

# A Claim of Malicious Abuse of Process Requires Proof That the Attorney Acted for His or Her Own Purpose

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In an unpublished opinion, *Lobiondo v. Schwartz*, 2007 WL 2188600 (N.J. Super. August 1, 2007), the New Jersey Superior Court Appellate Division placed welcome and strict limitations on the right of a plaintiff to bring malicious abuse of process actions against a lawyer. A plaintiff must now demonstrate that the lawyer knew the client's claim was baseless, and either knew the client was litigating for an improper purpose, which also happened to further the lawyer's own improper purpose, or that the lawyer was litigating for the lawyer's own improper purpose. These restrictions should protect lawyers who are merely filing actions on behalf of their clients and who have every reason to believe that the claims are meritorious based on what their clients are telling them. Such claims are frequently brought for the improper purpose of forcing the lawyer to withdraw from the case, thereby compromising the client's defense and increasing the costs of the defense.

The case that laid down this law started as follows: James Lobiondo and his wife owned a one-story beach club directly across the street from Grace Schwartz and her three daughters. Schwartz objected to Lobiondo's attempts to

increase the size of the beach club and the commensurate increase in noise and traffic. She communicated her displeasure to local officials and to the community in general. Lobiondo naturally took offense at these remarks and retained a law firm, the Giordano firm, to file a complaint against Schwartz alleging defamation, intentional infliction of emotional distress and tortious interference with business advantage. After a trial and an appeal, the only claims remaining were the counterclaims of Schwartz and her daughters, and their third-party claim against Giordano for malicious abuse of process for Giordano's part in pursuing the Lobiondo complaint. The third-party complaint against Giordano alleged malicious use of process by, intentionally and in bad faith, instituting litigation and continuing the litigation after they knew or should have known that there was no reasonable basis for doing so. The complaint also alleged Giordano's action was "an improper, illegal and perverted use of the legal process" which was intended to inflict emotional harm and was undertaken "in concert with Lobiondos to abuse the litigation process." On motions for summary judgment, the judge dismissed all claims and Schwartz appealed.





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In this appeal, the Appellate Court affirmed the dismissal of the claim that Giordano, while representing Lobiondo in the litigation against Schwartz, committed the tort of malicious use of process against Schwartz. The Court noted that malicious use of process is a disfavored action because the courts must be open to all people, without fear “of being subjected to a damage suit if the action results adversely.” Similarly, the Court recognized the need to protect a client’s choice of counsel by protecting that counsel from claims brought by a vindictive defendant. Nonetheless, the Court acknowledged that there are circumstances where a lawyer should be held liable for the malicious use of process just like everyone else. The Court looked to the Restatement (Third) of the Laws Governing Lawyers for guidance on what constitutes malicious use of process by an attorney, as opposed to a litigant.

The *Restatement* provides that “[a] lawyer representing a client in a civil proceeding ... is not liable to a non-client for wrongful use of civil proceedings ... if the lawyer has probable cause for acting or if the lawyer acts primarily to help the client obtain a proper adjudication of the client’s claim in that proceeding.” *Restatement (Third) of the Law Governing Lawyers*, § 57(2) (2000). In other words, the critical element necessary for a lawyer’s immunity for use of civil process on behalf of a client is that the lawyer has “probable cause” to believe that the client’s claim is supportable or that the lawyer is acting to help the client seek a legitimate goal through the proceeding.

The comments to the Restatement clarify that “the existence of probable cause and of an improper purpose are assessed separately for a lawyer and for the client on whose behalf the civil proceeding was brought.” *Restatement (Third) of the Law Governing Lawyers*, § 57(2), *Comment d.* Thus, the lawyer may have a defense to a claim of malicious abuse of process even where the client does not.

“Probable cause exists if the lawyer has a reasonable belief that the facts on which the claim is based can be established to the satisfaction of the trier of fact and has a reasonable belief that there is a sound chance that under those facts the claim may be held valid.” *Id.* But “probable cause” in this context is determined solely based on the

facts known to the lawyer at the time the complaint was filed. “When there is no dispute as to what facts were so known, the existence of probable cause is an issue of law to be decided by the tribunal, not a jury issue.” *Id.*

Nonetheless, even if a lawyer “has no probable cause and is convinced that his client’s claim is unfounded, he is still not liable [for wrongful use of civil proceedings] if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim.” *Id.* The fact that the lawyer is earning a legal fee does not constitute an improper purpose for the lawyer’s involvement.

A lawyer will be subject to these claims, like all other parties, if a “lawyer acts without probable cause ‘and for an improper purpose, as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid, he is subject to the same liability as any other person” *Id.* And while the lawyer’s motives are determined separately from those of the client, “the client’s motives, if known to a lawyer, may constitute evidence bearing on the lawyer’s motives.” *Id.*

Thus, the Court concluded that, “even assuming Giordano could have been found to know that Lobiondo was litigating for an improper purpose—a doubtful proposition—no reasonable fact finder could determine that Giordano pursued this litigation with the intent to further its own illegitimate purpose or that it had adopted an illegitimate purpose of the client.” Accordingly the Court affirmed the summary judgment order dismissing the claims against Giordano.

The holding in this case essentially gives lawyers the right to advocate zealously even if the lawyer knows that the claim is baseless. This decision will make it very difficult to successfully prosecute a claim against an attorney for malicious prosecution. This decision which will likely lead to a decrease in lawsuits of this type.