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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

No. 20180401

Rodenburg Law Firm,
Plaintiff- Appellant,

v.

Kathy Sira, a/k/a Kathy Jimenez,
Mikhail Usher, and Usher Law Group, P.C.,
Defendants-Appellees.

On Appeal From the Judgment of the District Court
For Cass County, North Dakota, No. 09-2017-CV-01712,
Dated September 13, 2018,
Honorable Steven L. Marquart, Presiding

APPELLANT'S BRIEF

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[¶1] Whether the trial court misapplied the law with respect to probable cause and an attorney's obligation to make inquiry into the validity of claims before bringing suit.

[¶2] Whether the trial court made clearly erroneous findings regarding the credibility of a witness.

[¶3] Whether the trial court misapplied the law regarding probable cause and malice in a malicious prosecution action.

[¶4] Whether the trial court misapplied the law regarding abuse of process.

STATEMENT OF THE CASE AND FACTS

[¶5] On June 20, 2017, Plaintiff Rodenburg Law Firm ("Rodenburg") sued Defendants Kathy Sira/Jimenez ("Sira"), Mikhail Usher ("Usher") and Usher Law Group, P.C. ("Usher Law"), alleging that they maliciously prosecuted a Fair Debt Collection Practices Act ("FDCPA") lawsuit ("New Jersey Complaint") [App.A030] against Rodenburg in New Jersey federal court. Rodenburg's Complaint was subsequently amended (Second Amended Complaint) [App.A023] to include claims for abuse of process and punitive damages. The case came on before Judge Steven L. Marquart for a bench trial; and on August 23, 2018, Judge

Marquart filed Findings of Fact, Conclusions of Law and Order for Judgment. [App.A012]. Judgment dismissing Rodenburg's claims was entered September 13, 2018. [Index#337].

[¶6] The court concluded that, prior to bringing the New Jersey Complaint, Usher did not have to investigate who made the anonymous calls to Sira, and that Rule 11 did not require any further inquiry by him. [¶¶35-39, App.A018]. The court concluded that there was nothing nefarious about Usher bringing three separate lawsuits on the same day, alleging nearly identical claims, without disclosing them as related cases. [¶¶40-43, App.A019].

[¶7] The court concluded that Usher and Sira reasonably believed they could succeed in the lawsuit on the issues of venue and personal jurisdiction, reasoning that repeated phone calls into New Jersey would establish both. [¶¶45-46, App.A020].

[¶8] The court concluded that there was no abuse of process because the lawsuit was brought for a purpose for which it was designed. [¶47, App.A020].

[¶9] The court concluded that Usher and Sira "had trustworthy information that caused both of them to believe that there was a chance that Sira/Jimenez's claim may be held valid upon adjudication," and that the malicious prosecution claim therefore failed. [¶51, App.A021].

[¶10] On January 16, 2017, Rodenburg was served with the New Jersey Complaint

in Fargo, North Dakota by a North Dakota process server. [Tr.22].

[¶11] The complaint was signed by Usher of Usher Law on behalf of Sira. Sira signed the Verification in Merced County, California. [App.A037].

[¶12] On the same day, Usher filed two other complaints, one against Eltman Law, P.C. [Index#308], and the other against Portfolio Recovery Associates [Index#307], containing nearly identical allegations of FDCPA violations. Usher did not list these as related cases on the case cover sheet. [Tr.358-359].

[¶13] Sira was of the belief that the three defendants were somehow connected, as the Discover debt pursued by Rodenburg and Eltman was a credit card payment for a medical bill, and the Portfolio Recovery case was for an anesthesiologist's bill for the same procedure. [Tr.100-110].

[¶14] The New Jersey Complaint alleges that "[s]ometime on or about July of 2010" Rodenburg contacted Sira in an effort to collect a debt. [¶9, App.A033]

[¶15] Rodenburg was retained by Discover Bank in November 2009 to make legal collection efforts on Sira's delinquent Discover Bank account; and, to that end Rodenburg sent Sira a demand letter on November 10, 2009. [Index#201].

[¶16] The complaint (¶¶10, 14, 27, App.A033) alleges that Rodenburg failed to send Sira a validation notice as required by 11 U.S.C. §1692g(a).

[¶17] Rodenburg mailed Sira the validation notice required by section 15 U.S.C. §1692g(a) which was contained in the demand letter mailed on November 10, 2009.

[Index#201]. Sira did not know what a validation notice was and did not keep records. [Tr.163-164]. Usher claimed that Sira confirmed all of the factual allegations in the New Jersey Complaint, but he had no notes or other records of their conversations. [Tr.450, 488].

[¶18] The New Jersey Complaint alleges that, although Rodenburg filed a lawsuit against Sira in October of 2012, Sira was not notified about that legal action until "her account was levied in June of 2016 by the unlawful actions of the Defendant." [¶17, App.A033].

[¶19] The demand letter was delivered to Sira at her forwarding address and not returned. [Index#202]. Rodenburg filed a lawsuit against Sira in Missoula County, Montana, District Court, on February 1, 2010. Sira acknowledged service on April 29, 2010. [Index#204]. When Sira did not respond, default judgment was entered against her on June 22, 2010. [Index#205]. In addition to acknowledging service of the summons and complaint, Sira knew of the judgment when she appeared in response to a Montana writ of execution in December of 2012 to make a Claim of Exemption and Request for Hearing, and to file an Affidavit in January of 2013. [Tr.99-102; Index#206].

[¶20] The New Jersey Complaint [(¶11, App.A033)] alleges, without specifying any dates, that Rodenburg repeatedly and continuously called Sira.

[¶21] Rodenburg closed Sira's file at Discover Bank's request in April of 2014,

nearly three years prior to the commencement of the New Jersey lawsuit. When Sira contacted Rodenburg on May 2, 2014, she was informed that Rodenburg had closed her case, and that it was no longer involved in collecting on her account. [Index#207]. Sira testified that the only thing this conversation meant to her was, "call Discover." She also testified, however, that she didn't think Rodenburg would leave her alone. [Tr.109-111]. The statute of limitations for an FDCPA claim is one year from the date on which the violation occurs. 15 U.S.C. §1692k(d).

[¶22] Sira told Usher that she contacted Discover as instructed by Rodenburg's employee in the 2014 telephone call initiated by Sira, that Discover referred her to Eltman Law, that she had agreed to make payments to Eltman, and that Eltman nevertheless continued to harass her by telephone. [Tr.148].

[¶23] Sira contacted Usher off the internet in late 2016, after which she sent him documents and spoke to him on the telephone. [Tr.353-354]. He mailed all documents, including the complaint, for her signature to her in California, based on her statement to him that she intended to move to New Jersey in the future. [Tr.512-513]. Nevertheless, Usher claims that Sira told him she received the anonymous calls in New Jersey and that he didn't know she lived in California until after the stipulation of dismissal of the New Jersey Complaint. [Tr.371, 516].

[¶24] Usher maintained that he reasonably believed that Rodenburg made certain anonymous telephone calls that Sira told him she had received in 2016. The callers

did not identify themselves, but Sira stated that the callers mentioned a "judgment" and suspected that it was Rodenburg because Rodenburg had obtained a judgment against her. [Tr.363]. Sira testified at trial that she lived in California, not New Jersey, in 2016, and that she received the anonymous calls while at work in Turlock, California. [Tr.141-142].

[¶25] Sira testified that she never said she knew for a fact that the calls were from Rodenburg; she only had a suspicion that the caller was Rodenburg. [Tr.148, 177]. She never checked the call record on her phone to see if that would reveal who the callers were, nor did Usher. [Tr.150-151]

[¶26] Usher testified that he did a Pacer search for cases involving Rodenburg over a 20-year period, and that he found 40 cases, including one involving a $311,000 judgment. He claimed that he inferred from this that "Sira's allegations had veracity" and that Rodenburg made the anonymous telephone calls. [Tr.365-369].

[¶27] The New Jersey Complaint (¶17, App.A033) alleges that "her account" was levied in June of 2016 "by the unlawful actions" of Rodenburg.

[¶28] Rodenburg did not make any collection efforts against Sira or anyone else in New Jersey, and it is undisputed that Rodenburg has never done business in New Jersey. [Tr.233-235]. Usher could not identify any bank where an attempted levy occurred. [Tr.487-490]. He did not ask for, and Sira did not supply, this information. [Tr.492]. He was, nevertheless, satisfied there was "conduct."

[¶29] Upon receiving the New Jersey Complaint, Rodenburg promptly (January 20) through attorney Eeva Greenley (Wendorf) contacted Usher and told him that the complaint alleged untrue facts, was barred by the one-year statute of limitations, and that personal jurisdiction over Rodenburg was lacking. Usher's repeated response was to ask if Rodenburg was going to make a settlement offer. [Tr.205-207].

[¶30] Usher did not respond with any facts to support his complaint; instead he refused to dismiss, stating "I will be glad to discuss potential settlement today. . . but dismissing the matter will simply not happen." [Tr.44-45, Index#242, Tr.49-50]. When Rodenburg asked Usher to check with Sira to make sure she was not confusing Rodenburg with another entity, Usher refused to discuss the matter further. [Tr.52-53].

[¶31] Because Usher refused to dismiss the baseless New Jersey Complaint, Rodenburg hired New Jersey attorney, Christopher M. Curci. Curci drafted and filed a Joint Discovery Plan and filed a motion to dismiss.

[¶32] Usher responded to the motion by asking Curci to submit a settlement offer from Rodenburg. [Dep. p.17; Index#260]. After receiving an extension of time to respond to the motion (until May 12, 2017), Usher contacted Curci on May 11 to ask whether Rodenburg would stipulate to dismissal with prejudice. [*Id*.] He initially sought to include a waiver of attorney fees, but Rodenburg refused to agree

to waive any possible claims. [*Id.*] Usher then agreed to a stipulation of dismissal with prejudice without any condition and the case was dismissed with prejudice. [*Id.*, p.24].

STANDARD OF REVIEW

[¶33] The existence of probable cause in a malicious prosecution action is a mixed question of law and fact. *Johnson v. Huhner*, 33 N.W.2d 268, 273 (N.D. 1948). The trial court's findings of fact are reviewed for clear error; its conclusions of law are reviewed *de novo*. *Richmond v. Haney*, 480 N.W.2d 751 (N.D. 1992).

ARGUMENT

I. The trial court misapplied the law regarding probable cause to bring the FDCPA claims in New Jersey.

[¶34] The trial court below concluded that Usher's New Jersey Complaint made "a short and plain statement of the claims showing the plaintiff Sira/Jimenez was entitled to relief." [¶¶21-22, App.A015-16]. Those conclusory allegations might satisfy the pleading minimums for Rule 8 of the Federal Rules of Civil Procedure. They do not, however, establish probable cause for anything. Usher testified that he claims three things provided him with a reasonable belief that Rodenburg violated the FDCPA with regard to Sira. First, he claims a reasonable belief that Rodenburg made anonymous, harassing phone calls to Sira in New Jersey. Second, he claims that he reasonably believed that Rodenburg attempted to levy against Sira's bank account. Third, he claims that Rodenburg's profile of FDCPA lawsuits made it likely that the firm was the offender here.

[¶35] Sira did not know who made the calls. Usher argued that it could have been a rogue employee of Rodenburg's [Tr.481], but there was no real basis for such an inference. It could have been Eltman; it could have been Portfolio; both of whom had her number. She said she didn't think the anonymous calls came from them because they always identified themselves when they called her. It certainly was

more likely that any mistaken or rogue agent would be from Eltman or Portfolio, firms that Usher knew were actively collecting in New Jersey. Eltman in fact was trying to collect the Discover judgment. Rodenburg did no collection work in New Jersey, and Usher presented no basis for concluding that it did so. Usher testified that he did a search on Rodenburg, finding some 40 lawsuits against it over 20 years.[1] He made no claim that any of those lawsuits involved conduct in New Jersey.

[¶36] It was not a reasonable or responsible thing for Usher to bring suit based on anonymous calls unconnected to Rodenburg. Probable cause requires an honest and reasonable belief: (1) in the existence of facts upon which the claim was based; and (2) that the facts support the conclusion that the claim had legal merit. Speiser, Kraus & Gans, American Law of Torts (2012) §28:21.

[¶37] Accepting Usher's claim that all he had to do was satisfy the bare bones of Rule 8 of the Federal Rules of Civil Procedure, the trial court concluded [¶34, App.A018]:

> The Complaint contained a short and plain statement of the grounds of the court's jurisdiction, contained a short and plain statement of the claim showing that the pleader was entitled to relief, and made a demand for the relief sought. Nothing more was required.

To the contrary, more is required. Usher was required to allege specific facts in

[1]A comparison search showed that Rodenburg's biggest competitor, Messerli & Kramer, was sued 118 times in 10 years. [Tr.580-582].

support of each claim sufficient to present a plausible claim for relief. *Bell Atlantic v. Twombley*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[¶38] The facts alleged in Usher's New Jersey Complaint [App.A031-A036] are either legally insufficient as a basis for the claims he asserts or are alleged without a reasonable basis. The complaint asserts 10 paragraphs [¶¶7-17] of "factual allegations." Then it asserts in a single count 7 separate FDCPA claims. Since these claims are not made in separate counts, the complaint is intentionally vague as to which factual conduct is alleged to support which claim.

[¶39] **15 U.S.C. § 1692d [¶21].** This statute requires conduct, within the statute of limitations, which has the natural consequence of harassing oppressing, or abusing someone in connection with the collection of a debt. Sira does not claim threats of violence, profane language, or any of the other listed examples.

[¶40] **15 U.S.C. § 1692c(a)(1) [¶22].** Contacting the plaintiff at a place and during a time known to be inconvenient for the plaintiff. Usher claimed this statute was violated by the alleged phone calls. However, Sira did not claim that the phone calls were inconvenient as to time; and, although she did claim the phone calls were made to her work, that was her work in California [Tr.141-142]; and if so, the violation would not supply the jurisdictional basis.

[¶41] **15 U.S.C. § 1692f [¶23].** Using unfair or unconscionable means to collect or attempt to collect a debt. Usher claims he has a chance to prevail on the claim of

violation of this statute based on the same phone calls. The statute, however, requires some relatively serious unfair practices, independent of other FDCPA sections, and it can't be used to vindicate a violation of another section. *Hillbeck v. Accounts Receivable Services*, No. 16-3345 (D. Minn. 05-15-2017). The anonymous calls speculation does not support a reasonable belief of a violation of this statute.

[¶42] **15 U.S.C. § 1692f(6) [¶24].** Threatened to unlawfully repossess or disable the consumer's property. Usher claimed that the alleged attempted bank levy could come under this section. As discussed above, that is mere speculation, and the overwhelming weight of the evidence shows that no bank levy attempt took place in 2016, or at any time other than 2012, well outside the statute of limitations. Moreover, a bank levy does not involve repossessing or disabling property.

[¶43] **15 U.S.C. § 1692e [¶25].** False deceptive or misleading representation or means in connection with the debt collection. Usher testified that the phone calls, again, could constitute a violation of this section. However, Usher had no factual basis for a reasonable belief that the telephone calls Sira described included the kind of misrepresentations prohibited by this section. Coupled with the speculation that Rodenburg made the calls, there can be no reasonable basis for this claim.

[¶44] **15 U.S.C. § 1692f(1) [¶26].** Collecting an amount not authorized by agreement or expressly not permitted by law. Usher claims that this statute could

be violated because Sira might have claimed nothing is due. That, however, is obviously not true because she validated the debt in Montana and was making payment to Eltman. Moreover, if he is talking about the period of 2010-2014, the claim was barred by the statute of limitations. If he is claiming that this section was violated by the anonymous callers, there is again no factual basis for the claim.

[¶45] **15 U.S.C. § 1692g [¶27].** Failing to send the consumer a validation notice within five days of the initial communication. The evidence is undisputed that Rodenburg did send this notice. While Usher may not have known this when he drafted the New Jersey Complaint, he did know that the notice would have been required back in 2010, and that, if it had not been sent, this claim would be barred by the statute of limitations. There was no plausible basis for Usher or Sira to believe they had any chance of success establishing this claim at trial.

[¶46] Usher testified that his conclusory statutory allegations were supported by the anonymous phone calls (¶¶ 21, 22, 23, 25), the failure to send a validation notice (¶23, 27) and the attempted bank levy (¶24, 26). He did not offer any legal analysis of the FDCPA claims involved.

[¶47] The allegation that Sira was not served with the Montana lawsuit and didn't know about the judgment until her bank account was levied in 2016 is directly refuted by the documentary evidence showing: (1) Sira signed and sent back an acknowledgment of service, and (2) she appeared in the Montana proceeding to

personally file a claim of exemption. Moreover, Sira positively testified to these matters. [Tr.101-102]. Usher's self-serving testimony about "sewer service" in New York and New Jersey cannot serve, as the trial court erroneously concluded, to justify outright fabrication. [¶30, App.A017]. Usher knew that the lawsuit was back in 2010, and that the judgment was in 2012. He offered no basis for bringing this claim outside the statute of limitations even if he believed that "sewer service" had occurred. Nor was any effort made to vacate the Montana judgment. The true facts were readily available to Usher, and contacting the Montana court would have provided him with all documentary proof he should have required.

[¶48] Even if Usher and Sira honestly believed that she did not know about the judgment until 2016, (a fact finding that is itself clearly erroneous given Sira's own testimony, and that Usher did not know of any attempted bank levy in 2016 (also unsupported by any evidence), Usher could not articulate any FDCPA provision violated by taking or enforcing the judgment four years prior to Sira's claim.

[¶49] The trial court adopted the rationale that a claim is supported by probable cause if the factual basis of the claim was enough to cause the pleader to subjectively believe that there was a <u>chance</u> that the claims may be held valid upon adjudication. It concluded accordingly [¶51, App.A021] that the anonymous calls were a sufficient basis to establish venue and personal jurisdiction in New Jersey.

[¶50] The trial court's legal authority for its "chance" ruling, is *Nisewanger v.W.J.*

Lane Co., 28 N.W. 2d 409, 412 (N.D.1947), which was decided in state court before Rule 11 was adopted, and before *Twombly* and *Iqbal* became applicable to this case. Rule 8 and *Nisewanger* allowed the court to rule that a speculative chance is a sufficient reasonable basis. However, the law now requires more in a federal court case.

[¶51] Since *Twomby* and *Iqbal* changed the pleading requirements in federal court, it no longer has been sufficient to draft a complaint on the belief of a chance possibility of success. A complaint must contain sufficient factual matter to state a claim that is plausible on its face. *Iqbal*, 556 U.S. at 663. "[L]abels, conclusions or formulaic recitations of the elements of a cause of action" are not factual matters and cannot sustain a claim. *Iqbal*, 556 U.S. at 670.

[¶52] This is not a motion to dismiss, nor is it a Rule 11 motion. However, these cases and Rule 11 inform the sort of inquiry a reasonably competent attorney must make when bringing a case in federal court. Under the prior rule (*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), a complaint was sufficient if there was some set of facts that could possibly entitle the plaintiff to relief. Accordingly, a reasonable attorney would bring a claim based on a possible chance that he could ultimately prevail. However, when a reasonably competent attorney brings a claim in federal court he must allege facts sufficient to show a plausible entitlement to relief — more than a "sheer possibility." There must be sufficient factual matter to allow a reasonable

inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678.

[¶53] The trial court did not review whether the Defendants had probable cause for each of the claims made in Sira's complaint. Instead, it stated [¶51, App.A021]:

> [T]he Court has already concluded that for the jurisdictional allegations in the complaint, and for the allegations in the specific cause of action, Sira/Jimenez and Usher had trustworthy information that caused both of them to reasonably believe that there was a chance that Sira/Jimenez's claim may be held valid upon adjudication.

The court found that Usher and Sira had a reasonable belief that she received harassing calls from Rodenburg in New Jersey in 2016. [¶¶11-14]. As discussed above, the court's factual predicates for this legal conclusion are clearly erroneous. Moreover, the court used the wrong legal standard for probable cause.

[¶54] Even if the court had been correct about the anonymous calls being a sufficient basis for personal jurisdiction, its conclusion [¶23] that those calls are a reasonable basis for Usher's multiple conclusory statements of statutory violation claims is arbitrary and unsupported by the law. Under Rule 10(b) of the Federal Rules of Civil Procedure, those separate claims of statutory violations should have been asserted in separate counts insofar as they were based on separate occurrences. The New Jersey Complaint is confusing and misleading even after Defendants have had an entire lawsuit to explain it. The deception is clearly intended to obfuscate the basis for the alleged statutory violations. As Usher stated at trial, he purposely

makes vague and broad allegations by repeating the statutory language and being obscure about the factual basis and called it "good lawyering" [Tr.464]. To the contrary, good lawyering would provide a separate count for each separate claim for relief, in a way that shows the facts underlying each claim. *Anderson v. Dist. Bd. of Trustees*, 77 F.3d 364, 366 (11th Cir. 1996).

[¶55] As to the alleged violations founded on the anonymous telephone calls, the Defendants' speculation that Rodenburg made those calls does not provide an honest and reasonable basis for believing that it did. It was more likely that the calls were made by someone like Eltman or Portfolio, whom they knew had her telephone number and they knew were actively collecting from her. Needing those phone calls and a New Jersey bank levy attempt for any hope of establishing jurisdiction, it was not reasonable to simply speculate that Rodenburg did those things without some minimal investigation — review of Sira's telephone records, checking with the bank where the levy was attempted, anything.

[¶56] Yet the only factual basis claimed by Usher other than the alleged phone calls was this alleged attempted levy on Sira's bank account. [Complaint, ¶¶12, 17, App.A033]. There was absolutely no factual basis to formulate a reasonable belief in this claim. Sira testified that there was only one bank levy — the 2012 attempted levy on her Montana bank account. This was outside of New Jersey and well outside the statute of limitations. Usher claimed he was justified in making this allegation,

then conducting discovery, and then amending the complaint if necessary [Tr.487-488]:

> I don't recall whether or not the bank levy was specifically in New Jersey, or whether she told me at that time that the bank levy was in New Jersey. I don't recall. If there's anything to refresh my recollection, I'd love to see it. But I don't remember specifically. The jurisdiction -- and I'm assuming that's where you're getting at -- doesn't rely only on that conduct happening in New Jersey. There's reasonable foreseeability that an individual who moved to New Jersey would be the recipient of this. And many banks have branches all over the country. Let's say Wells Fargo. And so I would assume it's possible that Ms. Sira living in New Jersey having a bank can get a bank levy in let's say Montana or California, but it still affects her here because she still has the same bank account.

[¶57] To determine whether a basis for legal action exists, a lawyer has a professional obligation to conduct a pre-suit investigation of the facts. *Wisc. Chiropractic Ass'n. v. Chiropractic Exam. Bd.*, 2004 WI App 30, 676 N.W.2d 580. A party and an attorney may not rely on formal discovery after the filing of the suit to establish their factual basis for the cause of action when the required factual basis could be established without formal discovery. *Id. a*t ¶15.

[58] A lawyer does not form a reasonable and honest belief as cavalierly as does Usher. Rule 11 of the Federal Rules of Civil Procedure requires that a reasonable belief be formed only after pre-suit inquiry "reasonable under the circumstances." Curiously, the trial court relied [¶38, App.A018] on the comment to Rule 11 stating that "what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer, whether he had to rely on the

client for information as to the facts underlying the pleading . . ., whether the pleading . . . was based on a plausible view of the law . . ." In this case there was no time pressure, Usher did not have to rely on the client (he had available other means for verifying the crucial anonymous call and bank levy allegations). Moreover, he had an elderly client he got over the internet, whom he never met face to face. Usher had an enhanced need to inquire behind her recollections.

[¶59] The information Sira provided Usher did not provide a reasonable basis for concluding that she had any plausible claims against Rodenburg. She did not know who made the phone calls and she did not identify any bank account. The court concluded that her information was "reliable"; however, Usher was not entitled to rely on speculation. Sira's statement that she received anonymous phone calls, even if reliable, does not support a reasonable belief that the calls came from Rodenburg. A simple check of the phone records on her cell phone might have shown who the caller was. Of course, since Sira was not residing in New Jersey in 2016, the fact that she received anonymous calls in California could not establish personal jurisdiction over Rodenburg in New Jersey.[2]

[¶60] While Usher didn't conduct any pre-suit investigation to support his

[2]The trial court discounted Sira's trial testimony that she was residing in California for all of 2016. Although the Court has great discretion in determining credibility, there is no legitimate basis in the record for this conclusion. Moreover, Usher didn't rely on her actually being a resident of New Jersey - instead he relied on his belief that she intended to return to New Jersey in the future.

allegations, he did take the time to search to see how many times Rodenburg had been sued. The fact of those suits, none of which involved anonymous calls or conduct in New Jersey, did not supply a reasonable basis for believing that Rodenburg made anonymous calls to Sira in New Jersey in 2016.

II. The trial court misapplied the law in dismissing this malicious prosecution action with respect to the FDCPA claims.

[¶61] In *Farmers Elevator Co. v. David,* 234 N.W.2d 26, 33 (N.D. 1975), the court stated the elements of a malicious prosecution action as follows:

> '* * * In general, to authorize the maintenance of an action for malicious prosecution, the following elements must be shown: (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance of, the defendant; (3) *The termination of such proceedings in plaintiff's favor*; (4) malice in instituting the proceedings; (5) want of probable cause for the proceeding; and (6) the suffering of injury or damage as a result of prosecution or proceeding.' 52 Am.Jur.2d 190 (1970). (Emphasis added.)

Rodenburg proved all elements of its claim against the Defendants, exceeding the "preponderance of the evidence" standard applicable to this claim, and meeting the clear and convincing standard required in order to support exemplary damages.

[¶62] The trial court concluded that the first two elements were met. Defendants commenced the New Jersey Action against Rodenburg. [¶49, App.A021]. As the

court had previously determined in its June 19, 2018 Memorandum Opinion and Order, the New Jersey Action terminated in favor of Rodenburg, the third element. *N.S.M. Resources Corp. v. Target Corp.,* 636 F.Supp.2d 857 (D. Minn. 2008); *Liberty Synergistics, Inc. v. Microflo, Ltd.,* 50 F.Supp.3d 267 (E.D.N.Y. 2014).

[¶63] The fourth element, malice, is also met. Rodenburg proved not only malice, but actual malice, which is required for punitive damages. The North Dakota Pattern Jury Instructions sets forth the definition of malice and actual malice:

> The term "malice" means an intent with ill will or wrongful motive to harass, annoy, or injure another person. Actual malice is the actual state or condition of the mind of the person who did the act. Direct evidence of actual malice is not required. Rather, the character of the act itself, with its surrounding facts and circumstances, may be inquired into for the purpose of ascertaining the motive or purpose which influenced the mind of the party in committing the act. Thus, upon the consideration of these, if that motive is found to be improper and unjustifiable, the law authorizes the jury to find it was malicious.
> * * * * *

North Dakota Pattern Jury Instructions, C-72.16 Actual Malice 2005; N.D.C.C. § 32-03.2-11(1); *Stoner v. Nash Finch, Inc*., 446 N.W.2d 754 747 (ND 1989). Actual malice was established through the evidence and testimony concerning the Defendants' knowledge, actions, and inactions before and after the New Jersey suit was commenced.

[¶64] The trial court concluded that the Defendants did not act with malice because the New Jersey proceeding was commenced for a proper purpose — that is, it sought relief available under federal law for FDCPA violations. [¶¶47, 51; A020, A021].

This ignores, however, the fact that the action was commenced in a jurisdiction (the District of New Jersey) which lacked the power to adjudicate those claims.

[¶65] Rodenburg met the fifth element — the Defendants lacked probable cause as a matter of law to bring, or maintain, any of the seven FDCPA claims asserted in the New Jersey Action. "Probable cause exists if the party instituting the action believes and has reasonable ground to believe that his action and the means taken in prosecuting it are legally just and proper." *Serhienko v. Kiker*, 392 N.W.2d 808, 814 (N.D., 1986). Defendants did not have reasonable grounds to believe that their suit against Rodenburg was justified by any of these allegations; and, in addition, they had no reasonable grounds for asserting personal jurisdiction over Rodenburg in New Jersey.

[¶66] Even if one or more of the statutory grounds asserted in the New Jersey Complaint was supported by probable cause, Rodenburg's action should not have been dismissed because Rodenburg was entitled to maintain the action if any claim was not supported by probable cause [*Lanz v. Goldstone*, 243 Cal. App. 4th 441, 197 Cal. Rptr.3d 227, 240 (2015)]:

> [W]here several claims are advanced in the underlying action, each must be based on probable cause.

[¶67] The sixth element is established here because Plaintiff suffered damages when it incurred attorney fees and lost production time in defending the New Jersey Complaint. North Dakota Pattern Jury Instructions C-70.62, Measure of Damages

Malicious Prosecution (2008).

[¶68] Overarching the lack of merit of any of the allegations asserted against Rodenburg is the fact that jurisdiction against Rodenburg was wholly lacking. In her New Jersey action, Sira verified that she was a New Jersey resident, which was not true as a matter of law. Sira never resided in New Jersey, and the last time she visited New Jersey was in August of 2015.

[¶69] Usher knew that Sira was in California immediately prior to starting the suit because he sent the three proposed complaints against Rodenburg, Eltman Law Firm and Portfolio Recovery Associates to her in California. Sira reviewed and signed the Verifications for all three complaints in front of a notary in California. [Index## 198, 199 and 200, p. 7]. The complaints falsely stated she resided in New Jersey.

[¶70] Sira testified she did not think it mattered what the complaint said with regard to her residence. [Tr.127]. She apparently did not ask Usher whether that was the case, but just assumed that a fact she swore to as being correct in a federal court lawsuit — which she knew to be false — was of no consequence. Sira failed her burden of showing that she made a full, good faith disclosure of all material facts that she could reasonably have discovered, and accordingly is not entitled to the defense that she relied on the advice of counsel. *Haswell v. Liberty Mutual Ins.*, 557 S.W.2d 628, 636 (Mo. 1977).

[¶71] The trial court found that Sira's trial testimony about where she lived in 2016

was not credible. While there was testimony that she suffers from bi-polar disorder, she also testified that her condition has been under control with medication for some time. She is competent enough to be employed. Her testimony did not reflect any inability to comprehend questions or recall facts. She was not confused. The fact that she sought out on the internet an attorney in New Jersey is wholly consistent with her testimony that she had been to New Jersey for two separate extended stays (6 months each), ending in 2015, and her intention (which never came to fruition) to return. [Tr.125-128]. If she had two extended stays in New Jersey and had used an internet search engine such as Google during that time, it is not unlikely that a Google search for an FDCPA attorney made in California in 2016 would have pulled up New Jersey attorneys. That she lived in California in 2016 is also consistent with the fact that she signed the verification of the complaints and all subsequent documents in California. Usher's own testimony was that she told him she intended to return to New Jersey in the future. [Tr.512-513].

[¶72] Defense counsel at trial elicited Sira's testimony on direct examination that she lived in California in 2016. [Tr.124-126]. Her deposition testimony only partially contradicts her trial testimony. At the time of the deposition, she was unsure when she been in New Jersey, testifying that she wanted to say she first came out there from California to stay for six months in 2010-2012, but then she settled on 2014. [Dep., pp. 12, 14-25; Index#258]. She testified that she couldn't recall

when the anonymous calls were made. [*Id*., p. 24]. She did testify elsewhere in her deposition that she was in New Jersey in 2016 [*Id*., p. 26]; but she also testified that she might have been working at the time she got the calls [which would place her in California]. [*Id*., p. 26].

[¶73] The fact that her deposition testimony contradicted some of her trial testimony is not a ground for a finding that she is not credible, especially when no effort was made at trial by defense counsel to change her testimony. Giving due deference to the trial court's credibility findings means that this Court will not reverse simply because it would have weighed the evidence differently. However, a credibility determination is not wholly inoculated from review. *Buckanaga v. Sisseton Indep. Sch. Dist*., 804 F. 2d 469, 474 (8th Cir. 1986). It can be overturned if clearly erroneous. *U.S. v. Nabors*, 972 F. 2d 355 (8th Cir. 1992). In this case, despite giving due deference to the court's credibility determination, the evidence leaves a definite and firm conviction that a mistake has been made; and the determination that Sira resided in New Jersey in 2016 is clearly erroneous.

[¶74] No testimony from Usher indicated that he had probable cause to believe Sira resided in New Jersey in January of 2017 when the suit was filed. Defendants did not have any basis for stating that Sira's residence as New Jersey in the complaint. As discussed above, the anonymous phone calls, in 2016, were also not a basis for New Jersey jurisdiction.

[¶75] Usher testified that jurisdiction was proper at the time of suit because Sira resided in New Jersey and Rodenburg is a multi-jurisdictional firm. However, Usher had no reasonable belief that Sira was a resident of New Jersey in 2016, or ever. She told him she had been in New Jersey for two 6-month visits and that she intended to return sometime in the future. In addition, Usher had no reasonable belief that Rodenburg had so much as made any contact with, or made any effort to contact Sira since May of 2014 *anywhere*.

[¶76] Jurisdiction over Rodenburg was lacking as a matter of law. The due process clause of the Fourth Amendment constrains a state's authority to require that a nonresident defendant respond to a complaint in its courts. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). To satisfy due process, the nonresident must have sufficient "minimum contacts" with the forum jurisdiction so that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In order to establish minimum contacts, a defendant must take actions by which it "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). There was no general jurisdiction over Rodenburg. Rodenburg does not have an office in New Jersey, it has never employed a New Jersey licensed attorney, and it has never filed a bond with the

Secretary of State of New Jersey. There was no specific jurisdiction over Rodenburg. Rodenburg has never made any collection efforts in New Jersey. Rodenburg obtained judgment in Montana against Sira, and any efforts it made against Sira were in Montana and occurred before May 2, 2014. Any cursory inquiry by Usher would have revealed that jurisdiction over Rodenburg was lacking. His belief that this jurisdiction existed, if he did so believe, had no reasonable basis in the facts or the law. His after-the-fact assertions that jurisdiction could be based on the anonymous calls is unsupported by facts on which a reasonably competent attorney would rely, as discussed above.

[¶77] In her suit against Rodenburg, Sira was aware of her obligation to be truthful yet she falsely swore she resided in New Jersey. Sira had never resided in New Jersey, and had not even visited the state in well over a year at the time she signed the Verification. She has not been back to New Jersey since August of 2015. What Sira knew, combined with the circumstances, reveal the only possible motive on her part to be improper. Rodenburg was the only collector who had obtained a judgment against her, and that judgment was still being pursued by Discover through another law firm. Sira wanted to make Rodenburg pay. She was "fed up" with debt collectors. Rodenburg was the only collector who obtained a judgment against her, and that was the root cause of the Eltman collection efforts. There was no evidence Rodenburg had done anything since 2014, when it last declined to take a payment

from Sira since the firm had closed the file; and she falsely verified the truth of facts she knew were not true. Rodenburg established through clear and convincing evidence that Sira acted with actual malice in suing the firm.

[¶78] Sira did not live in New Jersey in 2016, and Usher either knew, or should have known that. He had to mail documents to her in California. She never came to New Jersey. Usher had no reasonable belief to commence suit against Rodenburg because he either knew or should have known that jurisdiction was improper. Usher's commencement of the suit, maintaining it without investigation or response to Rodenburg's efforts to provide information and documents to him, combined with the surrounding circumstances, reveals by clear and convincing evidence that Usher acted with actual malice. The inference of actual malice must be drawn against the Defendants because of their willful failure to review evidence within their control.

[¶79] Usher testified that he would have had Sira request phone records only after discovery. Usher would have also requested Rodenburg's call logs and entire file since the date it was opened with Rodenburg in 2009, seven years before the Sira suit was commenced, six of which years would be past the statute of limitations. The juxtaposition of Usher's lack of pre-suit inquiry, followed by his lack of investigation after provided information by Rodenburg, compared to the voluminous, overbroad and irrelevant discovery he would have imposed on

Rodenburg in the litigation, is striking.

[¶80] It indicates that Usher ignores his pre-filing inquiry, and that he does so to obtain settlement with no regard for truth of allegations. Now, called to account for his commencing and maintaining that suit, he attempts to improperly shift fault for not dismissing the case after being contacted by Rodenburg. According to Usher, he would have let Rodenburg out of the meritless suit had Rodenburg positively proved, to his satisfaction, that there was no scintilla of merit to the allegations. But he already knew, or should have known, that the complaint's substantive allegations could not be true. That is separate from the fact that Usher ignored that jurisdiction was wholly lacking and all possible claims against Rodenburg were well beyond the one-year statute of limitations.

[¶81] Usher testified he serves discovery in about half of his cases, and that he only commences discovery once the court has issued a scheduling conference. However, Rodenburg's Pacer search of Usher's FDCPA cases [Index#315], reveals that Usher could not have served discovery in his FDCPA cases under those parameters. While his service of discovery within a suit is unrelated to his prior duty to have conducted an adequate pre-suit investigation, it demonstrates his lack of veracity and his improper motive.

[¶82] Defendants' lack of veracity and improper motive is also shown by their testimony that the goal behind the lawsuit against Rodenburg was to simply get the

phone calls against Sira to stop. Had that been the case, a pre-suit call or letter to Rodenburg might have been helpful. Moreover, Usher never mentioned wanting calls to stop to Eeva Wendorf during their phone conversations or in any subsequent communication**.** Nor did Usher and Sira so much as check Sira's cell phone to see who was making calls to her. Instead, Sira's only concern was to get back at Rodenburg and Usher's only concern was leveraging a nuisance settlement.

[¶83] Even assuming the 2016 collection calls occurred, the substance of the calls under either Sira or Usher's testimony did not rise to violations of the FDCPA. Neither was able to identify any matter of any call that could constitute a violation. Usher is familiar with the FDCPA and its requirements, and knows the FDCPA. Suing Rodenburg for the content of calls when in fact he did not know the content and what he was told by his client could not form a violation of the FDCPA, further demonstrates his malice.

III. The trial court erroneously dismissed the abuse of process claim.

[¶84] "An abuse of process occurs when a person uses a legal process, civil or criminal, against another primarily to accomplish a purpose for which it is not designed." *Riemers v. Hill*, 2016 ND 137, ¶22, 881 N.W.2d 624; *quoting Jordet v. Jordet*, 2015 ND 76,¶20, 861 N.W.2d 147. Here, the only connection to New Jersey

was the claim that Rodenburg made calls to Sira in New Jersey in 2016. Defendants, however, knew that Rodenburg did not make calls to Sira in New Jersey in 2016 because Sira was in California, not New Jersey, in 2016. Moreover, even if Sira had been in New Jersey in 2016, her speculation that Rodenburg made those calls is too slim a thread to support jurisdiction, as set out above. Defendants falsely alleged that Sira was a resident of New Jersey when she admits that she was a resident of California. Usher used fraudulent civil legal process in order to solicit a payment from Rodenburg throughout the pendency of the case, first several times to Rodenburg before they retained counsel, and then to Rodenburg's counsel.

[¶85] While Sira and Usher were entitled to use process for the legitimate purpose of bringing an FDCPA lawsuit, they were not entitled to use that process as a threat or club in a way that amounts to a form of extortion. *Herr v. Cornhusker Farms*, No. 1.15-CV-174 (D.N.D. 03-27-2017); *Volk v. Wisconsin Mortgage Assurance Co.*, 474 N.W.2d 40, 44 (N.D. 1991).

[¶86] Defendants used falsified legal process to bring Rodenburg before the New Jersey federal court, a distance and jurisdiction that would be sure to increase Rodenburg's cost of defending and thereby increase the nuisance value of the suit. Once there, Usher promptly solicited settlement offers with threats of "motion practice" and discovery. Defendants knew that there was no proper basis for jurisdiction and that the substantive allegations of the complaint were fabricated.

Defendants abused process for the illegitimate purpose of coercing the settlement of a baseless lawsuit.

[¶87] Defendants' liability for abuse of process does not require proof that they acted with malice. *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 751 (1989). It is sufficient if they acted knowingly. *Id*.

[¶88] The trial court effectively accepted Usher's testimony that he was entitled to bring suit on speculation and then conduct discovery afterwards to determine if his speculation was correct. Although the court stated correctly that what is required is a reasonable investigation of the facts under the circumstances, it failed to properly evaluate an attorney's obligation to conduct a reasonable pre-suit inquiry.

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CONCLUSION

[¶89] Based upon the arguments and authorities presented herein, Rodenburg respectfully requests the order of this court reversing the decision of the district court, and remanding the case for assessment of damages.

Dated: February 13, 2019

Respectfully submitted,

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No. 20180401

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Plaintiff- Appellant,

v.

Kathy Sira, a/k/a Kathy Jimenez,
Mikhail Usher, and Usher Law Group, P.C.,
Defendants-Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2019, I served copies of the Appellant's Brief and Appellant's Appendix on the Defendants-Appellees by first class mail from Fargo, ND addressed as follows:

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Mikhail Usher, and Usher Law Group, P.C.,
Defendants-Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2019, I served copies of replacement pages i, ii, iii, and iv of Appellant's Brief; and replacement page i and additional pages A001.1 and A001.2 (Notice of Appeal) of Appellant's Appendix on the Defendants-Appellees by first class mail from Fargo, ND addressed as follows:

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