

IN THE COURT OF APPEALS OF IOWA

No. 1-759 / 11-0120
Filed November 23, 2011

**BETTY DOBRATZ, P.H.D., and
TERRY BESSER, P.H.D.,**
Plaintiffs-Appellants/Cross-Appellees,

vs.

DANIEL KRIER, P.H.D.,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Story County, William J. Pattinson,
Judge.

ISU professors appeal the district court's ruling the tort of abuse of
process requires misuse of a judicial process. **AFFIRMED.**

Mark D. Sherinian and Melissa C. Hasso of Sherinian, Legrant, and Hasso
Law Firm, West Des Moines, for appellants.

Thomas J. Miller, Attorney General and George A. Carroll, Assistant
Attorney General, Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

This appeal presents an issue of first impression in Iowa—whether use of an internal administrative complaint procedure may be the basis for an “abuse of process” tort. We conclude this tort requires misuse of a judicial process. Accordingly, we affirm.

I. Background Facts and Proceedings.

Plaintiffs Betty Dobratz and Terry Besser are tenured professors at Iowa State University. Defendant Daniel Krier is an assistant professor at ISU. In March 2008, Krier filed a formal complaint of misconduct with the director of ISU’s office of equal opportunity and diversity. Krier alleged misconduct by plaintiffs and three other “senior colleagues . . . who have administrative power over me.” It is undisputed Krier’s formal complaint “was filed under [ISU’s] administrative rules contained in the faculty handbook.” The faculty handbook provides:

7.2.5 Formal Complaint Process

The formal complaint process is based upon peer review and respect for due process. It is an academic and not a judicial process. The goal is to determine the truth and to recommend and apply remedies and sanctions in keeping with the freedoms and responsibilities of the academic environment.

In May 2008, Krier amended the complaint to assert two additional charges: (1) Dobratz attempted to improperly influence the outcome of the investigation of Krier’s grievance and (2) Dobratz and Besser retaliated against him “for having filed a grievance against them.”

A faculty review board (FRB) was convened to respond to Krier’s complaints. The FRB hired Professor Lon Moeller of the University of Iowa to

conduct an investigation. Moeller's June 6, 2008 final report concluded the evidence did not support Krier's formal charges. The report was sent to Krier and the five respondents for comments. On June 25, 2008, the FRB issued its recommendation to the ISU provost:

After careful consideration of the charges brought by Dr. Krier, the investigative report prepared by Prof. Moeller, and the responses . . . the FRB has decided that the evidence does not sufficiently support any of the charges . . . and we recommend that the case be dismissed

In July 2008, ISU's provost dismissed Krier's administrative complaints: "I am accepting the FRB finding that there was not conduct in violation of the faculty conduct policy"

In December 2008, plaintiffs sued Krier for abuse of process, alleging:

The Defendant Krier used the administrative complaint process primarily to (1) delay or avoid the tenure and promotion decision which he was facing, (2) to disqualify Dobratz and Besser from their roles in his tenure and promotion decision, and/or (3) to intimidate other faculty members who might be critical of his candidacy for promotion and tenure.

In March 2010, jury trial commenced. The jury's special verdict responses found Krier committed "abuse of process" when he filed "either or both administrative complaints." The jury awarded compensatory and punitive damages to plaintiffs.

Krier filed a motion for judgment notwithstanding the verdict.¹ The court granted Krier's motion, dismissed the petition, and vacated the jury's verdict.

¹ The district court reserved ruling on Krier's motions for directed verdict at the end of the plaintiff's evidence and again at the close of all the evidence citing the "Uhlenhopp Rule." See *Butcher v. White's Iowa Inst.*, 541 N.W.2d 262, 264 (Iowa Ct. App. 1995). The district court explained: "Doing so gives the jury an opportunity to

The district court found:

[A]s a matter of law . . . [ISU's] faculty complaint procedure which Dr. Krier used in 2008 to lodge his charges . . . is not a "legal process" encompassed by the "abuse of process" tort.

. . . .

There is no doubt that the vast majority of . . . jurisdictions have declined to extend the abuse-of-process tort to nonjudicial proceedings. . . .

Those courts that have refused to apply the abuse-of-process tort to administrative proceedings uniformly based their decision on the notion that the tort's essence ". . . lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of penetrating an injustice."

Accordingly, if the purportedly abused process has no connection to a judicial forum it is not actionable.

Such remains the case in Iowa.

Dr. Kreir's use of [ISU's] complaint process in no way misused the power of this or any other court. It follows then, that the verdict . . . must be set aside.

(Citations omitted.)

Plaintiffs appeal.

II. Scope of Review.

"A motion for judgment notwithstanding the verdict is intended to allow the district court to correct any error in denying a motion for directed verdict." *Van Sickle Constr. Co. v. Wachovia Commercial Mortg.*, 783 N.W.2d 684, 687 (Iowa 2010). We review for correction of errors at law. *Id.*

III. Merits.

Plaintiffs first argue the district court erred in finding the "abuse of process" tort cannot be based on an administrative proceeding. Because we find the

consider the evidence, return a verdict, and potentially reach the same conclusion the trial court had tentatively reached."

resolution of this issue dispositive, we need not address the other issues raised on appeal.²

Plaintiffs contend Iowa precedent does not prevent the acceptance of an expansive interpretation of the “legal process” element of this tort and argue “the victim of the abusive institution of proceedings suffers the same injuries, whether those proceedings are administrative or judicial.” Plaintiffs assert Iowa should follow *Hillside Assoc. v. Stravato*, 642 A.2d 664, 668-69 (R.I. 1994), and hold the “abuse of process” tort can be based on administrative proceedings.

While we agree this is an issue of first impression in Iowa, we note the Iowa Supreme Court has discussed the scope of this tort’s “legal process” element. In *Fuller v. Local Union No. 106*, 567 N.W.2d 419, 421 (Iowa 1997), the petition was based on the allegation defendant “filed a false police report causing the Des Moines police department’s” OWI stop of plaintiff. The court ruled a report to the police is not sufficient “legal process.” *Id.* at 422. The *Fuller* court’s discussion of the “legal process” element contains multiple references to “court” or “judicial” actions or authority:

The tort of abuse of process is “the use of legal process, whether criminal or civil, against another primarily to accomplish a

² In January 2009, a deputy attorney general reviewed the pleadings and certified, “on the basis of the information now available,” Krier was acting in the scope of his employment. In May 2009, Krier answered and asserted the affirmative defense he was “acting in the scope of his employment as an employee of the State of Iowa when the incidents relating to Plaintiffs’ abuse of process claim occurred.” The court submitted Krier’s scope-of-employment defense to the jury and instructed the jury damages were recoverable only if plaintiffs proved Krier “was acting outside the scope of his employment at [ISU] when he filed his complaints” In its ruling on Krier’s post-trial motions, the court ruled the scope-of-employment issue “was factually based, and, as such, the decision in that regard belonged to the jury.” Krier now cross-appeals arguing he was acting within his scope of employment and is therefore immune from suit and liability. Because we affirm the dismissal of the petition based on the scope of the “abuse of process” tort, we need not address this issue of first impression.

purpose for which it was not designed.” The essence of this tort is an improper purpose for using the legal process. . . .

The three elements of an abuse-of-process claim are: (1) the use of a legal process; (2) its use in an improper or unauthorized manner; and (3) the plaintiff suffered damages as a result of the abuse.

We have not precisely identified what action constitutes a “legal process” sufficient to satisfy the first element. . . .

One authority defines the required “legal process” as “*process which emanates from or rests upon court authority, and which constitutes a direction or demand that the person to whom it is addressed perform or refrain from doing some prescribed act.*” 1 Am. Jur. 2d *Abuse of Process* § 2, at 411 (1994). Another commentator states that “it is *clear that the judicial process must in some manner be involved*” in order to meet the first element. W. Page Keaton et al., *Prosser and Keaton on the Law of Torts* § 121, at 898 (5th ed.1984). . . . The Massachusetts court of appeals has defined process as “the *papers issued by a court* to bring a party or property within its jurisdiction”

Other courts have considered what is sufficient to constitute “legal process” New York’s high court held an affidavit sent to a department of state government alleging misdeeds by a real estate broker and requesting the department to take whatever steps it deemed appropriate did not constitute “legal process” Finally an Illinois court ruled that a psychiatric report, obtained pursuant to a court order, was not “legal process” because the *report was not issued by a court.*

There is some scant authority to the contrary. . . .

We think the better view is that . . . a report to the police is not sufficient to constitute [the] “legal process” required for an abuse-of-process claim.

Id. at 421-22 (emphasis added) (citations omitted).

Despite this language, plaintiffs argue the Iowa Supreme Court impliedly approved an administrative basis for the “abuse of process” tort in *Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 400 (Iowa 1998). In *Penn*, a professor sued a student in connection with the university’s administrative investigation/hearing on the student’s sexual harassment charge against the professor. 577 N.W.2d at 396. Because the Iowa Supreme Court ruled the

professor's abuse of process claim failed to meet the statute of limitations, this case is not instructive. *See id.* at 400.

In 1998, the Nebraska Supreme Court surveyed the case law and ruled: "With the exception of *Hillside Associates* [1994 Rhode Island], the cases addressing this issue have held that process issued in an administrative proceeding cannot form the basis of an action for abuse of process." *Gordon v. Cmty. First State Bank*, 587 N.W.2d 343, 352-53 (Neb. 1998) (ruling alleged abuse of banking administrative process failed to state a claim for abuse of process). For example, in *Stolz v. Wong Commc'ns Ltd. P'ship*, 31 Cal. Rptr. 2d 229, 236-37 (Cal. Ct. App. 1994), California refused to extend the tort to include the abuse of administrative proceedings:

[N]o cause of action was stated because the tort of abuse of process requires misuse of a judicial process, and the only conduct of which plaintiff complained was alleged misuse of the administrative process of the FCC.

....

Application of the tort to administrative proceedings would not serve the purpose of the tort, which is to preserve the integrity of the court.

....

[T]he tort evolved as a 'catch-all' category to cover improper uses of the judicial machinery

More recently, in 2007, the Colorado Court of Appeals refused to extend the tort to administrative proceedings, ruling:

Here, [plaintiff] argues that defendants abused the workers' compensation process

A cause of action for abuse of process reflects the need to protect the integrity of judicial proceedings. Thus, the general rule is that "the judicial process must in some manner be involved." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 121, at 898 (5th ed.1984).

....

The vast majority of jurisdictions decline to recognize abuse of process in nonjudicial proceedings. Consistent with the analysis in these cases, which we find to be well reasoned, we decline to extend abuse of process to a workers' compensation proceeding because such claims do not involve any contact with a judicial forum.

Moore v. Western Forge Corp., 192 P.3d 427, 438-39 (Col. Ct. App. 2007) (citations omitted).³

During oral arguments, plaintiffs acknowledged Rhode Island is the only state supreme court to expand the abuse of process tort to administrative proceedings. We concur with the opinions expressed by the clear majority of the courts and decline plaintiffs' request to follow Rhode Island and expand the tort of abuse of process to include administrative proceedings. An actionable tort for abuse of process does not exist in Iowa unless there is some improper use of the process of the court. Accordingly, plaintiffs' claim fails.

AFFIRMED.

³ The cases cited by the Colorado court include: *Stagemeyer v. County of Dawson*, 192 F. Supp. 2d 998, 1010 (D. Neb. 2002) ("The 'process' in an abuse-of-process claim means judicial, as opposed to administrative, process because the purpose of the tort is to preserve the integrity of the court and the judicial process."); *O'Hayre v. Bd. of Educ.*, 109 F. Supp. 2d 1284, 1296-97 (D. Colo. 2000) (finding suspension of student by school administrators was not actionable "process" because "an abuse of process claim must involve the judicial process"); *Char v. Matson Terminals Inc.*, 817 F. Supp. 850, 858-59 (D. Haw. 1992) (ruling an appeal to state unemployment agency was not "process" for "abuse of process" tort—judicial process must be involved); *McCarthy v. KFC Corp.*, 607 F. Supp. 343, 345 (W.D. Ky. 1985) (dismissing claim based on employer's resistance to unemployment compensation claim because no judicial proceeding involved); *Kirchner v. Greene*, 691 N.E.2d 107 (Ill. Ct. App. 1998) (ruling abuse of process claim based on the initiation of DHS investigative proceedings failed because no court process was involved). California reaffirmed its decision not to expand the scope of this tort in *ComputerXpress v. Jackson*, 113 Cal. Rptr. 2d 625, 644 (Cal. Ct. App. 2001) (holding abuse of process requires misuse of a judicial process and does not extend to misuse of administrative proceedings).