

3.30D ABUSE OF PROCESS (Approved before 1984)

The plaintiffs in this action allege that the defendant is liable for abuse of process. The defendant denies the allegation.

There are two basic elements necessary to sustain the cause of action of abuse of process. They are (1) that the defendant made an improper, illegal and perverted use of the legal procedure, that is to say, his/her resort to the legal process was neither warranted nor authorized by law,¹ and (2) that the defendant had an ulterior motive in initiating the legal process. In other words, abuse of process is the misuse or misapplication of the legal procedure in a manner not contemplated by law.

Specifically, the plaintiff contends that the defendant utilized the legal process to intimidate, harass and coerce the plaintiff in order to obtain a collateral advantage. In other words, the plaintiff contends that the defendant invoked the legal process to accomplish some unlawful end, namely, to compel the plaintiff to do some collateral thing which he/she could not legally be compelled to do.

¹The court may explain the phrase “neither warranted nor authorized by law” in the factual context of the particular case.

The defendant denies this allegation and asserts that he, the defendant, made a regular and legitimate use of the process. The defendant contends that he/she employed the legal process to have his/her claims adjudicated or to enforce legitimate claims.

In short, in order for the plaintiff to prevail in this action, he/she must prove by a preponderance of the evidence that the defendant made an improper, illegal, and perverted use of the process and that there existed an ulterior motive or purpose on part of the defendant.

If you find that the use of the process was a proper one, then I charge you as a matter of law that the motive is immaterial. The legal pursuits of one's rights, no matter what may be the motive of the promoter of the action, cannot be deemed either illegal or inequitable. It is the misuse of the process, though properly obtained, which constitutes the misconduct for which liability is imposed.

If you find, therefore, that the defendant made a perverted use of legal procedure for which it was not designed, with an ulterior purpose, than I charge you as a matter of law, the law provides a redress and the defendant is thereby liable to the plaintiff.

NOTE TO JUDGE

See *Ash v. Cohn*, 119 N.J.L. 54 (E. & A. 1937) in which the court distinguishes malicious abuse of process from an action for malicious use of process:

An action for malicious abuse of process is distinguished from an action for malicious use of process in that the action for abuse of process lies for the improper, unwarranted and perverted use of process after it has been issued while that for the malicious use of it lies for causing process to issue maliciously and without reasonable or probable cause. *Grainger v. Hill*, 4 Bing. N.C. 212. Thus it is said, in substance, that the distinction between malicious use and malicious abuse of process is that the malicious use is the employment of process for its ostensible purpose, although without reasonable or probable cause, whereas the malicious abuse is the employment of a process in a manner not contemplated by law. Another fundamental distinction is that in the case of malicious use it is necessary to allege that the action in which the process was used has terminated favorably to the plaintiff whereas in the case of the malicious abuse no such allegation is necessary. *Saliem v. Glovsky* (1942), 132 Me. 402; 172 Atl. Rep. 4; 50 C.J. 612, sec. 373.” 119 N.J.L. at p. 58.

Prosser comments on the distinction between these causes of action in his treatise as follows:

Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently, in an action for abuse of process it is unnecessary for the

plaintiff to prove that the proceeding has terminated in his favor, or that the process was obtained without probable cause or in the course of a proceeding begun without probable cause. It is often said that proof of 'malice' is required; but it seems well settled that, except on the issue of punitive damages, this does not mean spite or ill will, or anything other than the improper purpose itself for which the process is used, and that even a pure spite motive is not sufficient where process is used only to accomplish the result for which it was created. Thus if the defendant prosecutes an innocent plaintiff for a crime without reasonable grounds to believe him guilty, it is malicious prosecution; if he prosecutes him with such grounds to extort payment of a debt, it is abuse of process. *Prosser on Torts*, Chap. 22, sec. 121 at 856-857 (4th ed. 1971).

See also Earl v. Winne, 14 N.J. 119, 135 (1953); 34 N.J. Super. 605, 616 (Cty. Ct. 1955), and *Gambocz v. Apel, et al.*, 102 N.J. Super. 123, 128-130 (App. Div. 1968), *certif. denied*, 52 N.J. 485 (1968).