

2002

Julian Dean Hatch v. Larry Davis : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JULIAN DEAN HATCH ,)	APPELLANT'S BRIEF
Plaintiff and Appellant,)	
vs.)	
LARRY DAVIS)	Appellate Case No. 20020778 -CA Trial Court No. 980600010
Respondent and Appellee.)	Priority of Argument:

THIS IS AN APPEAL FROM THE JUDGMENTS RENDERED
IN THE SIXTH DISTRICT COURT BY JUDGE K.L.MCIFF.

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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction pursuant to Section 78-2-2(3)(j) UCA (1953, as amended). This matter is subject to assignment to the Utah Court of Appeals, and has been transferred, pursuant to Section 78-2-2(4), UCA (1953, as amended).

STATEMENT OF ISSUES FOR REVIEW

- a. Did the trial court err in denying Hatch's Motion to Dismiss Davis's Malicious Prosecution Claim, since Hatch's claims had not been previously terminated in favor of Davis?

This is reviewed under the correctness standard. Hall v. Utah State Dept. of Corrections, 24 P.3d 958 (Utah 2001).

- b. Did the trial court err in denying Hatch's Motion to Dismiss Davis's Abuse of Process Claim, since Hatch's claims had not been previously terminated in favor of Davis? Did Davis properly allege an Abuse of Process Claim?

This is reviewed under the correctness standard. Hall v. Utah State Dept. of Corrections, 24 P.3d 958 (Utah 2001).

- c. Did the trial court err in dismissing the Malicious Prosecution Claim, after 4 days of trial, without telling the jury of the dismissal? The trial court was confused with the difference between Malicious Prosecution and Abuse of Process; was the jury also confused?

Whether the jury is properly instructed is reviewed under a correctness standard. Collins v. Wilson, 984 P.2d 960 (Utah 1999).

d. Does an Abuse of Process Claim in Utah require two elements, (1) an ulterior motive, and (2) an overt willful act in use of the proceeding, not proper in the regular conduct of the proceedings? Did Davis allege an Abuse of Process Claim?

Since this is a legal question, it should be reviewed for correctness. Steffensen v. Smith Management Corp., 862 P.2d 1342 (Utah 1993).

e. Was the jury properly instructed on the necessary elements for the Abuse of Process Claim?

The proper instruction of the jury is reviewed for correctness. Steffensen v. Smith Management Corp., 862 P.2d 1342 (Utah 1993).

f. Did the trial court err in ruling that the re-filing of the claims was allowed under Utah's Saving Statute (§78-12-40 U.C.A.) and then allow the jury to find it an abuse of process based upon the same facts?

This is a question of law for the court to decide, it should be reviewed for correctness. Steffensen v. Smith Management Corp., 862 P.2d 1342 (Utah 1993).

g. Was there a lack of probable cause, necessary for Abuse of Process after the court denied Davis's Motion to Dismiss Hatch's claims, at the end of Hatch's case-in-chief, and found sufficient evidence to go to the jury on both of Hatch's claims.

The lack of probable cause for Abuse of Process is a legal question.. Westar Mortgage Corp. v. Jackson, 61 P.3d 823 (N.M. 2002). It should be reviewed for correctness. Steffensen v. Smith Management Corp., 862 P.2d 1342 (Utah 1993).

h. Was there “extreme and outrageous” conduct by Hatch under an objective standard sufficient to sustain a claim of Intentional Infliction of Emotional Distress?

In challenging the sufficiency of evidence, the evidence in support of the verdict must be marshaled and demonstrated to be insufficient when viewed in the light most favorable to the verdict. State v. Hopkins, 989 P.2d 1065 (Utah 1999).

i. Did Davis actually suffer severe emotional distress under an subjective standard as a proximate result of any extreme and outrageous conduct by Hatch? Was there sufficient evidence to support an award of \$87,000 for Davis’ emotional distress when he had no actual damages?

In challenging the sufficiency of evidence, the evidence in support of the verdict must be marshaled and demonstrated to be insufficient when viewed in the light most favorable to the verdict. State v. Hopkins, 989 P.2d 1065 (Utah 1999).

j. Was Davis’s claim for emotional distress for actions which occurred in the early 1990s barred by Utah’s four (4) year statute of limitations. § 78-12-25(3)? Did the court err in failing to give a jury instruction on this issue?

A challenge to jury instructions is reviewed under a correctness standard. Steffensen v. Smith Management Corp., 862 P.2d 1342 (Utah 1993).

k. Is the “presence requirement” necessary in Utah for the tort of intentional

Infliction of Emotional Distress for actions directed towards a third-party, as stated in Restatement (Second) Of Torts § 46(b)(2).

This deals with the application of law, which should be reviewed under the correctness standard. Steffensen v. Smith Management Corp., 862 P.2d 1342 (Utah 1993).

1. Does Hatch have a Constitutional right to be critical of public officials and to petition the government with his grievances? Is harassment the proper limit to this right or is Davis required to allege and prove by clear and convincing evidence that the statements were false and published with “actual malice“?

This should be reviewed under a correctness standard. Steffensen v. Smith Management Corp., 862 P.2d 1342 (Utah 1993).

m. Did the trial court err in allowing expert testimony beyond the information contained in the depositions, after the court ruled at the Pre-trial Conference that such testimony would not be allowed, because disclosure of the expert’s testimony was untimely? Did Hatch’s counsel have a right to rely upon the trial court’s ruling at the Pre-Trial Conference?

This issue is reviewed under an abuse of discretion standard. State v. Wright, 765 P.2 12, 14 (Ut.App. 1988); State v. Adams, 5 P.3d 642 (Utah 2000).

n. Did the trial court fail to properly instruct the jury on the Intentional Infliction of Emotional Distress claim for a public official?

A challenge to jury instructions is reviewed under a correctness standard.

Steffensen v. Smith Management Corp., 862 P.2d 1342 (Utah 1993)

o. Did the trial court err in ordering that no real or personal property be transferred by Hatch prior to judgment being entered, under Rule 69(q) U.R.C.P.? Does such an Order violate Utah's Exemption Act? Was Hatch ever personally served with this Order, as required under Rule 69?

The review of statutory interpretation is a correctness standard, with no deference to the trial court. Reedeker v. Salisbury, 952 P.2d 577 (Ut.App.1998).

p. Did the trial court err in issuing supplemental proceedings on a Partial Judgment, which specifically reserved issues for further determination; and before a final judgment was entered.

The review of statutory interpretation is a correctness standard, with no deference to the trial court. Reedeker v. Salisbury, 952 P.2d 577 (Ut.App. 1998).

STANDARD FOR REVIEW

The standard of review for each of the above-numbered issues, is set forth above, following the statement of each issue.

PRESERVATION FOR REVIEW

The issues presented above, which require preservation, were preserved for review, in Petitioners' memoranda filed with the trial court to Dismiss the Amended Counterclaim (Rec. 52-57);

and for Summary Judgment (Rec. 282-454). The issues, including the testimony of the expert witness, were also raised in a Motion in Limine (Rec. 654-659), a Second Motion to Exclude Expert Testimony (Rec. 688-695), and at the time of trial (Trans. Vol. II, pg 549-551) objections to the jury instructions were also made on the record. (Trans. Vol. II. pg 733-734).

STATEMENT OF THE CASE

Hatch was pushed and his life was threatened by Davis at a special Boulder Town public hearing, where the Town's building program was being discussed. Hatch was being denied a building license, as well as business licenses by the Town. The Town's building program was being illegally operated. (Rec. 1-3) As a result, Hatch filed a federal civil rights suit (42 U.S.C. § 1983) against the Town of Boulder based on the denial of his civil rights, and lack of due process, in the issuance of these licenses. (Rec. 10-24) Hatch also filed a claim against Larry Davis in the federal action, for the assault and battery that occurred at the public hearing held to discuss the Town's Building Program. (Rec. 22-23) Larry Davis filed a motion to be dismissed from the federal action based on jurisdictional grounds and the fact that it was not part of a public hearing. The minutes from the meeting lacked the fact that a public hearing was held during the recess of the Town Meeting.¹ The federal court did not find a common nexus with the federal claims and so Davis was dismissed from the federal lawsuit on or about March 17, 1997. (Rec. 110-112) Davis

¹At trial in this case, Judith Davis the Town Clerk 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)

sought attorneys fees incurred in defending the action in federal court, which was denied. Hatch went on to prevail against the Town of Boulder in the federal lawsuit and was awarded \$86,000.00, plus attorneys fees. (Rec. 397-398).

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, 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." Davis claimed that Hatch had waged a campaign of hate and terror towards not only him, but his family, and the residents of Boulder. (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 July 21, 1999, before the court ruled on Hatch's Motion to Dismiss, Davis filed a Motion to Dismiss based on the statute of limitations, § 78-12-29 U.C.A. (Rec. 85) Davis also filed a Motion to Amend the Amended Counterclaim (Rec. 113), with a Second Amended Counterclaim and Answer, to include the statute of limitations as an affirmative defense. (Rec. 115-123) The court denied Davis's Motion to Dismiss based on the statute of limitations, ruling that Utah's saving statute, § 78-12-40 U.C.A., extended the time period for one year after the federal court dismissal, and that the Complaint filed on March 16, 1998, was timely. (Rec. 172).

Finally, 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. Davis claims that these letters and requests for information caused him stress on the job. (Rec. 307, 322).

Hatch sought discovery of Davis's employment file from the State of Utah (Rec. 206-207), which was denied by the court. (Rec. 240-244) In March of 2001 the trial court finally agreed to review the employment file *in camera*, but would only release what it thought to be discoverable and relevant information. (Rec. 274) The employment file showed prior complaints of Davis in the past, and stress in dealing with a former employee, but did not mention Hatch at all.

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.²

In September 2001, the trial court had not yet reviewed the employment file of Davis and so the original trial date in September 2001, was continued. 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. Mower from presiding in the

²Rather 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 and then based on that improperly found abuse of process.

case.³ On January 31, 2002, Judge David L. Mower recused himself from the case. (Rec. 647) Under the Scheduling Order, Davis had until December 8, 2002 to disclose both fact and expert witnesses, including expert testimony. (Rec. 625) This information was never properly disclosed to Hatch's counsel and a discovery request was filed for this information by Hatch on January 16, 2002. (Rec. 644-645) On February 20, 2002, a Motion in Limine was filed before the final pretrial 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 trial court found that the expert testimony provided was not adequate and Davis was required to make his expert available for deposition by the end of next week. (Rec. 670) The next day, Hatch's counsel noticed up the deposition of Davis's expert on March 21, 2002, for which she failed to appear. (Rec. 672-674) On March 22, 2002 Hatch filed a Second Motion to Exclude Expert Testimony. (Rec. 688-695).

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

³In 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.

elements of his claims and defenses available to Hatch on the Counterclaims. (Rec. 676-695)⁴ 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 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 offensively touch Hatch at the meeting, "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.

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

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 to go to 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.⁵

⁵Judge 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.

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 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.⁶ (Rec. 750-753).

⁶The 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.

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 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 State [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).

SUMMARY OF ARGUMENT

The court should have dismissed Davis's Counterclaim for Malicious Prosecution on Hatch's Motion to Dismiss, due to the fact that the initial proceeding against Davis had not been terminated in Davis's favor. Baird v. Intermountain School Federal C.U., 555 P.2d 877, 878 (Utah 1976); Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999); Restatement (Second) of Torts § 674(B) (1977).

Abuse of process also requires that the prior proceedings be terminated in favor of the person against whom they were brought. Winters v. Shulman, 979 P.2d 1218 (Ut. App. 1999); Amica Mutal Ins. Co. v. Schettler, 768 P.2d (Ut. App. 1989). Furthermore, the Abuse of Process claim is based on a lack of probable cause (without hope of success), and when an allegation of abuse of process is made based on such a claim, the "same sound judicial policy which requires termination of prior litigation for malicious prosecution, would seem to require a termination of the proceedings before an abuse of process claim. Friedman v. Roseth Corp., 75 N.Y.S.2d 515; Terry v. Wonder Seal Co., 170 S.E.2d 745 (Ga.App. 1969).

Moreover, contrary to the allegations made by Davis, abuse of process does not exist simply because the claims asserted are not true, even if they are asserted in bad faith. Crease v. Pleasant Grove City, 519 P.2d 888 (Utah 1974). Abuse of process requires two elements: (1) an ulterior motive; and (2) a willful act in use of the process not proper

in the regular conduct of the proceedings. Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999). These two elements were not alleged by Davis in his Counterclaim, were not established at trial, and the jury was never properly instructed on both elements, only the first element, ulterior motive. (Rec. 744).

The second element for abuse of process, a willful act in use of the process not proper in the regular course of the proceedings, requires an ***overt act, done in addition to filing and maintaining a lawsuit.***

v. Koniag, Inc., 31 P.2 77 (Alaska 2001). There was no willful or overt act alleged by Davis or committed by Hatch, which was not proper in the regular course of the proceedings. Furthermore, an improper act may not be inferred from an improper motive alone; if the act itself is still regular, the motive, ulterior or otherwise, is immaterial.⁷ Bosler v. Shuck, 714 P.2d 1231 (Wyo. 1986).

The Abuse of Process claim also fails as a matter of law and should have been dismissed after the court's ruling, at the end of Hatch's case-in-chief, when the court found as matter of law that Hatch met his prima facie burden on the facts and elements of his claims sufficient to go to a jury. This finding destroys any claim that Davis may have had for abuse of process. Westar Mortgage Corp. v. Jackson, 61 P.3d 823 (N.M. 2002) (existence of probable cause in proceeding underlying claim for abuse of process is question of law).

⁷This is directly contrary to the Instruction given to the jury in this case, which lists the ulterior motive, as the one essential element for Abuse of Process. (Rec. 744)

To recover for intentional infliction of emotional distress, the claimant must show, among other things, that the conduct was outrageous and intolerable, in that it is offensive against the generally accepted standards of decency and morality; and that the claimant actually suffered emotional distress. Samms v. Eccles, 358 P.2d 344, 346-47 (Utah 1961). Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”

of Grimm, 784 P.2d 1238, 1246 (Ut.App. 1989).

The evidence in this case, marshaled in favor of Davis, i.e., that Hatch wrote letters to Davis’s supervisors complaining about the Indian burial display and other operations at the State Park; and complained about his treatment from Davis, as being unresponsive and unprofessional; complaining that there needs to be an investigation of the Park; and that Davis is not the correct person to manage the Park; is not sufficient to rise to the level of extreme and outrageous conduct for intentional infliction of emotional distress.

Furthermore, Utah’s four (4) year limitation period applies to any claim for intentional infliction of emotional distress, § 78-12-25(3), U.C.A. (1953, as amended). Retherford, supra, at 975; and Davis’s claims are based on actions which occurred in the early 1990s, well beyond the four (4) year limitation period. These letters should have been excluded, or at a minimum, the jury should have been instructed regarding the limitation period. Particularly when the alleged symptoms appeared in the early 1990s. (Trans. Vol. I, pg. 352).

Moreover, Davis never suffered severe emotional distress. He only testified of an occasional upset stomach, headaches, and sometimes insomnia. He never sought professional help for these symptoms. The expert that testified based her information on an interview with Davis in February 2002, approximately 30 days before trial, 10 years after the symptoms occurred and after the discovery deadline. This expert also failed to provide a copy of her report to Hatch's counsel or appear at her deposition as ordered by the court at the Pre-trial Conference. Her testimony should have been excluded altogether.

Davis's claim for Intentional Infliction of Emotional Distress is based on Hatch's dealings with his wife, Judith Davis, as Boulder Town Clerk. However, where the conduct is directed towards a third person, the actor is only subject to liability of a family member *who is present at the time*. Restatement (Second) Of Torts § 46(b)(2); Samms v. Eccles, 358 P.2d 344 (Utah 1961); Lund v. Caple, 675 P.2d 226 (Wash. 1984). Hatch cannot be found liable for such conduct in this case, when Mr. Davis was not present.

In addition, Davis's Intentional Infliction of Emotional Distress claim against Hatch is prohibited by the First Amendment, which specifically provides citizens the right to petition their government, and to be critical of public officials. Therefore, as a citizen, Hatch had a constitutional right to voice his grievances to state officials and to be critical of Davis's official duties at the Park. Garrison v. State of La., 379 U.S. 64 (1964)(where criticism is of a public official and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the First Amendment, in the dissemination of truth). Furthermore, before Davis can prevail against Hatch, he must show

by clear and convincing evidence, that Hatch published false statements of fact, with “actual malice.” Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.3d 41 (1988); Margoles v. Habbart, 760 P.2d 324 (Wash. 1988) (clear and convincing proof of actual malice is required for a public official, this cannot be established solely by evidence of personal hostility, vindictiveness or spite). These required elements were never alleged by Davis in his Counterclaim or established at trial.

The trial court also improperly issued supplemental orders and writs of execution before there was a final judgment entered. D’Ashton v. Aston, 844 P.2d 345, 349 (Ut.App. 1992);

v. Williams, 993 P.2d 1911 (Utah 1999). A judgment which does not adjudicate all the claims between the parties is not a final judgment and cannot support the issuance of an execution. CIT Financial Services v. Erbs Indoor RV Center, 702 P.2d 858 (Id.App. 1985).

The trial court should not have issued writs of execution on the Partial Judgment, which specifically reserved issues for further determination.

Finally, Rule 69(q) does not provide for a prejudgment order precluding the transfer of any property before a judgment is entered, as the April 11, 2002 Order does. The proper procedure to follow would have been under Rule 64A, governing prejudgment attachments and garnishments, which was never followed. Furthermore, the April 11, 2002 Order is in violation of Utah’s Exemption’s Act § 78-23-1 et. seq., as it restricts even the transfer of property that is exempt from execution and does not provide the opportunity to request a hearing. The April 11, 2002 Order, was also never personally served on Hatch;

and Rule 69 requires personal service along with notice to the judgment debtor of a right to a hearing.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE MALICIOUS PROSECUTION CLAIM.

- A. Before an action can be brought for malicious prosecution, the underlying action must first be terminated in favor of the accused.

The law is clear that an action cannot be brought for malicious prosecution in a civil matter until after the underlying action is first terminated in favor of the accused and the civil suit was brought without probable cause for the purpose of harassment. Davis's claim for Malicious Prosecution should have been dismissed at the start, due to the fact that the underlying action was not first terminated in Davis's favor. Baird v. Intermountain School Federal C.U., 555 P.2d 877, 878 (Utah 1976); Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999) Restatement (Second) Of Torts § 674(B) (1977).

- B. The trial court erred in failing to inform the Jury of the dismissal of the Malicious Prosecution Claim.

After 4 days of trial and evidence, the court decided to dismiss the Malicious Prosecution and Abuse of Process claims, since all of the elements had not been satisfied, and the underlying proceeding had not been decided in Davis's favor based on a lack of probable cause. The court then decided to dismiss just the Malicious Prosecution claim, although both claims were based on the filing of the lawsuit without probable cause or hope of success.

After dismissing the Malicious Prosecution claim, the court failed to inform the jury that this claim was being dismissed and the reasons for the dismissal, i.e., that in order to find Malicious Prosecution, the case must first be decided in favor of the accused based on a lack of probable cause. This prejudiced Hatch because throughout trial Davis had combined the two claims and maintained that the claims against him were filed without any hope of success or probable cause. It was not until *after trial and the verdict was rendered*, that the trial court attempted to distinguish between the two claims for relief, reclassified Davis's Abuse of Process claim, and tried to find the necessary elements for the Abuse of Process claim.

II. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE ABUSE OF PROCESS CLAIM.

A. An Abuse of Process Claim was never properly alleged.

Davis's Counterclaim for Abuse of Process was based on the re-filing of the Complaint against him, which he claims was without any hope of success and for an improper purpose; that is, to intimidate the residents of the town council to comply with Mr. Hatch's narrow and peculiar political and philosophical positions. (Rec. 62).

The essential elements for abuse of process are (1) an ulterior motive; and (2) a willful act in use of the process not proper in the regular conduct of the proceedings. Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999); Executive Mgt. Ltd. v. Ticor Title Ins. Co., 963 P.2d 464 (N.M. 1998).

Therefore, Davis's claim for Abuse of Process does not state an essential element, i.e., that there was a willful act in use of the judicial process not proper in the regular course of the proceedings. Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999). There was no evidence presented, that Hatch used any process not proper in the regular course of the proceedings. Davis's claim against Hatch based on the malicious filing of the case should have been dismissed.

As set forth above, the Abuse of Process claim asserted against Hatch in this case does not allege that any action was taken in the course of the proceeding which was not proper in the regular course of the proceeding. It only alleges that the action was maliciously filed for an improper motive; therefore, the action is essentially the same as the Malicious Prosecution action and should have been dismissed along with the Malicious Prosecution claim. It is the allegations in the claim that should be determinative and not the title used or given to the claim. Even if it is not the same, it contains similar allegations, that the case was improperly filed and therefore the same sound judicial policy which requires termination of prior litigation for malicious prosecution should apply to the Abuse of Process claim in this case. Friedman v. Roseth Corp. 75 N.Y.S.2d 515; Terry v. Wonder Seal Co., 170 S.E.2d 745 (Ga.App. 1969).

B. The jury was not properly instructed on the Abuse of Process Claim.

As stated above abuse of process requires two elements: (1) an ulterior motive; and (2) a willful act in use of the process not proper in the regular conduct of the

proceedings. Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999); Executive Mgt. Ltd. v. Tigor Title Ins. Co., 963 P.2d 464 (N.M. 1998). These two elements were not established and the jury was never properly instructed on these two elements, the jury was only instructed on one element, ulterior motive. (Rec. 744).

The court never dealt with the second element for abuse of process. For instance, there was no willful act by Hatch in use of the process not proper in the regular conduct of the proceedings. The court made no finding in this regard, other than Hatch did not prevail on his claims at trial. There was no misuse of discovery, no improper seizure of property, no arrest, no criminal proceedings initiated, none of the uses generally found in an abuse of process case. The fact that Hatch did not ultimately prevail, does not by itself constitute an “improper use of the process,” Crease, *supra*.

A willful act under the abuse of process claim requires an ***overt act done in addition to the initiating of the suit***; thus, the mere filing of the lawsuit, even for an improper purpose, is not a proper basis for an abuse of process claim. Meidinger v. Koniag, Inc., 31 P.2 77 (Alaska 2001); Caudle v. Mendel, 994 P.2d 372 (Alaska 1999); DeVaney v. Thriftway Marketing Corp., 953 P.2d 277 (N.M. 1997) *cert. denied* 524 U.S. 915 (must be act that is irregular or improper in the normal course of the proceedings). There was no evidence of any overt action taken by Hatch in the course of the proceedings to constitute abuse of process. This over act must be utilizing the judicial procedure for purposes so lacking in justification, as to lose any legitimate function, as a reasonably justifiable litigation

procedure. Giles v. Hill Marce, 988 P.2d 143 (Arz.App. 1990). There were no overt acts alleged in this case or evidence of any overt acts presented to the jury.

Moreover, improper acts may not be inferred from an improper motive alone; if the act itself is still regular, the motive ulterior or otherwise is immaterial. Bosler v. Shuck, 714 P.2d 1231 (Wyo. 1986). This is directly contrary to the jury instruction which was given regarding Abuse of Process in this case, stating that the ulterior motive or purpose was the only one essential element for an abuse of process claim. (Rec. 744).

- C. It was improper for the trial court to reclassify the Abuse of Process claim after the trial was over.

As stated above, abuse of process does not exist simply because the claims asserted are not true, or even if they are asserted in bad faith. Crease v. Pleasant Grove City, 519 P.2d 888 (Utah 1974). Abuse of process requires two elements: (1) an ulterior motive; and (2) a willful act in use of the process not proper in the regular conduct of the proceedings. Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999); Executive Mgt. Ltd. v. Ticor Title Ins. Co., 963 P.2d 464 (N.M. 1998). These two elements were not alleged and were not established at trial, and the jury was not properly instructed on these two elements, the jury was only instructed on one element, the ulterior motive. (Rec. 744).

Since the court never dealt with the second element for abuse of process and the court made no finding in this regard, i.e. no misuse of discovery, no improper seizure of property, no arrest, no criminal proceedings initiated, none of the uses generally found in an abuse of process case. The fact that Hatch did not ultimately prevail, does not by itself

constitute an “improper use of the process,” Crease, supra. There is no evidence of any affirmative act manifesting a perversion of the process. Id.

It was improper for the court, after trial, to go back and try to reclassify Davis’s claim as a claim for Abuse of Process, when the necessary elements were never alleged and the jury was never properly instructed on an Abuse of Process claim.

D. The Abuse of Process claim cannot be based on the re-filing under Utah’s Saving Statute.

As stated above, the second element for Abuse of Process requires the use of the process in a manner not proper in the regular course of the proceeding. The re-filing of the lawsuit against Davis in State court, after it was dismissed from federal court based on jurisdictional grounds was allowed under Utah’s Saving Statute and ruled as timely by the court. Therefore, this re-filing of the complaint cannot stand as an abuse of process.

First, the filing of an action alone does not constitute an abuse of process. There must be something more than the mere institution of legal proceedings, even if frivolous, to constitute an act of abuse of process. Crease v. Pleasant Grove City, 519 P.2d 888 (Utah 1974). There must be some use of the process outside the regular course of the proceedings to constitute abuse of process. Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999); Executive Mgt. Ltd. v. Tigor Title Ins. Co., 963 P.2d 464 (N.M. 1988). Hatch’s filing of the Complaint alone cannot constitute an abuse of process, even if Hatch did not prevail, and even if the action was frivolous. Crease, supra. Furthermore, in this case the court found that the re-filing was timely and allowed under Utah’s Savings Statute.

The court previously ruled that the re-filing of the Complaint after it was previously dismissed from the federal court for lack of jurisdiction was allowed under Utah's Savings Statute. The court should not be allowed to rule that this pleading is allowed under the law, and then allow the jury to determine if it was an abuse of the process.

III. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CLAIMS FOR ABUSE OF PROCESS AND MALICIOUS PROSECUTION AFTER THE COURT FOUND PROBABLE CAUSE AT THE END OF HATCH'S CASE IN CHIEF.

The existence of probable cause in a proceeding underlying a claim for abuse of process is a question of law for the court. Westar Mortgage Corp. v. Jackson, 61 P.3d 823 (N.M. 2002). Even if facts are in dispute, the role of the jury is only to determine the facts bearing on the probable cause question; however, whether those facts constitute probable cause remains a matter for the court to decide. Id.

At the end of Hatch's case-in-chief, the trial court found sufficient probable cause on Hatch's claims to go to the jury. Specifically, "*that there is room within the evidence that has been admitted for the jury to reach either conclusion with respect to all claims,*" that, *if Mr. Hatch is believed and Ms. Mitchell is believed, it could find both assault and battery.*" (Trans. Vol, II, pg 712).

Therefore, since the court found sufficient probable cause to present the issue to the jury on both the assault and the battery claims. Hatch's claims cannot be frivolous, without probable cause, and there can be no abuse of process for bringing these claims without probable cause. Westar Mortgage Corp. v. Jackson, 61 P.3d 823 (N.M. 2002)(fact

that plaintiff is bound over for trial constitutes prima facie evidence of probable cause and is fatal to claim of abuse of process) The court at this time should have dismissed Davis's claims for Malicious Prosecution and Abuse of Process.

IV. THE COURT ERRED IN FAILING TO DISMISS THE CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

- A. The evidence when marshaled is insufficient to establish any "extreme & outrageous" conduct for intentional infliction of emotional distress.

For intentional infliction of emotional distress, the claimant must show (1) that the other party's conduct was directed toward the claimant; (2) that the conduct was outrageous and intolerable, in that it is offensive against the generally accepted standards of decency and morality (must show that a reasonable person would consider the alleged conduct to be outrageous under an objective standard); (3) that the party intended to cause, or acted in reckless disregard of the likelihood of causing, emotional distress; (4) that the claimant actually suffered emotional distress (must show that the claimant actually experienced subjective severe emotional anguish because of the objectively outrageous conduct); and (5) that said outrageous conduct proximately caused claimant's emotional distress. Samms v. Eccles, 358 P.2d 344, 346-47 (Utah 1961). The conduct must evoke outrage or revulsion, it must be more than unreasonable, unkind, or unfair; and furthermore, an act is not necessarily outrageous merely because it is tortious, injurious, or malicious, or because it would give rise to punitive damages or because it is illegal. Franco v. The Church of Jesus Christ of Latter-Day Saints, 21 P.3d 198 (Utah 2001).

Whether conduct is sufficiently outrageous to allow recovery is ordinarily a jury question, but initially it is the court's responsibility to determine if reasonable minds could differ on whether the conduct was so extreme as to result in liability. Keates v. City of Vancouver, 869 P.2d 88 (Wash.App.Div.2 1994).

The evidence regarding the issue of extreme and outrageous conduct, marshaled in favor of Davis, is specifically set forth in the above *Statement of Facts*, paragraphs 5 through 24, which include the letters written by Hatch, contained in Defendant's Exhibit 103. Hatch wrote letters, upon Davis's invitation, to Davis's supervisors, which was Hatch's right, complaining about the Indian burial display and other operations at the Park, which were legitimate issues. Hatch complained about his treatment from Davis, as being unresponsive and unprofessional. Hatch requested an investigation of the matters and the policies at the Park and stated that Davis may not be the right person to continue to manage the Park. However, according to Davis's own testimony, Hatch's complaints never put Davis's job in jeopardy; and Davis never received any indication that his job was in jeopardy, although he did claim that it was a concern to him. This evidence, even when marshaled in Davis's favor, is still insufficient to show the necessary extreme and outrageous conduct.

The actions of Hatch in writing letters to Davis and his supervisors, who are government official, and asking questions about the policies at the state Park and complaining about the way Davis ran the Park and treated Hatch, and even asking for an investigation and stating that Davis needs to be replaced as Park manager; do not rise to the level necessary

to constitute “extreme and outrageous” conduct. This conduct has not been considered atrocious and utterly intolerable in a civilized community. Mere insults especially in context of political disputes, do not exceed bounds of decency. Andrews v. Stallings, 8982 P.2d 611 (N.M.App. 1995); Snyder v. Medical Services Corp. of Eastern Washington, 985 P.2d 1023 (Wash.App.Div.3 1999)(insults, threats, and annoying employee, does not rise to necessary level); Garcia v. Lawson, 928 P.2d 1164 (Wyo. 1996)(no claim for bad taste, boorishness, condescension, obnoxiousness or social ineptitude); Keates v. City of Vancouver, 869 P.2d 88 (Wash.App.Div.2 1994)(police officer yelling at husband suspected of murdering wife, was not outrageous, even though officer yelled into husband’s face about murdering his wife, was insulting to husband and unbecoming to officer); and Breeden v. League Services Corp., 575 P.2d 1374 (Okla. 1978)(where collection company sent letters to debtor’s home, to her work, made several attempts to contact her by phone, both at home and at work, totaling 16 attempts, and in one call called her a God damned liar and deadbeat, collection company’s conduct was not outrageous).

Even if Hatch’s accusations were all false; and Davis was terminated from his job as a result; this would not be sufficient to constitute extreme and outrageous conduct. Sperber v. Galigher Ash Co., 747 P.2d 1025 (Utah 1987)(mere discharge from employment does not rise to level of outrageous or intolerable conduct, even if based on false reasons); Dubois v. Grand Central, 872 P.2d 1073 (Ut.App. 1994); Robertson v. Utah Fuel Co., 889 P.2d 1382 (Ut.App. 1995) cert. denied (discharge from employment not intolerable even if employee is required to discuss drug addiction).

- B. Davis's claim for emotional distress based on actions that occurred in the early 1990s is barred by Utah's four (4) year statute of limitations.

Utah's four (4) year limitation period applies to intentional infliction of emotional distress. § 78-12-25(3), U.C.A. (1953, as amended). Retherford, supra, at 975. The statute of limitations begins to run when the cause of action accrues. §78-12-1 U.C.A. (1953, as amended);

Lumber Sales, Inc. v. Bonneville Inv., Inc., 794 P.2d 11, 19 (Utah 1990). Davis made claims for actions which occurred in early 1989 and 1990, much more than four (4) years beyond the limitation period. The letters were written between 1990 and 1993, well beyond the limitation period. Any claim for damages at this time should have been dismissed and this evidence should have been excluded.

- C. A jury instruction should have been given regarding Utah's four (4) year statute of limitations for infliction of emotional distress.

As set forth above, the claims of Davis that occurred beyond the 4 year limitation period should have been barred and this evidence excluded at trial. If not excluded, at a minimum, the jury should have been instructed regarding the 4 year limitation period and that Davis cannot recover for his damages beyond this period. Davis previously argued, in opposition to Hatch's Motion for Summary Judgment, that this was a factual issue and a question for the jury. In addition, Davis testified at trial that he suffered his emotional distress at the time of each incident, in the early 1990s; and the court in its Post-Verdict ruling found that there was no single incident that constituted extreme and outrageous

conduct. This jury should have decided when Davis first suffered his alleged damages, and if it was beyond the time period allowed by the statute of limitations.

- D. There is a “presence requirement“ necessary for infliction of emotional distress for actions directed to another party.

Davis claims intentional infliction of emotional distress as a result of Hatch’s dealings with his wife, Judith Davis, as the Boulder Town Clerk. However, for a person to recover for such emotional distress that person *must be present at the time*. Restatement (Second) Of Torts § 46(b)(2); Samms v. Eccles, 358 P.2d 344 (Utah 1961); 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).

Hatch cannot be found liable for such conduct, when Davis was not present. If Hatch is found liable for such conduct, then there would be no limitation to this claim, all family members could claim emotional distress. Furthermore, since emotional distress is the only damage claimed by Davis, and he has no actual damages, he cannot recover for any actions directed to a third person. Restatement (Second) Of Torts § 47. In addition, Hatch

was justified in his complaints about the Town as he prevailed against the Town in his federal lawsuit.

- E. A jury instruction should have been given regarding the “presence requirement” for infliction of emotional distress.

As set forth above, Davis’s claim for emotional distress based on Hatch’s dealings with his wife should have been dismissed. Evidence of Hatch’s dealings with Davis’s wife, as the Town Clerk, outside of Davis’s presence should also have been excluded.

If not excluded, at a minimum, a jury instruction should have been given regarding the “presence requirement” before a party can recover for intentional infliction of emotional distress based on actions directed towards another party.

Such a requirement is even more important in this case, where Davis’s wife is also the Town Clerk and is required to deal with people regarding problems with the Town, including business licenses and other permits; and after Hatch prevailed on his rights against the Town.

V. HATCH HAS A CONSTITUTIONAL RIGHT TO BE CRITICAL OF PUBLIC OFFICIALS AND TO PETITION HIS GOVERNMENT WITH HIS GRIEVANCES.

Criticism of government is at the very center of the constitutionally protected area of free speech. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. Rosenblatt v. Baer, 383 U.S. 75 (1996). Where criticism is of a public official and their conduct of public business, the interest in

private reputation is overborne by the larger public interest, secured by the First Amendment. Garrison v. State of La., 379 U.S. 64 (1964). Even when the utterance is false, the great principles of the Constitution, which secure freedom of expression in area of criticism of official conduct of public officials, precludes attaching adverse consequences to any except the knowing or reckless falsehood. Id. For this reason a public official cannot recover for intentional infliction of emotional distress, absent a showing by clear and convincing evidence, not only that the publication was false, but uttered with actual malice. Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

The First Amendment requires clear and convincing evidence that the statements published were false and were made with “actual malice,” which does not refer to ill will, but rather to knowledge of the falsity.⁸ West v. Thomson Newspapers, 835 P.2d 179 (Ut.App. 1992) cert. denied 843 P.2d 1042, vacated on other grounds, 872 P.2d 999; Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993). Actual malice is required otherwise would-be critics of official conduct would remain silent and would be deterred from voicing their criticism. Costello v. Ocean County Observer, 643 A.2d 1012 (N.J. 1994).

Davis was employed by the State as a park ranger and was a public official. § 63-11-17.2, U.C.A. Therefore, as a citizen, Hatch had a constitutional and right to voice his grievances to state officials and elected representatives regarding Davis’s actions at the

⁸At common law actual malice connoted ill will and a conscious disregard for the rights and safety of others; and is constitutionally insufficient to prove actual malice in context of public official. Vaanese v. Gall, 518 N.E.2d 1177 (Ohio 1988) cert. denied 487 U.S. 1206.

Park. Davis did not allege or establish at trial, by clear and convincing evidence, that Hatch's statements were false, or that they were made with "actual malice." Therefore, Davis's claim for infliction of emotional distress must fail. The judgment should be reversed and the claim dismissed.

VI. THE TRIAL COURT ERRED IN ALLOWING EXPERT TESTIMONY AFTER THE COURT PREVIOUSLY RULED AT THE PRE-TRIAL CONFERENCE THAT SUCH TESTIMONY WOULD NOT BE ALLOWED.

At the Pre-trial Conference the court ruled that Davis's disclosure of his expert witness was not sufficient and did not comply with the Rule of Civil Procedure. Davis was to provide his expert for a deposition and was to immediately provide the reports. Davis's expert never did this and yet was able to testify at trial, contrary to the court's previous ruling.

Hatch's counsel did not have an opportunity to review the reports to rebut them or to take the expert's deposition before trial by the end of the week, as previously ordered by the court at the Pre-trial Conference. This greatly prejudiced Hatch at trial, and this information should have been excluded at trial consistent with the court's previous ruling at the Pre-trial Conference. It was an abuse of discretion for the court to allow Davis's expert to testify contrary to its previous order.

VII. THE TRIAL COURT ERRED IN ORDERING THAT NO REAL OR PERSONAL PROPERTY BE TRANSFERRED PRIOR TO JUDGMENT UNDER RULE 69(q).

- A. The court failed to follow statutory procedures in issuing a prejudgment writ of attachment.

Rule 69(q) deals with a person or corporation alleging to have property of the judgment debtor, or to be indebted to the judgment debtor. It does not provide for a prejudgment order precluding the transfer of any property before a judgment is entered, as the April 11, 2002 Order does. The proper procedure to follow would have been under Rule 64A, governing prejudgment attachments and garnishments, which was never followed.

B. The Order violates Utah's Exemption Statute.

Furthermore, the April 11, 2002 Order is in violation of Utah's Exemption's Act § 78-23-1 et. seq., as it restricts even the transfer of property that is exempt from execution and does not provide the opportunity to request a hearing. Even Rule 69(o) which applies to judgment debtors, after a final judgment has been entered, only allows the court to prohibit the transfer of nonexempt property pending a hearing. Furthermore, the April 11, 2002 Order, was never personally served on Hatch; and Rule 69(d)(e)(f) & (g) requires personal service along with notice to the judgment debtor of a right to a hearing. None of these procedures were followed and faxing a copy of the Order to Hatch's counsel does not comply with the service as required under Rule 69 of the Utah Rule's of Civil Procedure.

VIII. THE TRIAL COURT ERRED IN ISSUING SUPPLEMENTAL PROCEEDINGS ON A PARTIAL JUDGMENT, WHICH SPECIFICALLY RESERVED ISSUES FOR FURTHER DETERMINATION.

The trial court improperly issued supplemental orders and writs of execution, before there was a final judgment entered. This Court in D'Ashton v. Aston, 844 P.2d 345, 349 (Ut.App. 1992) states, "it is undisputed that a writ of execution may only be issued on a 'final' judgment. The Utah Supreme Court in the case of Cheves v. Williams, 993 P.2d

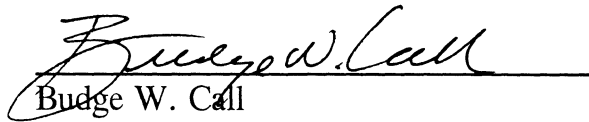
1911 (Utah 1999) also states that under Rule 62(a) and Rule 69(a), regarding executions to enforce a judgment, that the obvious implication of both of these provisions is that there exists a previously issued final judgment not stayed pending appeal. A judgment which does not adjudicate all the claims between the parties is not a final judgment and cannot support the issuance of an execution. CIT Financial Services v. Erbs Indoor RV Center, 702 P.2d 858 (Id.App. 1985)(uncertified partial judgment not being final will not support writ of execution); Ketcham v. Selles, 748 P.2d 67 (Or. 1987)(judgment that did not resolve all issues between parties was “intermediate order” and was not “judgment” for issuing writ of execution). The trial court erred in issuing supplemental proceedings and writs of execution on the Partial Judgment, while reserving issues for further determination. These writs should be ruled as invalid.

CONCLUSION

For the foregoing reasons the Judgment rendered in this case should be set aside, Davis’s claims should all be dismissed with prejudice; and Hatch should be entitled to proceed on his Assault and Battery Claims, without any of Davis’s claims pending against him.

DATED this 20 day of January, 2004.

BOND & CALL, L.C.

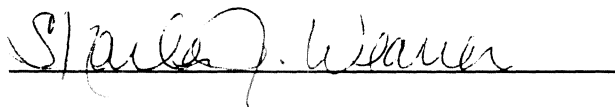

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CERTIFICATE OF MAILING

I hereby certify on the 5th day of January, 2004, two (2) copies of the foregoing **BRIEF OF THE APPELLANTS** were mailed, postage prepaid, to the following:

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