

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

MICHAEL S. PALIVODA,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-A-0017
ERIC M. FELIX, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CV 1296.

Judgment: Reversed.

Pete C. Klimis, 4126 Youngstown-Poland Road, Youngstown, OH 44514 (For Plaintiff-Appellee).

Jane Timonere, Timonere Law Offices, L.L.C., 4 Lawyers Row, Jefferson, OH 44047 (For Defendants-Appellants).

DIANE V. GRENDELL, J.

{¶1} Defendants-appellants, Mitchel J. Felix and Eric M. Felix, appeal the Judgment Entry of the Ashtabula County Court of Common Pleas, overruling their Joint Motion for Judgment Notwithstanding the Verdict; Alternatively, Joint Motion for New Trial. Plaintiff-appellee, Michael S. Palivoda, obtained a Judgment in the amount of \$24,000, following a trial in which the jury determined the Felixes committed the tort of abuse of process against him. For the following reasons, we reverse the judgment of the court below.

{¶2} On October 2, 2008, Palivoda filed a two-count Complaint against the Felixes. Palivoda alleged that, on August 22, 2005, the Felixes “made statements to the police, causing Plaintiff to be charged criminally in the Ashtabula County Court of Common Pleas (*State v. Palivoda*, Case No. 05 CR 315),” and that, “[o]n November 2, 2007, [he] was ultimately found not guilty of said charge.” Palivoda further alleged that the Felixes perverted these proceedings to accomplish an ulterior purpose, i.e., “to annoy, harass, and inflict emotional and financial distress upon Plaintiff.” Palivoda asserted these actions constituted abuse of process.

{¶3} On October 31, 2008, the Felixes filed their Answer and Counter-Claim, asserting causes of action for irreparable harm to reputation, infliction of emotional distress, abuse of process, punitive damages, and slander. On November 5, 2008, Palivoda filed his Answer to Defendants’ Counterclaim.

{¶4} On January 6, 7, and 8, 2010, the matter was tried before a jury. At trial, Palivoda presented evidence of the following: In the early evening of August 22, 2005, Mitchel (the father) and Eric (his son) came to his residence driving their own pickup trucks. The Felixes pulled in both ends of Palivoda’s horseshoe driveway. Eric exited his truck and began walking toward the residence to the point where Palivoda’s dog was chained up. Eric grabbed the dog’s chain and began to beat the animal, first with his hand and then with a baseball bat he retrieved from his truck.

{¶5} When the Felixes arrived on his property, Palivoda called his brother, Frank Palivoda, and told him to come to his house. Palivoda also called 911 and was speaking with the dispatch when he saw his dog become unconscious. Palivoda put the phone down, took a .22 caliber rifle and went outside. Palivoda fired one shot into the trees and two shots into the radiator of Eric’s unoccupied vehicle. Eric and Mitchel

went around to the back of Palivoda's property, where they caused further damage with the baseball bat.

{¶6} Eventually, Eric backed his truck up to the street. At some point prior to the arrival of the police, another neighbor, Jinger Webb, arrived on the scene. Mitchel's wife also drove by Palivoda's residence and collected the baseball bats used by Eric and Mitchel.

{¶7} Road deputies for the Ashtabula County Sheriff's Department arrived on the scene about 25 minutes after the incident began. The deputies took statements from Mitchel, Eric, and Jinger. Mitchel claimed he was standing next to his truck, parked in the road behind Eric's, when Palivoda fired three shots at them. Eric claimed that he was on Palivoda's driveway, walking toward his house, when Palivoda fired three shots at him. Jinger stated that she was seated in the front seat of Eric's truck when Palivoda fired the shots.¹ Based on the Felixes and Jinger's claim that Palivoda fired the shots at them, the deputies arrested Palivoda for Felonious Assault.

{¶8} Palivoda was tried and acquitted on three counts of Felonious Assault as a result of the events of August 22, 2005.²

{¶9} On January 8, 2010, the jury returned a Verdict for the Plaintiff (On the Complaint) in the amount of \$24,000, and a Verdict for the Plaintiff (On the Counterclaim).

{¶10} On January 14, 2010, the Felixes filed a Joint Motion for Judgment Notwithstanding the Verdict; Alternatively, Joint Motion for New Trial, on the grounds that "the evidence adduced at trial was not legally sufficient to sustain a finding that

1. At trial, Mitchel and Eric affirmed they were in the line of fire when Palivoda shot at Eric's truck. Jinger died before trial, and her written statement was introduced as evidence.

2. The criminal action against Palivoda was the subject of a prior appeal. See *State v. Palivoda*, 11th Dist. No. 2006-A-0019, 2006-Ohio-6494.

either Eric or Mitchell [sic] Felix had committed the tort of Abuse of Process against Michael Palivoda.” On February 9, 2010, Palivoda filed his Response to Defendants’ Joint Motion.

{¶11} On February 17, 2010, the trial court entered its Judgment Entry, overruling the Joint Motion.

{¶12} On March 17, 2010, the Felixes filed their Notice of Appeal. On appeal, they raise the following assignments of error:

{¶13} “[1.] Under Ohio law, abuse of process exists when a legal proceeding, in proper form and with probable cause, is perverted to attempt to accomplish an ulterior purpose for which it was not designed resulting in damage to the offended party. Did the jury lose its way in determining that all of the elements of abuse of process were met by the evidence?”

{¶14} “[2.] A party is entitled to a Judgment Notwithstanding the Verdict when the court concludes that the evidence adduced at trial is such that reasonable minds cannot reach the conclusion represented by the verdict. Should this Court rule that the evidence was not sufficient to support the verdict and reverse the decision of the trial court overruling the motion for Judgment Notwithstanding the Verdict?”

{¶15} “[3.] A Court may grant a new trial if it is proven that the verdict is not sustained by the weight of the evidence. Should this Court rule that the evidence was not sufficient to support the verdict and reverse the decision of the trial court overruling the motion for New Trial?”

{¶16} “[N]ot later than fourteen days after entry of judgment [following a jury trial], a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not

returned, such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion.” Civ.R. 50(B); *Freeman v. Wilkinson* (1992), 65 Ohio St.3d 307, 309 (Civ.R. 50(B) “only applies in cases tried by jury”).

{¶17} “Ordinarily, in order to sustain a motion for judgment notwithstanding a general verdict, the evidence received upon the trial and the facts established by admissions in the pleadings and in the record must be such that the court would have been required, upon a proper motion therefor, to direct a verdict for the party seeking such judgment.” *McNees v. Cincinnati St. Ry. Co.* (1949), 152 Ohio St. 269, at paragraph two of the syllabus. “In order to sustain *** a motion for judgment notwithstanding the verdict,” therefore, “the evidence received upon the trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied.” *Ayers v. Woodard* (1957), 166 Ohio St. 138, at paragraph two of the syllabus.

{¶18} “A motion for a directed verdict does not present a question of fact or raise factual issues, but instead presents a question of law, even though in deciding such a motion it is necessary to review and consider the evidence.” *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, at paragraph one of the syllabus. As a question of law, “it requires a de novo review.” *Environmental Network Corp. v. Good Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, at ¶23.

{¶19} “The three elements of the tort of abuse of process are: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it

was not designed; and (3) that direct damage has resulted from the wrongful use of process.” *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 1994-Ohio-503, at paragraph one of the syllabus.

{¶20} The sole argument raised by the Felixes under all three assignments of error is that the evidence presented at trial is legally insufficient to support a claim of abuse of process. Specifically, the Felixes assert the failure of the evidence to demonstrate that process was “perverted *** in an attempt to accomplish [an] ulterior purpose for which it was not designed,” and that “the Felixes *** subjected [Palivoda] to a criminal prosecution that lacked probable cause.” For the following reasons, we agree.

{¶21} The early cases limited abuse of process to cases where one was forced to do some collateral thing that he or she could not otherwise have been compelled to do by a court, in effect, extortion. The modern line of abuse of process cases has broadened the claim to include any act not within the scope of process, whether the result could have been obtained lawfully or otherwise. See generally, Bretz, Jr., *Abuse of Process - A Misunderstood Concept* (1971), 20 Clev.St.L.Rev. 401; and *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 271, 1996-Ohio-189 (“[s]imply, abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order”).

{¶22} In explaining the tort of abuse of process, the Ohio Supreme Court distinguished the related, but “separate and distinct,” tort of malicious prosecution. In contrast to abuse of process, “[t]he tort of malicious prosecution, whether criminal or civil, provides a remedy when a proceeding is instituted without probable cause.” *Yaklevich*, 68 Ohio St.3d at 297. “While both malicious prosecution and abuse of

process involve the improper use of a separate civil action, the two torts have different elements, and differ in their focus. The key consideration in a malicious civil prosecution action is whether probable cause was present initially to bring the previous suit, whereas the key consideration in an abuse of process action is whether an improper purpose was sought to be achieved by the use of a lawfully brought previous action.” *Id.*, at 300, 301, fn. 6 (“the two torts are not interchangeable; *** [t]he presence or absence of probable cause is the determining factor which divides the areas of operation of the two torts”).

{¶23} In a latter case, the Ohio Supreme Court further elaborated the difference between abuse and malicious prosecution. “In an abuse of process case, ‘the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.’” *Robb*, 75 Ohio St.3d at 271 (citation omitted).

{¶24} Conversely, “[a]buse of process does not lie for the wrongful bringing of an action, but for the improper use, or ‘abuse,’ of process. *** To make a case of abuse of process a claimant must show that one used process with an ‘ulterior motive,’ as the gist of [the] offense is found in the manner in which process is used. *** There must also be shown a further act in the use of process not proper in the regular conduct of the proceeding.” *Clermont Environmental Reclamation Co. v. Hancock* (1984), 16 Ohio App.3d 9, 11. See, also, Restatement of the Law 2d, Torts, Section 682, Comment a (“[t]he gravamen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly

obtained, for any purpose other than that which it was designed to accomplish”); *Wolfe v. Little*, 2nd Dist. No. 18718, 2001 Ohio App. LEXIS 1902, at *10 (“ulterior purpose or motive has been interpreted as an attempt to gain an advantage outside the proceeding, such as payment of money or surrender of a claim, using the process itself as the threat”).

{¶25} In the present case, Palivoda maintains that the allegations against him were trumped up by the Felixes in order to have him arrested and to avoid arrest themselves. This conduct wholly occurred pre-proceeding and there was no evidence of intra-proceeding impropriety presented.

{¶26} The suppositions or conclusory allegations as to the ulterior motive in the briefing of this case are apparent, but there is no affirmative evidence in the record establishing the alleged ulterior motive or that the Felixes used process themselves. Cf. *Kurinsky v. Natl. Cable Television Assn.* (1994), 98 Ohio App.3d 716, 727 (“it must be demonstrated that the precise actions of the defendant constituted the *use* of process which *use* of process perverted the legal proceeding in an attempt to accomplish the defendant’s ulterior purpose. Simply stated, one cannot *abuse* process if one does not actually *use* process”) (Krupansky, J., dissenting) (emphasis sic).

{¶27} In the present case, the facts, as pled and proven by Palivoda, demonstrate that there was no probable cause for the Felixes to accuse him of Felonious Assault, inasmuch as Palivoda did not cause or attempt to cause them physical harm by firing his rifle into the air and into an unoccupied truck. Cf. R.C. 2903.11(A)(2). According to Palivoda, the Felixes were lying when they reported to the police that he had fired upon them or in their general direction. Rather, the Felixes

made their statements with the intent to injure him by having him falsely convicted of felony charges.

{¶28} The facts of the present case adhere much more closely to the essential elements of a claim for malicious criminal prosecution, which consists of: “(1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the defendant.” *Rogers v. Barbera* (1960), 170 Ohio St. 241, at paragraph one of the syllabus; *Melanowski v. Judy* (1921), 102 Ohio St. 153, at paragraph one of the syllabus (the “gist” of an action for malicious prosecution is “the want of probable cause,” from which “the legal inference may be drawn that the proceedings were actuated by malice”).

{¶29} Palivoda argues that his criminal prosecution was instituted with probable cause, in that it was based on the Felixes’ statements which, although false, provided the police and prosecutor with probable cause. Palivoda’s argument would be persuasive if his claims were raised against the sheriff’s department or the county prosecutor. But with respect to the Felixes as the complaining witnesses, Palivoda’s case was based on the theory that they knowingly gave false statements to the police, statements which were not in fact based on probable cause that Palivoda had attempted to cause them harm. See *Aaron v. Venator Group*, 6th Dist. No. E-03-001, 2003-Ohio-4858, at ¶28 (“Aaron argues that a claim of abuse of process is proper because the Perkins Police Department reasonably relied on false information given by Chaffee in obtaining an arrest warrant. However, Aaron has not brought his claim against the Perkins Police Department. The claim was brought against Venator, and the fact remains that Aaron did not challenge the trial court’s finding that Venator, acting through Chaffee, had no ‘probable cause’ to ask the Perkins Police Department to

arrest Aaron for theft. Accordingly, the proper cause of action under these facts would have been for malicious prosecution, not abuse of process.”).

{¶30} The facts of the present case may constitute a claim for malicious prosecution, which was not pled in the trial court. As such, the facts of the present case are legally insufficient to sustain the verdict based on a claim of abuse of process. This conclusion is amply supported by case law.³

{¶31} In *Gillman v. Schlagetter* (S.D. Ohio), No. 3:08-cv-454, 2010 U.S. Dist. LEXIS 89163, the district court concluded that, “if a criminal action is initiated at a time when there is no probable cause, a plaintiff may not bring an abuse of process claim.” *Id.* at *29. “Abuse of process will not lie for the wrongful initiation of an action but only for the improper use, or ‘abuse’ of an action.” *Id.* at *28, citing *Gliatta v. Tectum, Inc.* (S.D. Ohio 2002), 211 F. Supp. 2d 992, 1010; cf. *Yaklevich*, 68 Ohio St.3d at 298, fn. 2 (“there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions”) (citation omitted).

{¶32} In *Tablack v. Wellman*, 7th Dist. No. 04-MA-218, 2006-Ohio-4688, the court of appeals upheld a grant of summary judgment in favor of a defendant on a counterclaim of abuse of process based on the facts alleged by the plaintiff in its brief: “JHS states in their brief that Tablack’s claims ‘were utterly without any factual or legal basis.’ They then go on to argue that Tablack lacked probable cause to file any of his

3. We are aware that this court has issued a previous decision to the contrary. In *Bayer v. Neff*, 11th Dist. No. 95-L-044, 1995 Ohio App. LEXIS 5897, this court allowed a claim of abuse of process where a criminal prosecution was initiated based on false “accusations” to the police. *Id.* at *13. To the extent that the holding of *Bayer* is inconsistent with the present decision, it is overruled. Cf. *id.* at *21 (Christley, J., dissenting in part) (while “declarations of no probable cause may be supportive of his claim of malicious prosecution, they are incompatible with a claim of abuse of process”).

claims. By making this argument, JHS defeats their own claim of abuse of process since they assert that one of the necessary elements does not exist.” *Id.*, at ¶142.

{¶33} Lastly, in *Hershey v. Edelman*, 187 Ohio App.3d 400, 2010-Ohio-1992, the court of appeals addressed the situation where a claim for abuse of process was based on the filing of a police report. The court observed that, in a claim for abuse of process, “the thing complained of is not that issuance of the process was wrongfully procured, but that, having been issued, it was wilfully perverted, so as to accomplish a result not commanded by it or lawfully obtainable under it.” *Id.* at ¶40, citing *Avco Delta Corp. v. Walker* (1969), 22 Ohio App.2d 61, 66 (citation omitted). In order to maintain the action, it was necessary to allege “that the action or process itself (here, the filing of the police report) was proper or filed with sufficient probable cause, but that the proceeding itself was perverted or corrupted in order to accomplish an ulterior purpose.” *Id.* at ¶44. As acknowledged above, Palivoda’s argument was not that his criminal prosecution was subsequently perverted or corrupted to accomplish some ulterior purpose, but, rather, that the Felixes lacked any probable cause to make the statements which initiated the prosecution.

{¶34} The assignments of error are with merit.

{¶35} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, overruling the Felixes’ Joint Motion for Judgment Notwithstanding the Verdict, is reversed. Costs to be taxed against appellee.

MARY JANE TRAPP, J., concurs in judgment only with a Concurring Opinion.

THOMAS R. WRIGHT, J., concurs in judgment only with a Concurring Opinion.

MARY JANE TRAPP, J., concurring in judgment only.

{¶36} I, too, conclude that this case is not an abuse of process case. Allowing the judgment to stand would only further muddy the murky waters that have unfortunately developed in the area of malicious prosecution and abuse of process. But, I write separately, as we were asked to decide whether the jury lost its way when it determined that all of the elements of abuse of process were supported by the evidence. While I concur with the majority's analysis up to and through the section of the opinion addressing perversion of the proceeding and, ultimately, the judgment, I cannot adopt the observations and analysis of the final section of the opinion discussing whether the proceeding was set in motion in proper form and with probable cause. This portion of the opinion is unnecessary to the determination of this case. Unlike the decisions cited in the last section of the majority opinion, this case was pled and tried on the sole theory of abuse of process against the Felixes. While it may be wise to elucidate generally the difference between malicious prosecution and abuse of process, any speculation as to the merits of a claim for relief that was not, in fact, brought against non-parties to this action is unwise.

{¶37} While Mr. Palivoda was indeed charged by the state, arrested, tried by a jury, and exonerated, undoubtedly causing him to incur legal expenses, these are all anticipated by-products of a criminal prosecution and within the ambit of the judicial process. Mr. Palivoda failed to establish how the process was perverted. Further, no affirmative evidence exists in the record to establish the alleged ulterior motive, nor is there any evidence that the Felixes *used* process themselves.

{¶38} It is the plaintiff's burden to show both an act committed during the process that was improper in the normal context of the proceeding, and the defendant's ulterior motive. See, *Wolfe*, supra. Neither was met in this case. Thus, I join in the judgment of the majority.

THOMAS R. WRIGHT, J., concurring in judgment only.

{¶39} The Felixes assert that the elements of abuse of process were not met by the evidence; that there was insufficient evidence to support submitting the case to a jury; and there was not competent, credible evidence going to all the material elements of the case. I agree; in fact, there was no abuse of process case at all.

{¶40} The early cases limited abuse of process to cases where one was forced to do some collateral thing that he or she could not otherwise have been compelled to do by a court, in effect, extortion. The modern line of abuse of process cases has broadened the claim to include any act not within the scope of the process, whether the result could have been obtained lawfully or otherwise. See, generally, Bretz, Abuse of Process - A Misunderstood Concept, (1971), 20 Clev.St.L.Rev. 401; *Robb v. Chagrin Lagoons Yacht Club, Inc.* (1996), 75 Ohio St.3d 264, 271 (abuse of process occurs "where someone attempts to achieve through use of the court that which the court is itself powerless to order.")

{¶41} *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 298, sets forth the elements of abuse of process: (1) a proceeding set in motion in proper form with probable cause; (2) which, once commenced, was perverted to

accomplish an ulterior purpose for which it was not designed; and (3) resulting in direct damage.

{¶42} “The tort of abuse of process arises when one maliciously misuses legal process to accomplish some purpose not warranted by law. *** The key to the tort is the purpose for which process is used once it is issued. *** *Abuse of process does not lie for the wrongful bringing of an action, but for the improper use, or ‘abuse,’ of process.* *** To make a case of abuse of process a claimant must show that one used process with an ‘ulterior motive,’ as the gist of offense is found in the manner in which process is used. *** There must also be shown a further act in the use of process not proper in the regular conduct of the proceeding. *** In a claim for abuse of process *** “(***) [t]he tortious character of the defendant’s conduct consists of his attempts to employ a legitimate process for a legitimate purpose in an improper manner, and this point must be clearly shown by the plaintiff to entitle him maintain (sic) his action.”” *Clermont Environmental Reclamation Co. v. Hancock* (1984), 16 Ohio App.3d 9, 11, quoting *Hauser v. Bartow* (1937), 273 N.Y. 370, 374. (Citations omitted.) (Emphasis added.)

Later cases have confirmed the concept that abuse of process does not lie for the wrongful bringing of an action but only for the improper use of the proceeding once a proper claim has been commenced. See *Gugliotta v. Morano*, 161 Ohio App.3d 152, 2005-Ohio-2570.

{¶43} These cases are in line with the Restatement 2d of Torts, Section 682: “One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process. COMMENTS & ILLUSTRATIONS: Comment: a. The gravamen of the misconduct for which the liability stated in this Section is

imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. *The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in this Section.*” (Emphasis added.)

{¶44} Further, in order to show the process was perverted to accomplish an ulterior purpose the plaintiff must identify both an act committed during the process that was not proper in the normal conduct of the proceeding and the defendant’s ulterior motive. “*** [U]lterior purpose or motive has been interpreted as an attempt to gain an advantage outside the proceeding, such as payment of money or surrender of a claim, using the process itself as the threat[,]” i.e., to coerce members to vote a certain way at the yacht club; coerce a settlement regardless of the merit of the claim; abuse criminal process to coerce adjustment of a private civil claim. *Wolfe v. Little* (Apr. 27, 2001), 2d Dist. No. 18718, 2001 Ohio App. LEXIS 1902, at *10.

{¶45} It has also been observed that in line with *Yaklevich* and *Clermont* “*** it must be demonstrated that the precise actions of the defendant constituted the *use* of process which *use* of process perverted the legal proceeding in an attempt to accomplish the defendant’s ulterior purpose *** one cannot *abuse* process if one does not actually *use* process.” *Kurinsky v. Nat’l Cable Television Assn.* (1994), 98 Ohio App.3d 716, 727, (Krupansky, J., dissenting.) (Emphasis sic.)

{¶46} We are presented in this case with the claim that the allegations were trumped up in order to have the plaintiff arrested and to avoid arrest themselves. This was all pre-proceedings and no evidence of intra-proceeding impropriety has been presented. Nor do I find any evidence that the Felixes *used* process themselves.

{¶47} It is the plaintiff's burden to show that defendant used process; committed an act during the process that was not proper in the normal context of the proceeding; and the defendant's ulterior motive. See, *Wolfe*, supra. These elements were not met in this case.