While a lawyer may be liable for abuse of process when acting on behalf of a client, the attorney’s liability has to be assessed separately from that of the client and the actions of the attorney have to independently satisfy each element of the tort. In addition, the lawyer should not be liable when acting for some proper purpose—for example, securing adjudication of a client’s claim—even though that would also procure the lawyer a fee, although the lawyer may be liable for acting for an improper purpose.27

2. An Act in the Use of the Legal Process Not Proper in the Regular Prosecution of the Proceeding

Ulterior motive by itself is not sufficient to establish a claim for abuse of process.28 As the North Carolina Supreme Court once put it, “[e]vil purpose alone is not sufficient ... [t]he bad intent must finally culminate in the abuse, for it is only the latter which is the gist of the action.”29 There is no abuse of process when the process, even if maliciously obtained, is used only for the purpose for which it was intended and the result accomplished is warranted by the writ.30 The plaintiff must also show an act in the use of the legal process that is not proper in the regular prosecution of the proceeding.31 That act must be willful.32 The act requirement is satisfied by an allegation that once a prior proceeding was initiated, the defendant committed some willful act whereby he or she sought to use the existence of the proceeding to gain an advantage in respect to some collateral matter.33

An allegation that the process under which the plaintiff allegedly suffered was totally null and void would not support an action for abuse of process.35 “Where the abuse complained of occurred in a prior civil action, the plaintiff must allege some improper act or perversion taking place after the filing of the complaint that is wholly inconsistent with and collateral to the action instituted.”36 (emphasis supplied.) If the result accomplished was warranted and commanded by the writ, there is insufficient evidence to support an action based on abuse of process.37
An offer to discontinue a proceeding in return for payment of money is one example of an improper willful abuse.\textsuperscript{38} Using criminal process to force payment of a civil debt has also been a sufficient basis for a claim of abuse of process.\textsuperscript{39} Where a party filed a notice of lis pendens when he allegedly had no lawful grounds under the applicable statute to do so, there was a sufficient allegation of misuse of process to withstand a motion for summary judgment.\textsuperscript{40} Where plaintiffs claimed an injunction was sought to coerce them to pay a judgment for which they were not responsible and to oppress their business activities until that judgment was paid, the plaintiffs stated a claim on which relief could be granted and their complaint should not have been dismissed.\textsuperscript{41} Another example of misuse of process occurred in a case in which two parties claimed rights to cut timber on the same property. One party, the appellee, sought an injunction against the other to prevent it from cutting timber. The appellee argued to the trial court that the status quo had to be maintained until the case could be heard on its merits and presented the court with a copy of a statute providing that an order could not be made, pending the action, permitting either party to cut timber, except by consent, until title to the land or timber was finally determined. Nonetheless, there was evidence that, after obtaining a preliminary injunction, the appellee went on the property and cut timber and that he admitted he entered the property and cut and removed timber and pulpwood after the injunction was issued. The appellate court said that a genuine issue of material fact was raised concerning the appellee’s actions after obtaining the injunction, and summary judgment was improper on an abuse of process claim.\textsuperscript{42}

Where a physician allegedly used a statutory commitment process for a purpose and result not warranted by the proceeding, but rather to “rid himself” of a patient who suffered from “incurable” hemophilia and did not respond to the physician’s treatment, a claim for abuse of process was stated.\textsuperscript{43}

An attorney who provided information and assistance to execute an arrest warrant against the plaintiff after it had been issued did not commit an improper act during the course of a criminal proceeding, and did not engage in abuse of process. While the attorney filed a motion to continue the criminal case based on false statements procured by her client, absent allegations that the attorney knew the statements were false, she could not be liable for abuse of process without specific allegations establishing she acted with an improper purpose.\textsuperscript{44}
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Prosecuting a suit in a regular way and according to the established procedure of the court provides no grounds for claiming abuse of process. Issuance of a valid summons accompanied by a “fatally defective complaint advancing no legitimate goal or purpose,” does not render the resulting acts and proceedings “a continuing perversion and misuse of process for an improper, collateral purpose.” Filing an answer to a complaint, though it may arguably contain false statements and results in a third-party action against the party charging abuse of process, is not the type of improper act on which a proper claim of abuse of process may be founded. Merely urging a prosecuting attorney to continue a case she intends to voluntarily dismiss for lack of evidence is not a “willful act outside the regular course of the proceedings.” A lis pendens that covered more property than it arguably should have did not warrant a claim for abuse of process.

In *Semones v. Southern Bell Tel. & Tel. Co.*, the telephone company procured a warrant for the plaintiff’s arrest for violation of the worthless check statute. The check at issue was drawn on the account of the corporation of which the plaintiff had been president. Prior to the plaintiff’s arrest, the corporation, with which he was no longer affiliated, became subject to an involuntary bankruptcy petition. The defendant was aware of the petition but did not notify the district attorney of it. The criminal action was voluntarily dismissed by the district attorney about six months after the arrest. The plaintiff argued the defendant’s failure to notify the district attorney of the involuntary bankruptcy constituted an act not proper in the regular prosecution of the proceeding. The defendant had a duty, according to the plaintiff, to seek dismissal of the prosecution after learning of the bankruptcy. The court disagreed and said the plaintiff’s argument was without merit because the automatic bankruptcy stay did not operate against the commencement or continuation of criminal actions, such as the worthless check prosecution.

D. Defenses

The statute of limitations applicable to a claim for abuse of process would appear to be three years. A release executed as part of a prior action did not bar the claim where the court found that the same duress that entitled defendants to recover for abuse of process in that prior action vitiates the release.