

TORTS—ABUSE OF PROCESS—AN EXCESSIVE ATTACHMENT SUPPORTS A CLAIM FOR ABUSE OF PROCESS RATHER THAN MALICIOUS PROSECUTION AND SUCH CLAIM MAY BE BROUGHT IN THE ACTION IN WHICH THE ATTACHMENT WAS ISSUED. *White Lighting Company v. Wolfson* (Cal. 1968).

White Lighting Company brought suit against Wolfson, a former employee, to recover \$850 allegedly advanced against future commissions. Wolfson denied the debt and cross-complained, alleging an oral employment agreement. The Company obtained a writ of attachment¹ and attached property worth approximately \$20,000 to secure the \$850 claim. Wolfson then amended his cross-complaint, charging that the over-attachment constituted an abuse of process.² The trial court sustained a general demurrer to this count of the cross-complaint on the ground that the cause of action was premature. The court believed that the action was based upon malicious prosecution which requires the successful termination of the process in favor of the attachment-defendant.

On appeal to the California Supreme Court, *held, reversed*. An excessive attachment supports a claim for abuse of process rather than malicious prosecution and such claim may be brought in the action in which the attachment was issued.³ *White Lighting Company v. Wolfson*, 68 Adv. Cal. 347, 438 P.2d 345, 66 Cal. Rptr. 697 (1968), *petition for rehearing denied* May 1, 1968.

The court clarified the confused status of wrongful attachment suits in California by distinguishing wrongful attachments,

- (1) levied maliciously and without probable cause;
- (2) maliciously procured when not entitled to the writ;
- (3) levied against property valued far in excess of the actual debt or exempt from attachment;
- (4) used to realize an improper purpose.⁴

The first and fourth types of wrongful attachment have been properly treated as supporting actions for malicious prosecution

1. For the procedure in attaching property refer to CAL. CODE CIV. PROC. § 540 (West 1954), *as amended*, (Supp. 1967).

2. The cross-complaint also included two counts for alleged violations of the 1933 Securities Act, two on the oral employment contract, and one based on quantum meruit.

3. The opinion contained two additional holdings concerned with other counts in the litigation. These dealt with the statute of frauds with reference to oral employment contracts.

4. 68 Adv. Cal. at 360, 438 P.2d at 352-53, 66 Cal. Rptr. at 704-05.

and abuse of process respectively.⁵ The confusion has occurred in those cases where the attachment was regularly issued but the creditor was not entitled to the writ, or where the value of the property attached was far in excess of the legitimate claim.⁶ Two means of recovery have been available to the attachment debtor for damages arising from these types.

First, the attachment debtor may recover from the attachment creditor or his sureties in an action based upon the undertaking.⁷ This is allowed by statute on attachments where the action was terminated in favor of the attachment-defendant. Recovery may be had for all damages proximately caused by the wrongful attachment up to the amount of the bond.⁸ Thus, if the attachment-defendant suffered damages in excess of the value of the bond he could not be fully compensated in an action based upon the undertaking.

The second means of recovery, an action for malicious prosecution, is not limited to the amount of the undertaking. However, as noted by the court in *White Lighting*, two elements essential to malicious prosecution may be lacking in an over-attachment situation:

- (1) The absence of probable cause in initiating the proceeding;
- (2) the termination of the action in favor of the attachment-defendant.⁹

Thus, any recovery, regardless of size, would be sufficient to defeat an action based upon either the undertaking or malicious prosecution. Since the attaching creditor usually recovered on his claim, though for a considerably smaller amount than the value of the attached property,¹⁰ the attachment-defendant had no remedy for damages proximately caused by the over-attachment. *White*

5. *Id.* at 360, 438 P.2d at 353, 66 Cal. Rptr. at 705. See *Goland v. Peter Nolan & Co.*, 2 Cal. 2d 96, 38 P.2d 783 (1934); *Crews v. Mayo*, 165 Cal. 493, 132 P. 1032 (1913); *Vesper v. Crane Co.*, 165 Cal. 36, 130 P. 876 (1913); *King v. Montgomery*, 50 Cal. 115 (1875); *Merron v. Title Guarantee & Trust Co.*, 27 Cal. App. 2d 119, 80 P.2d 740 (1938).

6. 68 Adv. Cal. at 360, 438 P.2d at 353, 66 Cal. Rptr. at 705. See *Spellens v. Spellens*, 49 Cal. 2d 210, 317 P.2d 613 (1957); *Pimentel v. Houk*, 101 Cal. App. 2d 884, 226 P.2d 739 (1951).

7. For the statutory requirement for the undertaking see CAL. CODE CIV. PROC. § 539 (West 1954).

8. *Id.*

9. 68 Adv. Cal. at 361, 438 P.2d at 354, 66 Cal. Rptr. at 706.

10. *Id.*

Lighting provides the needed remedy because an action for abuse of process, unlike actions based upon malicious prosecution or the undertaking, can be maintained regardless of whether the process was terminated in the defendant's favor or, as in the case of malicious prosecution, that the process was initiated without probable cause.

Additionally, *White Lighting* in overruling *Division of Labor Law Enforcement v. Barnes*,¹¹ allowed the attachment-defendant to assert damages in the primary action. Heretofore, the rule was that damages caused by wrongful attachment could not be made the basis of a counterclaim because such damages were not considered as arising out of the transaction specified in the complaint.¹² In holding to the contrary the court pointed out that:

[I]n cases such as the instant one in which the alleged wrongful attachment falls under categories (2), (3), and (4) a termination of that action in favor of the attachment defendant has no bearing upon the determination of whether the attachment writ was maliciously procured or improperly used.¹³

Thus the court concluded there was no reason why the attachment-defendant should not be allowed to pursue a counterclaim for abuse of process in the action where the attachment was initiated.

The holding is also significant in that it broadens the definition of an abuse or misuse of a process. It clearly indicates that the abuse need not always take the form of an overt threat to coerce the plaintiff into doing something he is not legally obligated to do. This appears to reverse a recent trend¹⁴ where the tort was apparently being limited to this very narrow form of abuse.

The essential elements of abuse of process have not been clearly defined in California.¹⁵ In attempting to define the required elements, the leading cases¹⁶ cite Dean Prosser¹⁷ and the

11. 205 Cal. App. 2d 337, 23 Cal. Rptr. 55 (1962).

12. *Id.* at 346, 23 Cal. Rptr. at 59.

13. 68 Adv. Cal. at 362, 438 P.2d at 354, 66 Cal. Rptr. at 706.

14. See *Spellens v. Spellens*, 49 Cal. 2d 210, 317 P.2d 613 (1957); *Coy v. Advance Automatic Sales Co.*, 228 Cal. App. 2d 313, 39 Cal. Rptr. 476 (1964); *Fairfield v. Hamilton*, 206 Cal. App. 2d 594, 24 Cal. Rptr. 73 (1962); *Tellefsen v. Key Sys. Transit Lines*, 198 Cal. App. 2d 611, 17 Cal. Rptr. 919 (1961).

15. 1 Cal. Jur. 2d *Abuse of Process* § 5 (1952).

16. *Pimentel v. Houk*, 101 Cal. App. 2d 884, 226 P.2d 739 (1951); *Tranchina v. Arcinas*, 78 Cal. App. 2d 522, 178 P.2d 65 (1948); and cases cited in note 14 *supra*.

17. Prosser defined these element as follows:

The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the

Restatement of Torts.¹⁸ From these sources it is clear that there are at least two elements necessary to sustain the tort.

First, there must be an ulterior motive or purpose behind the use of the process. This improper purpose must be the primary, motivating factor in the initiation of the process and must pervert the intended use of the process. It no longer appears that malice is required,¹⁹ but regardless of whether malice is necessary, it can be inferred from the second element, the wilful abuse of the process.²⁰ Although the ulterior motive may be inferred by the misuse of the process, the misuse of the process cannot be inferred from the motive.²¹

The second element necessary to sustain the tort is that there must be a definite, wilful act in the use of the process not authorized by the process.²² The confusion existing about this tort stems from

process not proper in the regular conduct of the proceedings. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by use of the process as a threat or a club. *There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort* (emphasis added).

W. PROSSER, LAW OF TORTS 877 (3rd ed. 1964) (footnotes omitted).

18. RESTATEMENT OF TORTS § 682. General Principle.

One who uses a legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby.

Comment:

a. The gravamen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings which were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in this Section.

RESTATEMENT OF TORTS § 682 (1938).

19. *Spellens v. Spellens*, 49 Cal. 2d 210, 232, 317 P.2d 613, 626 (1957); W. PROSSER, LAW OF TORTS 876 (3rd ed. 1964).

20. *Tranchina v. Arcinas*, 78 Cal. App. 2d 522, 526, 178 P.2d 65, 68; *Pimentel v. Houk*, 101 Cal. App. 2d 884, 886, 226 P.2d 739, 740.

21. W. PROSSER, LAW OF TORTS 877 (3rd ed. 1964).

22. See cases cited note 14 *supra*.

the uncertainty of what constitutes an act that abuses the process. Usually, the act is a threat made subsequent to the issuance of the process and with the intent to coerce compliance to the demands of the defendant.²³ An analysis of California case law²⁴ seems to indicate that a legal process may be abused in either of two general ways:

- (1) An overt threat made with the intent to prevent the process, or
- (2) the use of the process in violation of the defendant's rights.

The first is the classic form of abuse of process and consists of an overt threat with the intent to coerce the plaintiff into doing something he is not legally obligated to do.

The leading California case permitting recovery is *Spellens v. Spellens*,²⁵ where a writ of attachment was employed by the husband to coerce his wife into dropping her action for a judicial declaration that their marriage was valid. During the execution of the attachment, the husband offered to drop his claim if the wife would drop her action. Here the use of the attachment process was clearly perverted, and resulted in an abuse of process.

In *Tellefsen v. Key System Transit Lines*,²⁶ the plaintiff brought an action for abuse of process charging that the defendant appealed from an adverse judgment in another action with the purpose of obtaining a compromise settlement of the judgment. The court, in sustaining a general demurrer, stated that there must be some act other than the mere issuance of the process to sustain an action based upon an abuse of process.

In *Coy v. Advance Automatic Sales Co.*,²⁷ the plaintiff owned and operated an amusement machine business. The defendant, a creditor and competitor, had sued in a prior action for an amount alleged to be greater than actually owed. A writ of attachment was issued and the plaintiff's machines were attached, the value of the machines being far in excess of the amount prayed for in the complaint. During the levy, the defendant accompanied the marshal and installed his own machines wherever the plaintiff's were removed. In holding that an over-attachment did not

23. See note 17 *supra*, where Dean Prosser stresses this form of the tort.

24. See cases cited notes 14 and 16 *supra*.

25. 49 Cal. 2d 210, 317 P.2d 613 (1957).

26. 198 Cal. App. 2d 611, 17 Cal. Rptr. 919 (1961).

27. 228 Cal. App. 2d 313, 39 Cal. Rptr. 476 (1964).

constitute an act sufficient to sustain an action for abuse of process,²⁸ the court cited *Tellefsen* with favor and reiterated the requirement of some act other than the issuance of the process.

The most restrictive California case with respect to what constitutes a sufficient act is *Fairfield v. Hamilton*,²⁹ where the court denied an action for abuse of process because there was no direct evidence that the defendant offered to drop his action if the plaintiff complied with his demands. The implication was that an overt threat subsequent to the initiation of the process was absolutely essential to sustain the action. It was precisely for this reason that the lower court sustained the demurrer in *White Lighting v. Wolfson*.³⁰ The court stated that Wolfson alleged only an improper motive and failed to set out an act sufficient to support an action for abuse of process. Adherence to the rule in *Fairfield* would permit recovery only in those cases where there was direct evidence of an overt threat. In the case of an improper or excessive use of the process, absent any overt threat, there could be no recovery. The *Fairfield* court gave no indication that the abuse could be found in a form other than an overt threat to coerce the plaintiff into doing something he was not obligated to do.

However, it appears that those cases³¹ which required an overt threat to sustain the tort have overlooked a less restrictive form of the tort, as reflected in *Tranchina v. Archinas*,³² and *Pimentel v. Houk*.³³ These cases illustrate the principle that the use of a legal process which violates a legally protected right of the defendant may constitute an abuse of process.

In *Tranchina*, the defendant deceived the Office of Price Administration into permitting him to evict the plaintiff-tenant. The certificate authorized the eviction solely for the immediate occupancy by the owner. Following the eviction the owner failed to occupy the premises and instead rented portions of the property. In holding that such use of a legal process constituted an abuse of process the court laid the foundation for the second form of abuse of process. According to *Pimentel* it was the violation by the

28. This holding has been specifically overruled by *White Lighting*, 68 Adv. Cal. 347, 361 n.8, 438 P.2d 345, 354 n.8, 66 Cal. Rptr. 697, 706 n.8 (1968).

29. 206 Cal. App. 2d 594, 24 Cal. Rptr. 73 (1962).

30. 59 Cal. Rptr. 598, 600-01.

31. See cases note 14 *supra*.

32. 78 Cal. App. 2d 522, 178 P.2d 65 (1948).

33. 101 Cal. App. 2d 884, 226 P.2d 739 (1951).

landlord of the legal duty of peaceful enjoyment owed to the tenant that constituted the tort.³⁴

In *Pimentel*, the plaintiff attached defendant's farming equipment to secure an anticipated judgment on two promissory notes. Defendant counterclaimed alleging that plaintiff levied the attachment for the sole purpose of financially destroying the defendant. The court held that the cross-complaint did not show an improper use of the attachment process, merely an improper motive in using it. However, the court impliedly³⁵ took a more liberal position with respect to what constitutes an abuse or misuse of the attachment process. In supporting the lower court's demurrer on the facts of the case, it was said:

It is not alleged that said attachment covered property exempt from execution, *that it covered an excessive amount of the defendant's property*, that the debt alleged to be owed by defendant was otherwise secured, or that defendant requested that the levy be made upon other property.³⁶

Thus, in dicta, *Pimentel* offered the most liberal interpretation of what might constitute an act sufficient to sustain an action for abuse of process, and previewed the result in *White Lighting*. In discussing *Trachina*, the court in *Pimentel* stated "that the tort in the cited case lay in the violation by the landlord of a legal duty he owed the tenant."³⁷ It was the first case to articulate this form of abuse although *Trachina* was the first case actually allowing recovery.

The legal duty owed to an attachment-defendant was expressed in *Barceloux v. Dow*,³⁸ where the defendant's property had been attached to secure payment of attorneys' fees of \$35,000. The trial court sustained the defendant's motion to discharge the attachments on all property in excess of the amount stated by the plaintiff in the affidavit. The appellate court affirmed the order and in interpreting section 540 of the California Code of Civil Procedure³⁹ it held that the attachment-plaintiff owed a duty

34. *Id.* at 889, 226 P.2d at 742.

35. 68 Adv. Cal. 347, 361 n.7, 438 P.2d 345, 353 n.7, 66 Cal. Rptr. 697, 705 n.7 (1968).

36. 101 Cal. App. 2d at 886, 226 P.2d at 740.

37. *Id.* at 889, 226 P.2d at 742.

38. 174 Cal. App. 2d 170, 344 P.2d 41 (1959).

39. The statute provides;

[t]he writ must be directed to the sheriff, or a constable, or marshal of any county in which property of such defendant may be, and must require him to

“to attach only so much of defendant’s property as is necessary to satisfy plaintiff’s claim in full.”⁴⁰

White Lighting represents that class of cases where use of the process by the creditor was proper, but where it was carried to an extent not intended by the process. As in *Tranchina*, no overt threat was required to sustain the action. *White Lighting*, although not articulating the wrong in terms of a violation of a legal duty recognized that:

the wrongfulness in the excessive attachment lies, not in the institution of the suit or the procurement of the attachment, but in the illegitimate use of the attachment process to tie up more property than is reasonably necessary to secure the attaching creditor’s claim.⁴¹

If one interprets the excessive attachment as a violation of the right of the defendant to enjoy his property free from unwarranted interference from others, then such a result appears consistent with the decision in *Tranchina* and the dicta in *Pimentel*.

The holding in *White Lighting* raises a difficult question with regard to whether the creditor need have knowledge⁴² that the attachment is excessive⁴³ before an action for abuse of process can be maintained. The difficulty in determining the value of the debtor’s property would be a reason for denying any strict liability. On the other hand, it would seem reasonable that the attachment creditor cannot attach property indiscriminately without making any inquiry concerning its value.

White Lighting firmly establishes the principle that processes legally issued can be perverted by pursuing the action beyond the normally intended purpose. It is clear that a direct and overt act to

attach and safely keep all the property of such defendant within his county not exempt from execution, . . . or so much thereof as may be sufficient to satisfy the plaintiff’s demand against such defendant, the amount of which must be stated in conformity with the complaint

CAL. CODE CIV. PROC. § 540 (West 1954), *as amended*, (Supp. 1967).

40. 174 Cal. App. 2d at 173, 344 P.2d at 44.

41. 68 Adv. Cal. at 361, 438 P.2d at 354, 66 Cal. Rptr. at 706.

42. The attachment-creditor will usually have little or no knowledge regarding existing claims upon the debtor’s property. Thus, the attachment of that property, though of greater value than claimed in the affidavit, will not secure the debt because of the superior claims of the preexisting creditors.

43. *White Lighting* did not consider the question of what constitutes an over attachment. Criteria for determining whether any specific attachment is reasonable have not been delineated by the California courts.

coerce or threaten the defendant into submission is no longer an essential element to sustain an action for abuse of process. In those cases where the formal use of the process interferes with a legally protected right of the defendant, such use can constitute an act sufficient to sustain the tort.

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