

2005

JULIAN DEAN HATCH, Respondent to Petition, vs. LARRY DAVIS Petitioner for Certiorari: Brief of Respondent

Utah Supreme Court

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DOCKET NO. 20050078

IN THE UTAH SUPREME COURT

JULIAN DEAN HATCH ,)

BRIEF OF THE RESPONDENT

Respondent to Petition,)

vs.)

Supreme Court No. 20050078

LARRY DAVIS)

Court of Appeals No. 20020778-CA

Petitioner for Certiorari.)

THIS IS ON APPEAL FROM THE JUDGMENTS RENDERED
IN THE SIXTH DISTRICT COURT BY JUDGE K.L.MCIFF.
CERTIORARI WAS GRANTED BY THIS COURT ON
THREE LEGAL ISSUES RULED ON BY THE COURT OF APPEALS

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STATEMENT OF ISSUES FOR REVIEW

1. Whether entitlement to a jury instruction on the statute of limitations was waived by Respondent's failure to submit a legally correct instruction.
2. Whether Petitioner demonstrated an exception to the "presence" rule for intentional infliction of emotional distress.
3. Whether a "willful act" was properly pled as part of Petitioner's claim for abuse of process.

STANDARD OF REVIEW

On a grant of certiorari, the Supreme Court reviews the appellate court's application of the law for correctness. Wardley Better Homes & Gardens v. Cannon, 61 P.3d 1009 (Utah 2002). The decision of the appellate court is reviewed, not that of the trial court. Carrier v. Pro-Tech Restoration, 944 P.2d 346, 350 (Utah 1997).

When the appellant does not attack the trial court's factual findings, but instead contends that the trial court erred as a matter of law, the appellant is not required to marshal the evidence. Challenges to legal determinations do not require the marshaling of evidence.¹ Hodges v. Gibson Products Co., 811 P.2d 151 (Utah 1991).

The three above legal determinations, upon which certiorari was granted in this case, do not challenge the evidence to any factual findings made by the trial court; therefore, the marshaling of evidence, or a full transcript, is not required. Furthermore, the sufficiency of evidence was not an issue for which certiorari was granted in this case.

¹Furthermore, Rule 11(e)(2) only requires a transcript of all evidence in support of a finding or conclusion to argue on appeal that such finding or conclusion was either unsupported or contrary to the evidence. It does not require a transcript to challenge the trial court's rulings on the law.

STATEMENT OF THE CASE

Nature of the Proceedings

At a special public hearing, the Town's building program was being discussed. Hatch was being denied a building license, as well as other business licenses by the Town. The Town's building program was being illegally operated. (Rec. 1-3) During this meeting, Davis, the husband of the Town Clerk, Judith Davis pushed Hatch up against some chairs and threatened his life. As a result of these actions, Hatch filed a federal civil rights suit (42 U.S.C. § 1983) against the Town of Boulder (Rec. 10-24) and also against Davis for the assault and battery occurring at the public hearing. (Rec. 22-23)

Larry Davis filed a motion to be dismissed from the federal action based on jurisdictional grounds and the fact that he claimed it was not a public hearing. The minutes from the meeting, kept by Davis's wife, Town Clerk Judith Davis, were submitted to argue that a public hearing was not being held during this time.²

Based on these minutes, the federal court did not find a common nexus with the federal claims and Davis was dismissed from the federal lawsuit on March 17, 1997. (Rec. 110-112) Davis sought attorneys fees incurred in defending the action in federal court, which were denied. Hatch went on to prevail against the Town in the federal lawsuit and was awarded \$86,000.00, plus attorneys fees. (Rec. 397-398).

²At trial in this case, Judith Davis admitted that there was indeed a public hearing during the recess of the Town Meeting and that the recess was taken specifically to hold a public hearing on the building inspection program. (Trans. Vol. I, pg. 330-335)

On March 16, 1998, within a year of Davis's dismissal from the federal lawsuit, Hatch filed his assault and battery claim against Davis in Garfield County. (Rec. 1-3) Davis filed an Answer and Counterclaim on July 21, 1998, alleging Abuse of Process and Malicious Prosecution. These claims were based on Hatch's re-filing of the lawsuit in state court after its dismissal from federal court. (Rec. 4-24) The basis of Davis's claims was that the action was brought, "*without any hope of success and to intimidate the residents of the town as well as the town council to comply with Hatch's narrow and peculiar political and philosophical positions.*" (Rec. 5-6).

On August 11, 1998, Hatch filed a Motion to Dismiss the Counterclaim on grounds that all of the elements, including termination of the initial proceeding in favor of Davis, had not been met in order to state such claims. (Rec. 25). Before the court ruled on Hatch's Motion to Dismiss, Davis filed an Amended Answer and Counterclaim on May 6, 1999, including two additional actions, for Intentional Infliction of Emotional Distress and for Attorney's Fees, based on Utah's bad faith statute. (Rec. 60) On May 20, 1999, Hatch filed a Motion to Dismiss the Amended Counterclaim, again based on the grounds that all of the elements, including termination of the initial proceeding in favor of Davis, had not been satisfied to state such a claim. (Rec. 50).

On October 14, 1999, the trial court denied Hatch's Motion to Dismiss the Amended Counterclaim (although Davis never filed a memorandum in opposition to the second Motion to Dismiss, the trial court treated the first response as if it had been filed to the later Motion to Dismiss, Rec. 178-179). The basis of the court's ruling was that the

termination of the underlying action was not a prerequisite and that “this case appears to be in the ‘unusual’ category.” Relying on the language in Baird v. Intermountain School Fed. Credit Union, 555 P.2d 877 (Utah 1976). (Rec. 33, 178-179).

The parties proceeded with discovery and Hatch’s counsel deposed Davis and asked him what specific facts constituted Abuse of Process or Malicious Prosecution, to which he responded the re-filing of the lawsuit in state court after it was dismissed in federal court; and that the claims made against him were untrue. (Rec. 299-300, 324) The emotional distress dealt with Hatch’s dealings with Davis’s wife in the federal lawsuit (which Hatch won), and complaints and requests for information, that Hatch had written to the Utah State Park Department and other governmental officials, regarding the operation of Anasazi State Park from 1990 to 1993. (Rec. 307, 322).

Hatch filed a Motion for Summary Judgment on April 27, 2001, again claiming that the elements for Abuse of Process and Malicious Prosecution had not been met; and that the facts testified to by Davis in his deposition were not sufficient to support these claims. Hatch also sought dismissal of the Intentional Infliction of Emotional Distress claim, since the letters he had written to his governmental representatives, could not be deemed “outrageous conduct,” under an objective standard, and Davis did not suffer any severe emotional distress. *Hatch also claimed that the letter writing occurred over four years ago, and was thus, barred by the four year statute of limitations § 78-12-25(3) U.C.A.*; and any claim based on Hatch’s dealing with Judith Davis is baseless (she never testified of distress); and Hatch’s dealings with Judith Davis cannot be grounds for

intentional infliction of emotional distress, since Hatch had a right to complain, as evidence by his victory in the federal lawsuit; *and would be barred anyway by the “presence requirement,” since Mr. Davis was not present when any alleged conduct took place. Restatement (Second) Of Torts § 46(b)(2).* (Hatch’s Memorandum in Support of Motion for Summary Judgment is located at Rec. 281-454).

The court denied Hatch’s Motion for Summary Judgment ruling that the filing of the 1996 lawsuit may constitute an act of wrongful use of civil proceeding, stating that “wrongful use of civil proceedings “means to sue someone without a good reason and lose the lawsuit.”(Rec. 587-589) The court then goes on with an analysis of “ex parte” proceedings, when there was no question regarding any ex parte proceedings presented in the case. (Rec. 588) This is contained in the court’s Order of July 5, 2001. (Rec. 587-589). In July 2001, after receiving this ruling, Hatch filed a Petition for an Interlocutory Appeal, feeling that he should not be required to proceed in this matter when these claims should have been dismissed. (Rec. 591) This Petition was denied on September 12, 2001. (Rec. 613). The presence of these claims prejudiced Hatch on his assault and battery claims at trial.³

A Scheduling Order was entered on January 2, 2002, setting trial for April 2nd, 3rd ,4th and 5th. (Rec. 625-626) Hatch filed a Motion to Disqualify Judge David L.

³Rather than finding a lack of probable cause to bring the claims under a legal determination, the jury found against Hatch on a preponderance of the evidence standard on his assault and battery claim, and then based on that standard, improperly found abuse of process.

Mower from presiding in the case.⁴ On January 31, 2002, Judge David L. Mower recused himself from the case. (Rec. 647). On February 20, 2002, Hatch filed a Motion in Limine to exclude any expert's testimony; any correspondence with Davis's wife, when Mr. Davis was not present; and any letters written by Hatch to government or state officials. (Rec. 654-659).

At the March 11, 2002 Pre-trial Conference, Hatch requested Judge McIff to go back and review Judge Mower's previous rulings, including the court's refusal to dismiss the Counterclaims. The court indicated that it would not go back and review any previous decisions. (Rec. 670).

The matter was tried to a jury on April 2nd, 3rd, 4th, 5th and 9th 2002. At the time of trial counsel for Hatch submitted specific jury instructions outlining the necessary elements of his claims and defenses available to Hatch on the Counterclaims. (Rec. 676-695)⁵ Hatch's Jury Instruction for Malicious Prosecution, contained the 3 elements, including the termination of the proceeding in favor of the accused. (Rec. 679, File 4). *Hatch's Jury Instruction for Intentional Infliction of Emotional Distress included the "presence" requirement when the conduct is directed to a third person* (Rec. 681, File

⁴In a previous lawsuit Hatch v. Town of Boulder, App.Case.No. 20000189-CA, Judge Mower had found Hatch in bad faith awarding attorneys fees against Hatch, which was overturned by this Court, then after remand failed to enter an order for Hatch's costs on appeal.

⁵Pages 670-699 are repeated twice in the Record. The jury instructions are located, as the second set, in File 4 of the Record.

4), and *Utah's Four Year Statute of Limitations period for Intentional Infliction of Emotional Distress*. (Rec. 695, File 4).

At trial, witness Lynne Mitchell, testified that she was at the Town Meeting and she saw Davis push Hatch, "Larry (Davis) came over to him (Hatch), pushed him against some desks, bellied up to him." "He bellied right up to him and backed him into the - - into the desks." (Trans. Vol. 1. pg. 111) She further testified that Ms. Davis had to come and wedge herself between Larry (Davis) and Julian (Hatch) at which point Julian was able to get away; and that Larry continued to follow Julian and that she had to step in between the two of them to keep Davis from following Hatch. She further testified that Davis continued to provoke them after the meeting. She also filed a letter with the police regarding the incident. (Trans. Vol. 1. pg. 112-113).

Hatch testified at trial that a few years before the Town Meeting, he had been physically accosted by Davis when he reached into Hatch's vehicle, grabbed Hatch by the shoulder and began to shake him and told him "I'm going to get you." (Trans. Vol. II. pg. 420, 421). At the Town Meeting Hatch testified that Davis "pushed into me with his belly - - did not push with his hands - - he just came and bellied up to me." (Trans. Vol. II. pg 434). Hatch testified that he was pushed up against the back of some desks and pinned, "No, I could not move at all. I could have pushed my way out, I guess. I was against the desks on my back." (Trans. Vol. II. pg. 435). Hatch further testified that his life was threatened when Davis said "You're dead." (Trans. Vol. II. pg. 435). Hatch, is

not a violent person, and was concerned for his safety, based on his past experiences with Davis and Davis's training at POST as a police officer. (Trans. Vol. II. pg 435).

The Police Report of Monte Luker was also admitted into evidence at the trial. (Plaintiff's Ex.80) It contained statements from Hatch that he was pushed; and statements from other witnesses that Davis was 2-3 inches from Hatch's face, and that Davis's statements were very threatening and his demeanor was extremely confrontational, hostile and intimidating; and Davis beckoned Hatch to come over and fight. (Plaintiff's Ex. 80).

At the end of Hatch's evidence Davis moved for dismissal, which was denied by the court.(Rec. 719) The court found, that there was a factual issue presented on the assault and battery claims, sufficient for the jury. (Trans. Vol. II, pg 540-542, 712).

During Davis's case, Davis testified that he was the manager of Anazasi State Park near Boulder, Utah. As manager had lengthy discussions with Hatch regarding an Indian burial display. (Trans. Vol. II, pg 600). Davis told Hatch that he would remove the display at the Park. (Trans. Vol. II, pg 601). The display was not removed. Hatch raised other complaints about the Park. Hatch wrote as an officer of the Boulder Regional Group, Davis personalized the matter by writing back to Hatch as an individual. Davis further invited Hatch to write with his complaints, stating "we can't fix what we don't know about." (Trans. Vol. I, pg. 253) Davis was aware that Hatch met with Director Miller in Salt Lake in 1990 (Trans. Vol .I, pg. 259) Davis did not remember a specific call from Director Miller (Trans. Vol. I, pg. 260) Davis stipulated that the burial

issue was a legitimate concern. (Trans. Vol. I, pg. 270) Davis testified that a letter was written by Hatch claiming that Davis was rude and acted in an “unprofessional manner, lost his temper, swearing, pounding his fists, yelling.” Davis admitted that he got angry with Hatch, and that dealing with Hatch was frustrating. (Trans. Vol. II, pg 606) Davis admitted that he lost his cool with Hatch and apologized to the Division. (Trans. Vol. II, pg. 620) Davis testified that he was concerned about his employment at that time, because Hatch went up the chain of command with his complaints about the Park (Trans. Vol. II, pg. 621), but Davis also testified that he referred Hatch to Mr. Dyckman (Trans. Vol I, pg. 273-274); and that Hatch had the right to write letters to his supervisors. (Trans. Vol. II, pg. 651); and that he had an opportunity to respond to all the questions posed by Hatch. (Trans. Vol. II, pg. 608-609) Davis’s job at the Park was never in jeopardy as a result of any letters or actions taken by Hatch. (Trans. Vol. II, pg. 650-651). Davis testified to this, and his employment file did not mention Hatch at all.⁶

Davis admitted, that at the Town Meeting, he was the one who got up out of his seat and came over to Hatch, and confronted him, at least saying “if you have something to say to me, you ought to be man enough to say it to my face” (Trans. Vol. II, pg. 631-632). Davis denied he said “your dead,” and claims that he remained at arms length, without touching Hatch. (Trans. Vol. II, pg. 633). The issue at the Town Meeting was about the legality of the Town’s building inspection program, Hatch wanted to

⁶Judge McIff and counsel for both parties reviewed Davis’s employment file and no one could find any mention of Hatch, his letters or his complaints.

eliminate it and Davis wanted to keep it. (Trans. Vol. I, pg. 343). Other people in town raised the same issues. (Trans. Vol. I, pg. 306) Hatch was being denied building permits, by Davis's friend Randy Catmull (Trans. Vol. I, pg. 298).

Davis did not suffer any actual damages on his Counterclaims only emotional distress, from headaches, sometimes an upset stomach, and occasional insomnia. (Trans. Vol. II, pg. 652). Davis also presented testimony by an expert witness regarding his emotional distress, which contained reports and other facts not contained in Davis's deposition. These reports were never disclosed to Hatch's counsel as ordered by the court at the Pre-Trial Conference. These reports also contained interviews conducted in February, a month before trial after the discovery period had expired. Hatch's counsel objected to this testimony, as this information was not provided as ordered by the court at the Pre-Trial Conference. The court denied the objections. (Rec. 719).

The court also allowed testimony regarding Hatch's dealings with Davis's wife, Judith Davis, who was the Town Clerk for Boulder. These dealings were out of Mr. Davis's presence and had nothing to do with Mr. Davis, but Hatch's dealings with the Town of Boulder. Under the Town's ordinances, it was the Clerk's responsibility to issue the licenses Hatch was requesting. (Trans. Vol. II, pg. 624-626) Hatch had already prevailed on these issues in the federal court action. (Rec. 397-398). Furthermore, at trial counsel for Davis stipulated that Judith Davis made mistakes as the Town Clerk. (Trans. Vol. I, pg. 326). It was Hatch's dealings with Mr. Davis's wife, out of his presence, which was the basis for his emotional distress claim. (Trans. Vol. II, pg 654).

At the end of Davis's evidence, Hatch again sought the dismissal of the Counterclaims as the evidence was insufficient to support the claims. Furthermore, the court had already found, at the end of Hatch's case-in-chief, that there was a sufficient basis to find probable cause on Hatch's assault and battery claims to go to the jury. Therefore bringing the assault and battery claims could not be deemed either as malicious prosecution, or an abuse of process by the jury, when both are based on a lack of probable cause. The court denied Hatch's motion stating: (Trans. Vol. II, pg 712)

My view of the Motion is the same view I have with respect to the motion Mr. Bradshaw made at the conclusion of your case, when he asked that I dismiss the assault and battery claims. I'm satisfied that there are differing versions on all of these issues and that the jury is going to have to determine who it believes, what it believes, ***and that there is room within the evidence that has been admitted for the jury to reach either conclusion with respect to all claims.*** I find there's room for a reasonable jury to conclude that assault and battery, or at least assault - - battery may be a different story. ***But if Mr. Hatch is believed and Ms. Mitchell is believed, it could find both assault and battery.***

After four days of trial and a long weekend, on Tuesday April 9th, the court in chambers told counsel that he was going to dismiss the Malicious Prosecution and Abuse of Process claims, based on the court's review of the file and the jury instructions. Counsel for Davis strenuously objected to such a dismissal and objected to any communication to the jury by the court that these claims were being dismissed, as this would undoubtedly weaken his case. Hatch's counsel insisted that the jury be told that the claims were being dismissed by the court. The trial court in an attempt to reach a middle ground, dismissed the Malicious Prosecution claim, without telling the jury, and

left in the Abuse of Process claim, although the court did indicate, at the time, that it wasn't sure if this could even be allowed and that it may disallow it later, or may refuse to certify any verdict rendered on the Abuse of Process claim by the jury. The parties then stipulated that only attorneys fees were being sought as damages on the Abuse of Process claim and that the amount and propriety of attorneys fees would be determined at a later time. (See the second paragraph of the court's Post Verdict Ruling and Clarification, dated April 16, 2002, Rec. 782).

Hatch was not allowed to give proper jury instructions regarding the "presence" requirement on the claim of intentional infliction of emotional distress. Furthermore, evidence was allowed of conduct that occurred well beyond the four-year statute of limitation period, and Hatch was not allowed to give a jury instruction regarding the four-year statute of limitation period for the jury to consider. (Although Davis had earlier argued that this was a factual matter for the jury to decide in opposition to Hatch's earlier Motion for Summary Judgment. Rec. 483-484).

The jury instruction allowing Hatch to petition his government and write to governmental leaders, was improperly limited, so as not to include any conduct which may satisfy the definition of "Intentional Infliction of Emotional Distress." (Rec. 746)

The court also improperly instructed the jury on the Intentional Infliction of Emotional Distress and on the Abuse of Process claim (Rec. 743-746), not deciding the difference, or which claim applied, until after trial. (Rec. 782-794).

After four days of trial, the jury was never informed of the court's ruling and the dismissal of the Malicious Prosecution claim. Hatch was prejudiced by the Malicious Prosecution and Abuse of Process claims being asserted against him on his claims. The jury found no cause of action on Hatch's Assault and Battery claim, and then found for Davis on his claim for Abuse of Process and awarded \$75,000.00, although only \$55,000.00 was ever presented in evidence, or claimed by Davis; and the parties had already stipulated that any recovery would be limited to attorneys fees, and would be later determined by the court. This also prejudiced Hatch. Such prejudice is evident from the jury's awarded of \$75,000.00 without any evidence to support it. Furthermore, the jury awarded \$87,000.00 on Davis's claim of Infliction of Emotional Distress, although no actual damages were alleged or incurred, or any basis given for the \$87,000.00 amount.⁷ (Rec. 750-753).

After trial, the court requested the parties to submit additional memoranda dealing with the Malicious Prosecution and Abuse of Process claims, and whether the court could proceed with the Abuse of Process claim after dismissing the Malicious Prosecution claim. The court ruled on April 16, 2002 that the Malicious Prosecution claim should not have gone to the jury and that this case did not present any "unusual" circumstance as referred by the Utah Supreme Court in Baird v. Intermountain School

⁷The amount of this award can only be based on the fact that evidence came in that Hatch had received an \$86,000.00 award earlier against the Town in the federal lawsuit for the violation of his civil rights. The jury in this case was not acting on evidence, but solely prejudice against Hatch.

Fed. Credit Union, 555 P.2d 877 (Utah 1976), contrary to the prior rulings by Judge Mower, from which Hatch had sought an interlocutory appeal, and that this claim should not have gone to the jury. (Rec. 785-787) However, the court allowed the Abuse of Process claim to remain in spite of the clear language by the Utah Court of Appeals in Winters v. Schulman, 979 P.2d 1218 (Ut.App. 1999) and Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Ut.App. 1989) stating that an “abuse of process claim requires that the prior proceedings have terminated in favor of the person against whom they were brought.” 977 P.2d at 1255. The trial court found that Davis could proceed with his Abuse of Process claim and that prior termination was not required. (Rec. 789-790) However, the trial court could not allow the \$75,000.00 damage award on the Abuse of Process claim to stand, since there was no evidence of this presented to the jury. (Rec. 790) *The court further ruled that since there was not a single act of outrageous conduct, “but a practice of acts tolerable by themselves,” the statute of limitations issue was not a legitimate issue for the jury to consider.* (Rec. 798).

On April 11, 2002, before any Judgment was rendered in the case, the trial court, relying on Rule 69(q) of the Utah Rules of Civil Procedure entered an Order Precluding Plaintiff’s Transfer or Encumbrance of Property with a value greater than \$500.00. (Rec. 756-757) Counsel for Hatch was contacted by telephone and objected to such an order, since a judgment had not been entered, and Rule 69(q) did not provide for such an order against Hatch. Hatch’s counsel requested personal service of the Order on Hatch before it became effective. This was agreed to by Davis’s counsel, but the Order

was never personally served on Hatch. Finally, after the court issued its Post Verdict Ruling and Clarification (Rec. 782-795), the court entered a Partial Judgment in the amount of \$87,000.00. (Rec. 796). The Partial Judgment provides that it, “does not resolve all the issues raised between the parties in the suit, the time for appeal shall not commence to run until a final judgment is entered that fully concludes the litigation.” (Rec. 796).

On or about April 29, 2002, Hatch filed a Motion to Set Aside the Verdict on Intentional Infliction of Emotional Distress (Rec. 825-833), and a Motion for New Trial; or in the alternative a Remittitur on the Amount of Damages. (Rec. 834-846).

On May 14, 2002, before a final judgment was entered, the trial court issued a Writ of Garnishment on an exempt IRA account, which was taken (Rec. 855-857), a copy of the Writ was never sent to Hatch’s counsel; and on July 18, 2002, the trial court further issued an Order in Supplemental Proceedings again before a final judgment was entered. This Order was also never personally served on Hatch, but a copy was sent to Hatch’s counsel, who objected to it as being premature and filed a Motion to Quash the Order. Hatch also filed a Motion to Vacate the Order Precluding Plaintiff’s Transfer or Encumbrance of Property. (Rec. 813-824).

On June 9, 2002, the court denied two pending motions, the Motion to Vacate Order and the Motion for New Trial.(914-919) On September 5, 2002, the trial court held an evidentiary hearing on the outstanding issues and the attorneys fees as damages on the Abuse of Process claim. The attorneys fees were reduced to \$43,542.93

and final judgment was entered on September 5, 2002. (Rec. 1044-1047, 1059-1062) A Motion and Order in Supplemental Proceedings was issued that day. (Rec. 1065-1067) Hatch's Notice of Appeal was filed on September 17, 2002. (Rec. 1054-1055).

Statement of the Facts

1. At trial Lynne Mitchell testified that she was at the public hearing and that she witnessed Davis push Hatch up against some desks. She further testified that she had to wedge herself between Davis and Hatch, so Hatch could get away and that Davis continued to follow Hatch, provoking him to fight. (Trans. Vol. I. pg 111-113).

2. Hatch testified at trial, that he had been grabbed and threatened before by Davis (Trans. Vol. II, pg. 420-421) and that at the public hearing Davis pushed him back against some desks so Hatch couldn't move, and among other things told Hatch "You're dead." (Trans. Vol. II, pg. 435).

3. Hatch testified that he was in fear for his safety, as a result of Davis's actions at the public hearing; Davis's previous actions towards Hatch; and the fact that Davis had been trained in physical combat at POST as a police officer. (Trans. Vol. II, pg. 435).

4. The Police Report of Monte Luker, admitted into evidence, also contains statements from Hatch that he was pushed; and statements from other witnesses stating that Davis's face was 2-3 inches from Hatch's face, that Davis's statements were very threatening and his demeanor extremely confrontational, hostile and intimidating; and that Davis beckoned Hatch to come over and fight. (Plaintiff's Ex. 80).

5. Davis testified that he had lengthy discussions with Hatch in the past (1989-1990) about an Indian burial display. (Trans. Vol. II, pg 600). Davis told Hatch that the display would be removed. (Trans. Vol. II, pg 601). The display was not removed, when promised; and Hatch raised more questions about the Park. Davis invited Hatch to write with his complaints, stating “we can’t fix what we don’t know about.” (Trans. Vol. I, pg. 253).

6. Hatch raised legitimate issues in his letters, such as the adequacy of the facilities at the State Park to house such a burial display. (Trans. Vol. I, pg. 270). Hatch was referred to Davis’s supervisors by Davis himself. (Trans. Vol. I, pg. 273).

7. Davis testified that he received a call from a division director or someone (not sure who) wanting an explanation of what’s going on.” (Trans. Vol. II, pg 603) Davis did not remember a specific call from his supervisor. (Trans. Vol. II. pg. 604). This occurred back in March of 1990. (Trans. Vol. II. pg. 605).

8. Hatch did not make any threats to Davis but only questioned the operation of the Park and that the burial display be removed from the Park. Davis found Hatch to be a very demanding person. (Trans. Vol. I, pg. 257). Davis didn’t immediately respond to Hatch because of his demanding attitude. (Trans. Vol. I, pg. 258).

9. Hatch wrote letters to Utah State Park directors and Governor Bangetor about the Indian burial display and the display, met with Director Miller in Salt Lake City, and the display was finally removed. This occurred back in June of 1990. (Trans. Vol. I,

pg. 263). Davis testified that he was planning to remove the burial display anyway, regardless of any action from Hatch. (Trans. Vol. I, pg. 261-262, 266).

10. At trial Davis produced letters written by Hatch, although Davis did not know or testify as to what was contained in each of these letters. (These letter are contained in a book of exhibits, identified as Defendant's Exhibit 103). A letter written by Hatch in March of 1990, claimed that Davis was rude and acted in an "unprofessional manner, lost his temper, swearing, pounding his fists, yelling." Hatch further states, "I believe that State Parks need to be aware of this behavior and ought to see that it does not happen to me or anyone else in the future. An investigation should be conducted into the policies and unprofessional behavior of theses [sic] persons. I would like a written apology from Supt. Davis concerning his derogatory and adversarial letter to me." (See Def's Ex. 103, tab 6, 2nd page). At trial, Davis admitted that he got angry with Hatch at times, and that dealing with Hatch was frustrating. (Trans. Vol. II. pg 606).

11. On April 29, 1990 a letter was written by Hatch, not to Davis, but to Jerry A. Miller, regarding Mr. Miller's failure to answer Hatch's questions regarding the Park in a competent manner. Hatch states in the letter, "I will no longer wait and expect a decent reply to my concerns and I hereby 'wash my hands' of you and your flunky employees at State Parks." Hatch further writes, "the one glaring problem is with Jerry Miller, Larry Davis, and Anazasi State Park. It appears obvious to me who needs to be forced to obey the law and the problem will quickly be mended." The law is referring to the proper burial of Native American Indian remains. (Def's Ex. 103, tab 8).

12. On March 13, 1992, a letter was written to Davis, asking seven (7) specific questions about the Indian burial. (Def's Ex. 103, tab 11). This was not responded to by Davis. On April 20, 1992, Hatch wrote a letter to Jerry Miller, not Davis, stating that Mr. Davis had failed to answer his questions and that Davis still continues to fight respectful actions towards the Anazasi Human remains and material goods, with which he has been entrusted. It appears by this hostile reply that Mr. Davis is not desirous of reinterment [sic] but is not courageous enough to say so." Finally Hatch concludes his letter stating, "Mr. Davis is not the correct person to lead Anasazi State Park in efforts to deal with the public in an equitable and considerate way. He appears to be too emotionally attached to the old Anazasi St. Pk. After twenty something years. We need someone to replace Mr. Davis and stop the continued abuses and problems which plague Anazasi Park." (Def's Ex. 103, tab 13).

13. Julian also wrote of the incident in front of the Post Office on June 2, 1992, when he was physically accosted by Mr. Davis. (Def's Ex. 103, tab 16) At trial, Davis admitted that he lost his cool with Hatch, at this time; and apologized to the Division for the incident. (Trans. Vol. II, pg. 620).

14. The next letter from Hatch was not to Davis, but to Governor Bangerter in June of 1992. Hatch in this letter asked for an investigation into the Division of State Parks due to problems with Park Manager Larry Davis and Director Jerry Miller. (Def's Ex. 103, tab 19).

15. The letters after this were not sent to Davis, but to Steven Roberts, regarding the free, or preferential, use of the Park by Boulder Outdoor Survival School (“BOSS”), owned by personal friends of Davis. (Def’s Ex. 103, tab 27). As far as Mr. Davis, the letter states, “until my complaints about BOSS occupying space at the park were made to Park Manager Larry Davis on March 8, 1990, after his request in writing for me to do so, the Division of Sate [sic] Parks didn’t even have a lease contract with BOSS. Evidently, Mr. Davis quickly got a lease beginning May 1, 1990 but for many years the law was broken because he just let them move their trailers and personnel onto the park without any contract. The Free-ride for Mr. Davis’s personal friends must end and I ask that you suspend and end this lease on April 30, 1993.” (Def’s Ex. 103, tab 27). The following letters simply sought information regarding BOSS’s operation on the Park. (Def’s Ex. 103, tabs 29,30,32).

16. At trial Davis testified that his job was never threatened by any letter or complaint from Hatch. He testified that he was concerned about his employment, but only because Hatch went up the chain of command with his complaints about the Park. (Trans. Vol. II, pg. 621). However, Davis also testified that Hatch had the right to write letters to his supervisors regarding legitimate issues at the Park (Trans. Vol. II, pg. 651); and that he (Mr. Davis) had an opportunity to respond to all the issues raised by Hatch. (Trans. Vol. II, pg. 608-609).

17. Davis's job at the Park was never in jeopardy as a result of any letters or actions taken by Hatch. (Trans. Vol. II, pg. 650-651). Davis never received any letter, or notice, or any indication that his job was put in jeopardy as a result of any letter or action taken by Hatch. (Trans. Vol. II, pg. 650-651)

18. As Davis testified the letters do not say that Davis should be fired from the Park Service or that he is corrupt, but that "an investigation should be conducted into the policies and unprofessional behavior of these persons." (Trans. Vol. II, pg. 607, 619). Davis testified, that as a result of these letters, he had to answer questions and respond to phone calls. This started in 1990, and lasted between 1990 and 1992. (Trans. Vol. II, pg. 607, 651).

19. Davis admitted, that at the public hearing, he was the one who got up walked over to Hatch and confronted him, and at least said to Hatch "if you have something to say to me, you ought to be man enough to say it to my face" (Trans. Vol. II, pg. 631-632). Davis denied he said "your dead," and he claimed that he remained at arms length, without touching Hatch. (Trans. Vol. II, pg. 633).

20. The building inspector, Randy Catmull, was a friend of Davis, and Davis felt as though the town was feeding on him like a bunch of hungry sharks, (Trans. Vol. I, pg. 300) and that by voting to eliminate the building inspection program the Town was letting "Julian win again." Davis was also upset with Hatch over the issue of Town prayer. (Trans. Vol. I, pg. 299, 302; letter to Joel Greer, Plt's Ex. 56).

21. Davis did not testify of any conduct taken by Hatch against his wife, Judith Davis, while in his presence. Davis simply testified that he eventually learned that Hatch asked for an investigation into her services as postmistress. (Trans. Vol. II, pg. 624).

22. As far as emotional distress, Davis testified that he has thought about Hatch over the past 11-12 years and his life has been less enjoyable. (Trans. Vol. II, pg. 636-637). He sometimes gets upset stomachs, headaches, and wakes up at night; however he never saw a health care professional regarding his symptoms. (Trans. Vol. II, pg. 653-655). These symptoms appeared right after the incidents occurred in the early 90s. (Trans. Vol. I, pg.352).

23. Judith Davis testified that she couldn't think of anything outrageous or intolerable that was done against her by Hatch and she has never been fearful of Hatch. (Trans. Vol. I, pg. 340-341). Although Mr. Davis claims emotional distress through his wife, Judith Davis, she did not bring any claims against Hatch for Infliction of Emotional Distress or any other claims asserted in Davis's Counterclaim. (Trans. Vol. I, pg. 340-341). Judith Davis testified that she has not seen any letters written by Hatch accusing her of any malfeasance, and she doesn't know of any action taken against her as a result of any complaints made by Hatch. (Trans. Vol. I, pg 354).

24. Judith Davis also testified that Hatch's effect on Davis was high blood pressure, indigestion, and inability to concentrate at times. Davis did not seek any help or medicine for these symptoms. (Trans. Vol. I, pg. 344). She also testified that Davis had a

history of high blood pressure, and high cholesterol, and had an operation on his heart in 1997, as well as, having his knees replaced in 1994. (Trans. Vol. I, pg. 346).

ARGUMENT

I. THE RESPONDENT DID NOT WAIVE THE RIGHT FOR THE COURT OF APPEALS TO INSTRUCT THE TRIAL COURT ON THE 4 YEAR LIMITATION PERIOD.

1. Preservation.

This issue was properly preserved because the trial court ruled on the statute of limitations issue stating that it was not a legitimate issue for the jury to consider. (Rec. 798). Therefore, by ruling on the issue, the trial court demonstrated that the issue was brought to its attention; and thus, the issue was sufficiently preserved for review. Spears v. Warr, 44 P.3d 742 (Utah 2002).⁸

2. Standard of Review.

Whether the trial court applied the proper statute of limitations is a matter of law, reviewed for correctness. State v. Lusk, 37 P.3d 1103 (Utah 2001). Whether the trial court's refusal to give a jury instruction constitutes error, is a question of law reviewed for correctness. State v. Bluff, 52 P.3d 1210 (Utah 2002). In addition, whether

⁸Furthermore, the issue was raised by Hatch on summary judgment (Rec. 281-454), which is sufficient to preserve it for review. Pierce v. Pierce, 994 P.2d 193 (Ut.App. 2000). Hatch argued that the actions occurring more than 4 years ago should be excluded. Also to overcome summary judgment, Davis argued that whether there was a single act, or one continuing act, was a factual issue for the jury to decide. (Rec. 483-484)

a proposed jury instruction correctly states the law presents a question of law reviewed for correctness. Id. at 1210; State v. Housekeeper, 62 P.3d 444 (Utah 2002).

3. Relevant Law.

This Court in Retherford v. AT&T Communications, 844 P.2d 949, 975 (Utah 1992) in addressing the statute of limitations for infliction of emotional distress, after reviewing the legal claim of alienation of affection, stated as follows:

Applying this standard by analogy, we hold that the statute of limitations for intentional infliction of emotional distress does not begin to run until the distress is actually inflicted, i.e., when the plaintiff suffers emotional distress.⁹ Id. at 975.

This Court in Retherford also applied Utah's four-year limitation period, 78-12-25(3) to the infliction of emotional distress claim. Id. at 975. This is the four year period relied upon by Hatch in his jury instruction.¹⁰

Thus, the jury instruction proposed by Hatch is not clearly erroneous under the law. In addition, the Court of Appeals was well within its discretion to rule that the trial court erred when it failed to instruct the jury on the four year limitation period for the claim of intentional infliction of emotional distress. Low v. City of Monticello, 45 P.3d 1153 (Utah 2002); Busche v. Salt Lake County, 26 P.3d 862 (Ut.App. 2001).

Davis claims that the trial court did not error in failing to instruct the jury on the four year limitation period; because the jury instruction proposed by Hatch, did not

⁹This is the same statement in Hatch's Jury Instruction, which Davis claims is an incorrect statement of the law. See Davis's Brief page 25, footnote 13.

¹⁰Davis claims that this 4-year period is an incorrect statement of the law. See Davis's Brief page 25, footnote 14.

account for the possibility of ongoing conduct. However, Davis never proposed an instruction accounting for the possibility of ongoing conduct; and therefore, Davis should not be able to raise this argument for the first time on appeal.¹¹ State v. Archambeau, 820 P.2d 920, 922 (Ut.App. 1991).

Perhaps most importantly, the continuing conduct theory *was not the law* according to this Court in Retherford. In Retherford, 844 P.2d 949, 976 footnote 18, this Court refused to adopt the theory of continuing violation, stating, “[a]lthough *we do not at this time adopt their analysis*, we note that courts facing similar difficulties in adjudicating Title VII claims, see 42 U.S.C. 2000e-2, have enunciated a theory of continuing violation in order to allow plaintiff to recover for patterns of employment discrimination.”

This Court then went on to find, based on the facts in Retherford, that the plaintiff may have suffered emotional distress in September of 1985, when she took medical disability leave at the insistence of her psychiatrist. Thus, this Court noted, the emotional distress did not come into existence, as a matter of law, before September of 1985; and is sufficient to raise a factual issue that the 4 year statute had not run by the time she filed her complaint in April of 1989.

¹¹The trial court should have instructed the jury on the four-year limitation period; and if Davis wanted an instruction on possible continuing conduct, he is the one that should have raised it, not Hatch.

Most importantly, this Court in Retherford added, of course at trial defendants will have the opportunity to prove *to the satisfaction of the finder of fact* that the elements accrued some time before Retherford's leave of absence. However, on the facts before us we cannot say as a matter of law that it accrued before April of 1985. Therefore, this Court never held in Retherford that in situations of alleged ongoing and continued harassment, recovery is allowable so long as "one act of the violation occurs within the statute of limitation period."¹² It was proper for the court to instruct the jury on the four year limitations period in Retherford, and the jury should have been so instructed in this case.

The cases cited by Davis regarding the refusal of the trial court to give an erroneous jury instruction are inapposite to this case; and are clearly distinguishable by their facts, as they deal with instructions that are clearly erroneous and directly contrary to the law. For example, in State v. Bluff, 52 P.3d 1210 (Utah 2002), the defendant wanted to instruct the jury that the *mens rea* for murder under the felony murder statute required an intent to commit murder, after this Court had clearly ruled that the *mens rea* required under the statute was only to commit the underlying felony. Id. at 1219. In State v. Alonzo, 932 P.2d 606, 616 (Ut.App. 1997), the defendant tried to claim the statutory justification defense, after this Court earlier rejected such a defense against a charge of resisting arrest. Id. at 616. These cases are far different than in this case, where this Court

¹²If such is the case, why would the defendants in Retherford be given the opportunity to prove that the elements accrued some time before April of 1985.

in Retherford stated that the four year limitation period did apply; and that it was not adopting the continuing violation theory for infliction of emotional distress.

Not only did the trial court fail to instruct the jury on the 4 year limitation period, as established by this Court in Retherford, but the trial court failed to instruct the jury on the continuing violation theory.¹³ Clearly the determination as to whether a separate act occurred or if it was part of a continuing violation is a factual question for the jury to decide. The trial court erred in taking upon itself the factual decision and ruling that since there was not a single act of outrageous conduct, but a practice of acts tolerable by themselves there was no legitimate issue for the jury to decide. (Rec. 798) The appellate court was proper in its review, under the correctness standard, to correct the trial court on this issue.

4. Appellate Court Discretion.

In reviewing a trial court's decision, the appellate court is given broad discretion and may affirm and rule upon any legal ground or theory appearing on the record, although the ground or theory was not presented or argued in the lower court. Low v. City of Monticello, 54 P.3d 1153 (Utah 2002); Busche v. Salt Lake County, 26 P.3d 862 (Ut.App. 2001). It is also appropriate for the appellate court to rule on matters

¹³As stated above the continuing violation theory would have been Davis's burden to propose; but even under that theory this Court required that three factors be considered (1) the subject matter, (2) the frequency and (3) the permanence. Retherford, at 976 ft. note 18. These factors were never presented to the jury, as the fact finder, and were not even considered or mentioned, by the trial court in its ruling.

which may become material when a case is remanded for further proceeding. Anderson v. Utah County Board of County Commissioners, 589 P.2d 1214 (Utah 1979). See also State, In re S.A. v. State, 37 P.3d 1172 (Ut.App. 2001) (the appellate court has a duty to address issues that may rise again on remand).

Given this Court's ruling that the four year limitation period is the proper one for intentional infliction of emotional distress; and the opportunity for a defendant to prove that the elements occurred before the four year limitation period; the appellate court was well within its discretion to find that the trial court erred in failing to instruct the jury on the four year statute of limitations period for Davis's claim of intentional infliction of emotional distress.

**II THERE HAS BEEN NO EXCEPTION TO THE
 "PRESENCE REQUIREMENT" FOR INTENTIONAL
 INFLECTION OF EMOTIONAL DISTRESS,
 DEMONSTRATED IN THIS CASE.**

A. Standard of Review.

A person claiming intentional infliction of emotional distress based on outrageous conduct directed towards another cannot recover unless that person is present at the time of the outrageous conduct.. A trial court's interpretation of law is reviewed for correctness. Ledfors v. Emery County Sch. Dist., 849 P.2d 1162-63 (Utah 1993).

B. Relevant Law.

The *Restatement (Second) of Torts, Section 46(b)(2)* provides:

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

The courts have generally followed this "presence" requirement except in the most egregious of circumstances. Lund v. Caple, 675 P.2d 226 (Wash. 1984) (husband who was not present when alleged outrageous conduct by pastor with husband's wife occurred, including sexual relations; did not establish necessary elements of tort directed to a third person); Lien v. Barnett, 794 P.2d 865 (Wash.App.Div.1 1990) (plaintiff could not maintain action for emotional distress, where pleadings indicated that such action occurred outside of his presence); Miles v. State Child Protective Services, Dept., 6 P.3d 112 (Wash.App.Div.2 2000) (plaintiff must be present when conduct occurred.).

The purpose of the presence requirement is to put some limit on such liability to the plaintiffs who are present at the time, as distinguished from those who later discover what has occurred. Without such a limitation the number of persons who may suffer emotional distress is virtually unlimited. *Restatement (Second) Torts, Section 46, Comment 1.*

C. Circumstances in this Case.

In this case, Davis does not dispute that the alleged misconduct directed towards his wife took place outside of his presence. He argues instead that the Restatement leaves open the possibility of situations in which the presence requirement may not be required, referring to *Comment 1, Restatement (Second) of Torts, Section 46*. However, as analyzed by the Court of Appeals, such cases deal only with the circumstances of a loved one dying or being sexually assaulted. Under such egregious circumstances an exception may arise to the presence requirement.

There is no such allegation of assault or physical abuse in this case. In fact, Davis's wife, to whom Davis claims the action was directed against, did not make any claims against Hatch, for assault, abuse, or infliction of emotional distress. This was also never alleged by Davis in his claims against Hatch. In Davis's claim for Infliction of Emotional Distress, he claims Hatch filed a lawsuit and demanded an investigation regarding Judith Davis's duties as Town Clerk,¹⁴ and wrote letters to the U.S. Postal Service regarding her duties as Postmistress. Hatch's questioning of Davis's wife concerning her duties as Town Clerk and as Postmistress for the Town of Boulder certainly does not rise to the level necessary to prove an exception to the "presence requirement" for a claim of intentional infliction of emotional distress.

¹⁴Hatch prevailed against the Town in his federal lawsuit; and at trial in this case the parties stipulated to the fact that Judith Davis made mistakes as the Town Clerk. (Trans. Vol. 1, pg. 326)

Davis has failed to demonstrate that an exception to the presence requirement should have been recognized by the appellate court in this case. The appellate court's ruling in this regard should not be disturbed.

D. There is no Presumption of the Verdict on Legal Issues.

As stated above, the proper application of law is a question of law for the trial court, reviewed for correctness. Ledfors v. Emery County Sch. Dist., 849 P.2d 1162-63 (Utah 1993). Therefore, there is no presumption to be given to the jury's verdict on this legal issue; and Davis has failed to state any law in support of this argument.

Davis claims that the court must assume that the verdict was supported by competent and sufficient evidence. However, Hatch is not challenging any factual finding by the court, but rather the application of law. The legal principal of the presence requirement to assert a claim for infliction of emotional distress. Therefore, Hatch is entitled to a complete review of such application by the appellate court, under the correctness standard, without any presumption in favor of the verdict.¹⁵ The appellate court properly reviewed this matter and found that the presence requirement should be applied in this case. Davis has failed to demonstrate that such a ruling is in error. The appellate court's ruling on this issue should not be disturbed.

¹⁵Furthermore, such a presumption would not be proper since the trial court failed to follow the law in arriving at the verdict.

III A “WILLFUL ACT” WAS NOT PROPERLY PLED AS PART OF DAVIS’S CLAIM FOR ABUSE OF PROCESS.

A. Standard of Review.

Davis failed to state a claim for abuse of process as required under Utah law. A trial court’s interpretation of the law is reviewed for correctness. Ledfors v. Emery County Sch. Dist., 849 P.2d 1162-63 (Utah 1993).

B. Relevant Law.

Abuse of process has two elements: “First, an ulterior purpose; second, an act in the use of the proceedings, not proper in the regular prosecution of the proceedings. Hatch v. Davis, 2004 UT App 378, Paragraph 34. See also *William Prosser, Law of Torts, Section 121, at 857* (“the essential elements of abuse of process . . . have been stated to be: first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding.”).

The mere filing of a lawsuit, even for an improper purpose, is insufficient for an abuse of process action, outside some definite act or threat not authorized by the process. Brown v. Kennard, 113 Cal. Rptr. 2d 891, 894 (Cal.Ct.App. 2001). The action must not be regular in the course of the proceeding. Id. A willful act for an abuse of process claim requires ***an overt act done*** in addition to the filing of a lawsuit. Meidinger v. Koniag Inc. 31 P.3d 77 (Alaska 2001); Vallance v. Brewbaker, 411 N.W.2d 808, 810 (Mich.Ct.App. 1987).

C. Pleadings in this Case.

In both his original and amended counterclaim, Davis's abuse of process claim was that Hatch's commencement of actions against him in federal and state court was "*a perversion of the process in order to accomplish an improper purpose; that is, to intimidate the residents of the town as well as the town council to comply with Hatch's narrow and peculiar political and philosophical positions.*"

D. No Allegation of a Willful Act.

As the Court of Appeals ruled, it is clear that Davis has failed to plead any facts or make any allegation that Hatch engaged, "in an act in the use of the process not proper in the regular prosecution of the proceeding." Hatch v. Davis, 2004 UT App 378, Paragraph 36.

Although Davis did allege an improper or ulterior motive or purpose for filing the actions against Davis, i.e., to intimidate, an "improper act may not be inferred from the motive." *William Prosser, Law of Torts, Section 121, at 858*; see also Keller v. Ray Quinney & Nebeker, 896 F. Supp 1563, 1571. Therefore, Davis failed to state an essential element for an abuse of process claim, that being some definite and overt act, outside the regular course of proceeding. Accordingly the trial court erred in failing to dismiss the abuse of process claim.¹⁶

¹⁶Davis's claim that Hatch attempted to have him fired by the State Parks Commission or to have Ms. Davis removed as Postmistress for the Town, by writing to supervisors, does not help Davis since these allegations do not constitute any use of the civil process.

Furthermore, although Utah's has a liberal pleading requirement, Davis never amended his pleadings and never sought leave to amend his counterclaim for abuse of process, in order to include any further allegations or facts that would constitute a willful act for an abuse of process claim. Furthermore, since Davis never sought leave to amend at the trial court level, he is not allowed to make this argument for the first time on appeal. State v. Archambeau, 820 P.2d 920, 922 (Ut.App. 1991). Moreover, even if Davis did obtain leave to amend, Davis still fails to state any specific act conducted by Hatch, *outside the regular course of the proceeding*, that would constitute a willful act for an abuse of process claim.¹⁷

E. No Presumption of Verdict on the Legal Issue.

As stated above, the proper application of law is a question of law for the trial court and is reviewed for correctness. Ledfors v. Emery County Sch. Dist., 849 P.2d 1162-63 (Utah 1993). Therefore, there is no presumption to be given to the jury's verdict on this legal issue; and Davis has failed to state any law in support of this argument.

Davis claims that the court must assume that the verdict was supported by competent and sufficient evidence. However, Hatch is not contesting any factual finding by the court on this issue; rather Hatch is contesting the application of law. The necessary

¹⁷Rather, Davis continues to rely on the claim that Hatch was trying to intimidate or coerce Davis by filing suit. Again such allegations go towards motive, not to any specific act outside the regular course of proceeding; and an improper act cannot be inferred from improper motive. *William Prosser, Law of Torts, Section 121, at 858*; see also Keller v. Ray Quinney & Nebeker, 896 F. Supp 1563, 1571

elements to state a claim. Therefore, Hatch is entitled to a review of such application under the correctness standard, without any presumption in favor of the verdict.

Given the allegations in Davis's counterclaim for abuse of process, it is clear that Davis has failed to allege a "willful act" outside the regular course of the proceeding, as part of his claim for abuse of process. This element properly limits the claim to instances where the process is abused outside its regular course of proceeding, not simply when a party filing may have an ulterior motive. This is why the courts have refused to imply an improper act from an ulterior motive.¹⁸

This Court should not expand the requirements for an abuse of process claim to include such an implication, as argued by Davis; otherwise, any allegation made by a party that an action was commenced for an improper purpose alone, i.e. to intimidate, would be sufficient to state a claim for abuse of process. In reality, such an unlimited expansion for an abuse of process claim in Utah, would result with every answer filed to now include a claim for abuse of process, simply by alleging an improper motive on the part of the claimant.

¹⁸The fact that Hatch sought money damages against Davis for assault and battery is not an ulterior motive, as such damages are allowed under the law. Furthermore, Hatch's claims were not simply frivolous claims to extort money. Even Judge McKiff at the end of the Hatch's case in chief, found probable cause and sufficient evidence on Hatch's claims to go to the jury. (Trans. Vol II, pg. 712). This finding was not appealed.

Davis has failed to point to any case where abuse of process was found after a party's claims were found to have probable cause by the court; and the court found sufficient evidence to go to the jury on the factual issues. Such a ruling by this Court, under the circumstances of this case, would have disastrous results and would set an undesirable precedent, as any party who loses in court, even after a finding of probable cause by the court and a jury trial on the merits, would be liable for abuse of process.

CONCLUSION

Hatch did not waive the right for the appellate court to rule that the jury should have been instructed that the statute of limitations for intentional infliction of emotional distress is four years. This is a legal issue for the appellate court to decide, and the appellate court's ruling is consistent with this Court's ruling in Retherford and subsequent cases regarding the four-year limitation period for infliction of emotional distress claims. The jury instruction proposed by Hatch is also consistent with the four year limitation period, and is not so clearly erroneous under the law, that Hatch waived the right for the Court of Appeals to address this issue.

The Petitioner has failed to demonstrate that under the facts of this case an exception to the "presence requirement" should be recognized in order to allow Davis to recover for intentional infliction of emotional distress for Hatch's complaints to his wife as Town Clerk and as Postmistress. This is further true, when Ms. Davis has not alleged any claims against Hatch on her own behalf for assault, battery or infliction of emotional distress. To recognize such a broad exception, as in this case, would open the door to an unlimited number of plaintiffs being able to claim emotional distress.

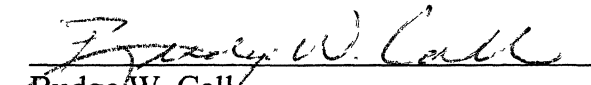
The Petitioner has failed to state a claim for abuse of process and in his pleadings has failed to set forth any facts to allege a "willful act" outside the regular course of the civil proceedings. Petitioner's claim that the action was filed for an improper purpose, i.e. to intimidate, is not sufficient to allege a claim for abuse of process, without alleging a willful act outside the regular course of the proceeding. To

allow an abuse of process claim based solely on an alleged improper purpose or motive, would open the door for every answer filed, to contain a claim for abuse of process by merely alleging an improper motive on the part of the plaintiff.

The appellate court properly determined these legal issues in reviewing the trial court's legal determinations on these issues. The decision issued by the Court of Appeals should [REDACTED] be affirmed and not disturbed by this Court on review.

DATED this 22 day of June, 2005.

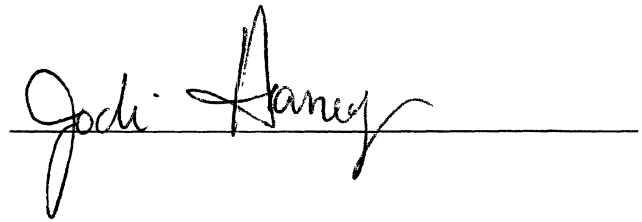
BOND & CALL, L.C.


Budge W. Call,
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify on the 23 day of June, 2005, two (2) copies of the foregoing **BRIEF OF RESPONDENT** were mailed, postage prepaid, to the following:

James C. Bradshaw
BROWN BRADSHAW & MOFFAT
10 West Broadway, Suite 210
Salt Lake City, UT 84101



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