

**2620 ABUSE OF PROCESS**

An abuse of process occurs when a person uses a legal process against another primarily to accomplish a purpose for which it is not designed. In this case, (defendant) (state the legal process used, e.g., caused a subpoena to be issued to plaintiff; commenced an involuntary commitment proceeding against plaintiff; etc.) The purpose of (a subpoena)(involuntary commitment proceeding) is (state purpose).

To establish an abuse of process, (plaintiff) must prove that:

1. (Defendant) had a purpose other than that which the process was designed to accomplish; and
2. (Defendant) subsequently misused the process to accomplish a purpose other than that it was designed to accomplish.

Both elements must be proved to establish an abuse of process. The process must be used for something more than a proper use with a bad motive.

**SPECIAL VERDICT**

1. Did (defendant) engage in an act of abuse of process in (state process used) against (plaintiff)?

Answer: \_\_\_\_\_  
Yes or No

2. If you answered "yes" to question 1, answer this question:  
Did the use of (state process used) cause (plaintiff) damages?

Answer: \_\_\_\_\_  
Yes or No

3. If you answered "yes" to question 2, answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) damages?

\$ \_\_\_\_\_

#### COMMENT

This instruction and comment were approved by the Committee in 1994 and revised in 2012.

**Definition.** "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." Restatement, 3 Torts 2d, p. 474, sec. 682. Adopted in Brownsell v. Klawitter, 102 Wis. 2d 108, 114, 306 N.W.2d 41 (1981).

". . . : it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." Restatement, 3 Torts 2d, p. 474, sec. 682.

**Elements.** There are two elements of the tort. (1) A purpose other than that which the process was designed to accomplish and (2) a subsequent misuse of the process. Thompson v. Beecham, 72 Wis. 2d 356, 362 (1976); Strid v. Converse, 111 Wis. 2d 418, 427, 331 N.W.2d 350 (1983). Both elements must be met in order to establish an abuse of process. The process must be used for something more than a proper use with a bad motive. The improper purpose must also culminate in an actual misuse of the process to obtain some collateral or ulterior advantage. In Schmit v. Klumpyan, 2003 WI App 107, 264 Wis.2d 414, 663 N.W.2d 331, the court of appeals held that the second element requires a showing that the process was used to obtain a collateral advantage:

A key component of the second element is the requirement that the process be used to obtain a collateral advantage, an advantage that is "not a benefit to the suitor that the process was designed to secure." The attempt to obtain a collateral advantage is an important component because the tort is characterized as an attempt to use process as a means of extortion. An early decision of the Wisconsin Supreme Court clarifies that the inquiry is "whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he would not legally be compelled to do."

**General.** Abuse of process is broader than malicious prosecution and may provide a remedy where malicious prosecution will not. Malice, want of probable cause, and termination in the plaintiff's favor are not required in an abuse of process claim. Strid, supra at 426.

"Abuse of process lies even in those instances where legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it is not designed. The gist of the tort is misuse or misapplying process justified in itself for an end other than that which it was destined to accomplish. The purpose for which the process is

used. . . is the only thing of importance." Maniaci v. Marquette University, 50 Wis. 2d 287, 299-300, 184 N.W.2d 168 (1971) .

An action for abuse of process may be the subject of counterclaim since proof of termination of the underlying proceedings is not required. Brownsell v. Klawitter, supra at 115. However, if the cause of action for abuse of process is based upon lack of probable cause, then termination of the proceedings is necessary to establish the absence of probable cause. Brownsell, supra at 116; Badger Cab Co. v. Soule, 171 Wis. 2d 754, 767-68, 492 N.W.2d 375 (Ct. App. 1992)

**Burden of Proof.** The committee believes the burden of proof to show abuse of process is the middle burden. See Wis JI-Civil 205.

**Lawyer Immunity.** The Wisconsin Supreme Court has recognized that an attorney who is acting in a professional capacity has qualified rather than absolute civil immunity. Nevertheless, the immunity does not apply when the attorney acts in a malicious, fraudulent, or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled. Strid, supra at 429-30.