

**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 PETITION FOR REHEARING

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POINTS OF LAW PRESENTED

[¶1] Whether a finding of no improper purpose for an abuse of process claim establishes the absence of malice for a claim of malicious prosecution of a civil action.

[¶2] Whether lack of probable cause on multiple claims creates an inference of malice in an action for malicious prosecution of a civil action.

[¶3] Whether a finding of malice is induced by an erroneous view of the law

when it fails to consider the inference arising from the absence of probable cause on multiple claims.

STATEMENT OF THE CASE AND FACTS

[¶4] The Rodenburg Law Firm appealed from dismissal of its action against the Defendants-Appellees for malicious prosecution and other relief. In its Opinion filed July 30, 2019, this Court affirmed that dismissal. In upholding dismissal of the malicious prosecution claim, the Opinion [¶14] states that “the district court’s findings about the absence of malice was not induced by an erroneous view of the law . . .” The district court found that the Defendants did not act with malice because the New Jersey proceeding was commenced for a proper purpose (seeking relief under the FDCPA). [Findings, ¶¶47, 51]. It did not, however, consider whether the absence of probable cause for most, if not all, of its seven FDCPA claims gave rise to an inference of malice. This Court’s Opinion [¶¶16-17], states that it is unnecessary to determine whether probable cause existed, apparently because the district court’s factual finding of no malice was based on the factual conclusion reached in its determination of the abuse of process claim, that the action was commenced for a proper purpose. [Opinion, ¶13].

SUMMARY OF ARGUMENT

[¶5] The district court operated under a mistake of law when it found probable cause despite the fact that most, if not all, of Defendants' FDCPA claims were unsupported. The court's finding of no malice was further affected by its failure to consider the inference of malice arising from the lack of probable cause for multiple claims. While both probable cause and malice must be shown, the trier of fact cannot, under these circumstances, ignore the absence of probable cause in determining whether malice exists.

ARGUMENT

[¶6] It has long been the law in North Dakota that an inference of malice can arise from the absence of probable cause [*Kolka v. Jones*, 6 N.D. 461, 71 N.W. 558, 562-63 (1897)]:

[M]alice may be inferred by a jury from want of probable cause. [citations omitted]. The malice necessary to sustain the action for malicious prosecution need not be ill will towards the plaintiff. Legal malice will support the action, and any unjustifiable motive constitutes legal malice. . . . If no presumption of malice could be deduced from the want of probable cause, yet, **the commencement by Jones of an action** in his own name, on a claim to which he knew he had no title, **after he knew that the claim had been in law extinguished** by settlement between the parties, **must be deemed to have had for its object no other purpose than to so harass** Kolka as to force him to pay Jones an additional sum not owing by him . . . [emphasis added].

[¶7] The inference of malice is one of fact, drawn from the absence of probable

cause [*Johnson v. Huhner*, 76 N.D. 13, 22, 33 N.W.2d 268, 273 (1948)], and while the absence of probable cause does not require a finding of malice, it does require that the trier of fact consider whether the absence of probable cause under these circumstances raised the inference.

[¶8] This Court's Opinion [¶13] cites to *Kummer v. City of Fargo*, 516 N.W.2d 294, 298 (N.D. 1994), for the proposition that "malice for a malicious prosecution action is essentially synonymous with the element of ulterior purpose in abuse of process." In *Kummer*, a criminal malicious prosecution case, the court stated:

"Malice" is defined as " 'a primary purpose other than that of bringing an offender to justice' ". *Richmond, supra*, 480 N.W.2d at 755 (quoting *Prosser & Keeton, supra*, at 871). Thus, "malice" for purposes of a malicious prosecution action is essentially synonymous with the element of "ulterior purpose" in abuse of process. See *Prosser & Keeton, supra*, at 898 ("the two torts have the common element of an improper purpose in the use of legal process").

While malice in bringing a criminal action is "a primary purpose other than that of bringing an offender to justice," malice in bringing a civil action is broader, established by showing "any unjustifiable motive." *Kolka, supra*.

[¶9] In malicious prosecution of a civil case, the action can be maintained if even one claim is maliciously pursued without probable cause [*Crowley v. Katleman*, 8 Cal. 4th 666, 687, 34 Cal. Rptr. 2d 386, 881 P.2d 1083 (1994)]:

Defendants argue that when there is probable cause for at least one of the theories of liability asserted in the prior action, the defendant has to defend against that theory in any event and hence the

"litigation" is not unjustifiable and unreasonable. Of course, the defendant also has to defend against the theories of liability asserted in the prior action without probable cause, but defendants dismiss that fact with the explanation that in so doing the defendant "has simply been required to respond to additional allegations and arguments directed at a single prior right."

The explanation, however, begs the question. By defining the "litigation" in issue as the prior action per se rather than each theory of liability litigated, defendants assume the point to be proved. It is true that such a defendant must in any event defend against the one valid theory of liability; but the defendant's obligation also to defend against the invalid theories of liability may well be so burdensome--as the complaint alleges in the case at bar--that it amounts to an impairment of the defendant's interest in freedom from unjustifiable and unreasonable litigation.

[¶10] In this case, the district court found that there was no abuse of process because the Defendants did not attempt to extort an improper settlement after the case was commenced. An action for abuse of process is focused on conduct after the suit was commenced ("[t]he subsequent misuse of the process, though properly obtained"¹), while an action for malicious prosecution of a civil suit looks at whether the defendant commenced the action for an improper purpose.² Asserting multiple claims without probable cause raised an inference of malice which was not considered by the district court either because it conflated malicious prosecution and abuse of process or because it misapplied the law of malicious prosecution of a civil action.

¹Restatement (Second) of Torts, §682 (1977), comment *a*.

²Restatement (Second) of Torts, §676 (1977), comment *c*.

[¶11] In the New Jersey Complaint, Defendants made seven different claims. [Appellant’s Brief, ¶38]. The district court did not find probable cause for each of these claims, and — as a matter of law — most of the claims were unsupported. [Appellant’s Brief, ¶¶39-49]. No reasonable attorney could bring a claim, for example, based on conduct which took place in 2010, when the statute of limitations plainly barred such claims. Defendants knowingly asserted FDCPA claims upon which there was no possibility of recovery. Even if one or more of these claims could possibly have led to recovery, the assertion of multiple claims without probable cause raises an inference of malice which should have been considered by the district court when making its determination of whether the action was brought with an improper motive.

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CONCLUSION

[¶12] This Court's Opinion leaves open questions about the nature of a claim for malicious prosecution of a civil action. Based upon the arguments and authorities presented, Appellant respectfully requests the order of this court granting the Petition for Rehearing and setting the case on for briefing.

Dated: August 16, 2019

Respectfully submitted,

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Appellees.**

CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellant's Petition for Rehearing consisting of 9 pages complies with the page limitation of Rule 40(b) of the North Dakota Rules of Appellate Procedure.

Dated: August 16, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2019, I served copies of the Appellant's Petition for Rehearing on the Defendants-Appellees by filing on the North Dakota Supreme Court E-filing Portal.

Dated: August 16, 2019

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AMENDED CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2019, I served copies of the Appellant's Petition for Rehearing on the Defendants-Appellees by filing on the North Dakota Supreme Court E-filing Portal. The individuals served, addresses and email addresses are as follows:

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