Docket No. 31332
Supreme Court of Idaho, Boise, March 2005 Term

Cunningham v. Jensen

Decided Sep 14, 2005

Docket No. 31332.

Filed September 14, 2005. Opinion Withdrawn January 23, 2006.

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Michael R. McLaughlin, District Judge.

The district court's order dismissing the Cunninghams' claims for abuse of process, conspiracy to commit abuse of process, and intentional infliction of emotional distress pursuant to I.R.C.P. 12(b)(6) is: vacated and remanded.

Dennis M. Charney, Eagle, for appellants.

Holland and Hart, LLP, Boise, for respondents William McCurdy, J. Nick Crawford, and Brassey, Wetherell, Crawford and McCurdy, LLP. B. Newal Squyres argued.

Ringert Clark, Chtd., Boise, for respondents Jensen and Hansen.

TROUT, Justice.

This is an appeal from a district court decision dismissing the Cunninghams' claims of abuse of process, conspiracy to commit abuse of process, and intentional infliction of emotional distress, pursuant to I.R.C.P. 12(b)(6). Because we now articulate a broader definition of an abuse of process claim and how such a claim must be pled, we vacate the district court decision and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

In August 1998, the Cunninghams entered into a real estate contract with Respondents Donald and Charlotte Jensen, for the sale of real property referred to as the Willow Creek Ranch, in the amount of $850,000. After the sale closed, the parties became embroiled in a dispute over numerous alleged misrepresentations made by the Jensens during the transaction. As a result, the Cunninghams brought a lawsuit against the Jensens and the Jensens' grandson, Arthur Hansen (referred to collectively as the Jensens), for wrongful concealment of property defects, falsely stating property boundaries and condition and falsely promising to take certain actions regarding irrigation. In this underlying lawsuit, the Jensens were represented by attorneys William McCurdy and J. Nick Crawford and their law firm, Brassey, Wetherell, Crawford, and McCurdy, LLP (the Law Firm).

During the pre-trial phase of the underlying litigation, the Cunninghams complained that the Jensens and the Law Firm engaged in wrongful and abusive actions for the purpose of delaying, stalling and subverting the Cunninghams' case, such as failing to appear for depositions, failing to produce documents, and failing to comply with court orders. The Cunninghams asked the trial court to impose severe sanctions for the alleged wrongful conduct, including striking the answer and entering default. The trial court refused to enter default,

but entered four separate orders for attorneys' fees and costs against the Jensens totaling $6,513.89, and monetary sanctions in the amount of $17,200.00, specifically noting that the Jensens and the Law Firm had caused delays in the speedy resolution of the case and had been the cause of unnecessary expenditures by the Cunninghams. Ultimately, the lawsuit was settled and the case dismissed.

However, prior to settlement, based on the conduct of the Jensens and the Law Firm in the underlying suit, the Cunninghams filed the instant lawsuit based on the tort of abuse of process, conspiracy to commit abuse of process, and intentional infliction of emotional distress. The complaint alleged that the defendants had intentionally delayed the filing of an answer, engaged in numerous discovery abuses, presented false and perjured testimony and affidavits to the district court, refused to comply with district court orders compelling discovery, and filed motions and pleadings with the district court that were for the purpose of delaying, stalling and subverting the Cunninghams' case and/or to gain collateral advantages in the proceeding not authorized by law. The complaint also alleged that as a result of these wrongful actions, the Cunninghams incurred numerous injuries, including the loss of their anticipated trial date, the inability to use Willow Creek Ranch for its intended purpose, the inability to cultivate crops, the inability to divide and develop an 80-acre section of the ranch, an inability to begin construction of their home because they had to expend their resources in the litigation, and damages associated with severe emotional distress.

The Jensens and the Law Firm both filed separate motions to dismiss these claims pursuant to I.R.C.P. 12(b)(6). Although affidavits were filed in support of the motions, the trial judge clearly treated the matter as a 12(b)(6) motion, not a motion for summary judgment. The district court granted the motions, finding that the complaint failed to state a claim upon which relief could be granted. The trial court determined that the allegations raised in the complaint, even if taken as true, did not rise to the level of the use of "process," the defendants' conduct was not extreme and outrageous, and public policy considerations dictated that the proper remedy for the alleged conduct was for court sanctions rather than a separate tort action.

The Cunninghams timely filed a notice of appeal, arguing that the district court erred by too narrowly interpreting the term "process" as used in the tort of abuse of process and by dismissing the other claims. The case was assigned to the Court of Appeals, which affirmed the district judge. The Cunninghams then sought leave for review by this Court, which was granted.

II. STANDARD OF REVIEW

The Court, on a petition for review of a Court of Appeals decision, gives serious consideration to the views of the Court of Appeals, but directly reviews the decision of the lower court. *Head v. State*, 137 Idaho 1, 43 P.3d 760 (2002). The standard of review for an order of a district court dismissing a case under Rule 12(b)(6) of the Idaho Rules of Civil Procedure is the same as the summary judgment standard of review. *See BHA Investments, Inc., v. State*, 138 Idaho 348, 350, 63 P.2d 474, 476 (2003); *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398, 987 P.2d 300, 310 (1999). However, a 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated, while a motion for summary judgment looks at all the evidence in the record to see if there are issues of material fact and whether the moving party is entitled to a judgment as a matter of law. *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002). After viewing all facts and inferences from the pleadings in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. *Coghlan*, 133 Idaho at 398, 987 P.2d at 310. "The issue is not whether the plaintiff will ultimately prevail, but whether the party is `entitled to offer evidence to support the claims.'" *Id.* citing *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (citations omitted).

III. ANALYSIS

A. Abuse of Process

In Idaho, the essential elements of the tort of abuse of process have previously been recognized as: (1) an ulterior, improper purpose and (2) a willful act in the use of the process not proper in the regular course of the proceeding. *Badell v. Beeks*, 115 Idaho 101, 104, 765 P.2d 126, 129 (1998). The general principles relating to a determination that a party has abused the court's processes has also been stated as follows:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

Restatement (Second) of Torts § 682 (1977). However, we have never fully defined the scope of the tort of abuse of process in Idaho, nor articulated the standards necessary for pleading the cause of action.

In their complaint, the Cunninghams' references to the "ulterior, improper purpose" element of the claim include the following:

> 10. From the time that Plaintiffs filed suit against Defendants . . . until the date of the filing of this complaint, one or some combination of the Defendants to this lawsuit engaged in a wrongful and abusive course of action with the sole purpose of delaying, stalling and subverting the Plaintiff's case and/or to gain collateral advantages in the proceeding that are not authorized by law.
>
> 11. [Defendants'] course of action . . . [was] not intended to advance the litigation, but rather, to delay and/or hinder the litigation.

. . . .

> 13. The above facts constitute a malicious misuse and/or misapplication of regularly issued civil process to accomplish purposes not permitted by the Idaho Rules of Civil Procedure, any Idaho statute or any case law decided by the Idaho Appellate Courts.

The complaint also makes the following allegations regarding a willful act in the use of process:

> 11. This course of action included, but was not limited to, intentionally delaying the filing of an answer to the Plaintiff's complaint, intentionally delaying the taking of discovery depositions, intentionally refusing to appear for scheduled depositions, refusing to comply with lawful requests for production of documents relevant to the Plaintiff's case, refusing to comply with deposition notices that requested the production of documents, presenting false and perjured testimony, presenting false and perjured affidavits to the Court, refusing, on numerous occasions, to comply with orders compelling discovery entered by the Court, filing motions and pleadings with the Court which were not intended to advance the litigation, but rather, to delay and/or hinder the litigation and making unsworn statements to the Court which were false and/or misleading.

The district court found the complaint insufficient because it did not allege an actual use of court "process," under a more limited definition of the term. "Process" has traditionally been defined as a "summons or writ, esp. to appear or respond in court." BLACK'S LAW DICTIONARY 1222 (7th ed. 1999). "Process is so denominated because it proceeds or issues forth in order to bring the defendant into court, to answer the charge preferred against him, and signifies the writs or judicial means by which he is brought to answer. *Id.* Some courts continue to follow this narrow definition of process. *See, e.g., Doyle v. Shlensky*, 458 N.E.2d 1120, 1128 (Ill.App.Ct. 1983) (noting that process issued by the court must be distinguished from pleadings which are

created and filed by the litigants). However, we think the better reasoned approach used by an increasing number of courts, is to give a broader definition to "process" to include a wide range of procedures related to the litigation process. *See, e.g., Nienstedt v. Wetzel*, 651 P.2d 876, 881 (Ariz.Ct.App. 1982). Thus, we reevaluate the sufficiency of the complaint in this case regarding the allegations of "use of process" under this developing case law.

We note that the Court of Appeals and the district judge apparently considered not only the complaint filed in this case, but also an affidavit provided by the Jensens containing the district court's orders in the underlying litigation regarding sanctions, which set forth factual matters relating to those sanctions. However, even though the parties filed affidavits and apparently attempted to present extrinsic information, the district judge clearly stated in his order that he was considering this only as a 12(b)(6) motion for judgment on the pleadings. For purposes of such a motion, it is proper only to consider the allegations in the complaint itself, and not any extrinsic information. *Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 133, 106 P.3d 455, 459 (2005). Therefore, on appeal we will judge the sufficiency of the Cunninghams' claims for relief solely on the basis of the complaint and not on any collateral information.

A motion to dismiss under Rule 12(b)(6) for failure to state a claim is usually read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim and calls for "a short and plain statement of the claim showing that the pleader is entitled to relief" and a demand for relief. I.R.C.P. 8(a)(1), (2). As with a motion under Rule 8(a), every reasonable intendment will be made to sustain a complaint against a Rule 12(b)(6) motion to dismiss. *Idaho Comm'n on Human Rights v. Campbell*, 95 Idaho 215, 217, 506 P.2d 112, 114 (1973). A court may normally grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only "when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." *Wackerli v. Martindale*, 82 Idaho 400, 405, 353 P.2d 782, 787 (1960); *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995).

It need not appear that the plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be granted. Wright Miller, Federal Practice and Procedure § 1357, at 339 (1990). Whether the pleadings meet this liberal standard presents a question of law over which the Court will exercise free review. *Ernst*, 120 Idaho at 945, 821 P.2d at 1000. But as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief. Wright Miller, *supra*, § 1357, at 344-45.

We conclude that since several policy considerations for this type of cause of action need to be addressed, it is appropriate to require, as we do with fraud, that there be specific allegations in the complaint to support a cause of action for abuse of process. Thus, against this background, we now address the legal requirements necessary to establish an abuse of process claim.

1. Ulterior, Improper Purpose

The requirement that a party asserting an abuse of process claim must prove an ulterior, improper purpose on the part of the defendant comes from the belief that a perversion of legal process is only contemplated when a party uses the process "primarily to accomplish a purpose for which the process was not designed." *General Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 304 (3rd Cir. 2003). Traditionally, "[t]he improper purpose [has taken] 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 the use of the process as a threat or club, . . . [i]n other words, a form of extortion." *Butera v. Boucher*, 798 A.2d 340, 353 (R.I. 2002) (quoting W. Page Keeton, *Prosser Keeton on the Law of Torts*, § 121 at 898 (5th ed. 1984)).

However, the modern trend is to interpret the tort more broadly so that an ulterior, improper motive can include "legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process." *General Refractories*, 337 F.3d at 305, quoting *McGee v. Feege*, 535 A.2d 1020, 1026 (Pa. 1987); *See also Crackel v. Allstate Ins. Co.*, 92 P.3d 882, 887 (Ariz.Ct.App. 2004) (a party can demonstrate the `ulterior purpose' element of abuse of process by showing that the process has been used primarily to accomplish a purpose for which the process was not designed); *Nienstedt v. Wetzel*, 651 P.2d 876, 882 (Ariz.Ct.App. 1982) (the point of liability is reached when the utilization of the procedure for the purpose for which it was designed becomes so lacking in justification as to lose its legitimate function as a reasonably justifiable litigation procedure); *Ion Equipment Corp. v. Nelson*, 168 Cal.Rptr. 361, 369 (Cal.Ct.App. 1980) (The ulterior motive to prove is that the party employing the process did so for an end not germane thereto, and an improper purpose may consist in achievement of a benefit totally extraneous to or of a result not within its legitimate scope.)

There are troubling concerns in adopting a broader definition for the tort of abuse of process. There is clearly the potential for litigants to abuse this cause of action, filing lawsuits outside the main litigation to obtain undue advantage in the underlying suit, or burdening the courts with claims of improper litigation tactics for every perceived slight by their opponents. Further, there are remedies within the litigation itself, such as court-ordered sanctions, which can compensate litigants for abusive tactics by the opposing party. Allowing recovery of damages in an abuse of process action that could be recoverable and addressed by the court in the underlying litigation would be inefficient and could create the possibility that a disappointed litigant would seek a "second opinion" if the litigant didn't feel the sanctions were sufficient in the first case. As one court has noted:

> [A]ttorneys have a relatively swift mechanism for redressing careless, slick, underhanded, or tacky conduct: court-imposed sanctions. Once imposed, sanctions may be reviewed by an appellate court. They may not, however, be tried de novo under the guise . . . of a tort action. [Such would] represent an intolerable attempt to end-run and abuse the judicial system and could lead to a geometric proliferation of litigation.

Pollack v. Superior Court, 279 Cal.Rptr. 634, 636 (Cal.Ct.App. 1991).

Thus it is important to impose a requirement that the plaintiff plead and prove an ulterior, improper purpose. A party properly asserting an ulterior, improper purpose must also allege with specificity and prove that the primary purpose of the abusive action was external to the litigation, rather than simply gaining an advantage in the litigation itself. The plaintiff must also show that the defendant's improper purpose was the primary motivation for its actions, not merely an incidental motivation. Thus, more emphasis is placed on the external motivations of a party using a particular litigation procedure, rather than a technical definition of the process used to accomplish the intended end.

Further, the plaintiff must allege and prove that the damages or consequences associated with the defendant's actions are external to the litigation and are such that they cannot be compensated in the underlying proceeding (not simply inadequately redressed). Finally, because of the above policy considerations, plaintiffs must plead these matters with specificity and will bear a clear and convincing burden of proof concerning the ulterior, improper purpose element if the matter goes to trial.

2. Willful Act in the Use of Process

Contrary to a more limited definition of "process" requiring actual court action or intervention, courts now have been inclined to interpret the term more broadly to encompass the entire range of procedures incident to the litigation process. *See, e.g., General Refractories Co. v. Fireman's Fund. Ins. Co.*, 337 F.3d 297 (3rd Cir. 2003)

(use of discovery proceedings, making misrepresentations to opposing counsel and the court and filing motions considered process); *Hopper v. Drysdale*, 524 F.Supp. 1039 (D.Mont. 1981) (filing notice of deposition can be the basis for an abuse of process claim); *Crackel v. Allstate Ins. Co.*, 92 P.3d 882 (Ariz.Ct.App. 2004) (a litigant may commit abuse of process while merely defending an underlying action through conduct such as serving an unreasonable offer in bad faith, asserting bogus defenses, exercising procedural rights, engaging in misconduct at mandatory settlement conferences); *Nienstedt v. Wetzel*, 651 P.2d 876 (Ariz.Ct.App. 1982) (the entire range of court procedures incident to litigation, including the noticing of depositions, entry of defaults and the utilizations of various motions, could be the basis for an abuse of process claim); *Food Lion, Inc. v. United Food Commercial Workers Int'l Union*, 567 S.E.2d 251, 253 (S.C.Ct.App. 2002) (process embraces full range of activities and procedures attendant to litigation including taking discovery and filing motions);

However, even the broadest definition of "use of process" should require a party to "actively seek and employ a legal process. . . ." *General Refractories*, 337 F.3d at 311, quoting *Hart v. O'Malley*, 647 A.2d 542, 551 (Pa. 1994); *See also Nienstedt*, 651 P.2d at 881 (essential to an abuse of process claim is a willful act in the use of judicial process); *Hainer v. Am. Med. Int'l, Inc.*, 492 S.E.2d 103, 107 (S.C. 1997) (some definite act in the use of process is required); *Brown v. Kennard*, 113 Cal.Rptr.2d 891, 895 (Cal.Ct.App. 2001) (abuse of process requires affirmative act outside the purpose of the process); *Ruberton v. Gabage*, 654 A.2d 1002, 1005 (N.J. Super Ct. App. Div. 1995) ("[t]here can be no abuse of process without use. If the process is not used at all no action can lie for its abuse."). Thus, the defendant must make some actual use of the judicial proceeding, whether it is by conducting discovery or filing motions and pleadings. Mere delay or inaction does not constitute the use of process.

We agree with the above authorities which have held that a willful act in the use of various litigation procedures is necessary to support this element of an abuse of process claim. Therefore, to establish a claim for abuse of process there must be a showing by clear and convincing evidence that the defendant has (1) affirmatively used a legal process against the plaintiff; (2) primarily to accomplish an improper purpose outside of simply gaining an advantage in the underlying litigation for which the process was not designed; and (3) harm has been caused to the plaintiff by misuse of the process external to the litigation that cannot be compensated in the underlying proceeding. Again, the allegations in a complaint pleading abuse of process must be made with specificity, alleging the facts supporting each element of the cause of action.

3. The Cunninghams' Complaint

While the Cunninghams' complaint contains several allegations that would qualify as constituting a use of process, i.e., filing motions and pleadings, it also contains many allegations that are not sufficient to assert an abuse of process under the above analysis, such as delay in filing an answer and responding to discovery requests, or refusal to appear at depositions. The allegations as to an improper and ulterior purpose also must be revisited, as they have not been pled with sufficient specificity as to what purpose outside of the underlying litigation itself defendants intended in improperly using the process. Finally, it is unclear from the current complaint whether the alleged damages were external to the litigation, and could not have been addressed in the previous court-ordered sanctions. Thus, the case must be remanded to allow the Cunninghams the opportunity to amend their complaint to plead an abuse of process claim in a manner consistent with the legal principles outlined in this decision.

B. Conspiracy to Commit Abuse of Process

The district court correctly found that civil conspiracy is a derivative tort that relies on an underlying actionable wrong. Since we are remanding the case to allow the Cunninghams the opportunity to set forth sufficiently an actionable wrong for abuse of process in accordance with the legal requirements set forth in this opinion, the district court's dismissal of this claim is also vacated.

C. Intentional Infliction of Emotional Distress

The district court found the Cunninghams' complaint also failed to allege the type of conduct necessary to state a claim for intentional infliction of emotional distress (IIED). In Idaho, the elements of IIED are: (1) the defendant's conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the plaintiff's emotional distress; and (4) the emotional distress was severe. *Edmondson v. Shearer Lumber Prod.*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003). The defendant's conduct must be more than simply unjustifiable, and must rise to a level of atrocious conduct, beyond all possible bounds of decency, so that it would cause an average member of the community to believe it was outrageous. Other courts have said that the conduct must be so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community. *See Coors Brewing Co. v. Floyd*, 978 P.2d 663, 666 (Colo. 1999); *Trujillo v. Northern Rio Arriba Elec. Co-op, Inc.*, 41 P.3d 333, 343 (N.M. 2001); *Computer Publns., Inc. v. Welton*, 49 P.3d 732, 735 (Okla. 2002); *Harris v. Jefferson Partners*, 653 N.W.2d 496, 500 (S.D. 2002); *Finlan v. Dallas Indep. Sch. Dist.*, 90 S.W.3d 395, 411 (Tex.App. 2002); RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965).

In their complaint, the Cunninghams alleged, in part, that the conduct of the defendants was intentional and/or reckless, that it was extreme and/or outrageous, that it directly resulted in the Cunninghams suffering extreme emotional and physical distress and that the emotional distress was and continues to be severe. They also contended that the defendants knew or should have known that their conduct, collectively and individually, would cause the Cunninghams to suffer emotional distress. The complaint further alleged that as a direct and proximate result of defendants' actions, the Cunninghams have been required to retain the services of licensed professionals in an attempt to resolve the physical and emotional problems caused by the defendants.

The district court erroneously dismissed this claim on the basis that the alleged conduct was not extreme and outrageous. This finding took the court outside of the pleadings and necessitated an evaluation the evidence, which is not appropriate in a motion to dismiss for failure to state a claim. The question of whether behavior is sufficiently extreme to constitute outrageous behavior is typically a factual matter and is properly determined at trial, or possibly after discovery upon a motion for summary judgment if there are no disputed facts. *See, e.g., Angie M. v. Superior Court*, 44 Cal.Rptr.2d 197, 203 (Cal.Ct.App. 1995). To sustain an IIED claim on a 12(b)(6) motion the court must simply determine whether the complaint meets the pleading requirements of Rules 8(a) and 12(b)(6).

Here, from the allegations in Cunninghams' complaint, we cannot say that there are no set of facts under which Cunninghams could prevail, or that there is some insurmountable bar to relief. While the allegations are clearly bare and minimal, the Cunninghams have at least recited all of the elements for an IIED claim. Therefore, it was improper for the trial court to make fact-finding determinations as to the level of the conduct alleged for purposes of determining a 12(b)(6) motion.

The district court was also persuaded by authority stating that there is an absolute privilege for statements made during a judicial proceeding that extends to tort claims including IIED. The court found that the privilege precluded the IIED claim in this case. Likewise, on appeal, the Jensens urge that allegations referring to false or

perjured testimony, false or perjured affidavits, motions and pleadings not intended to advance the litigation, and false or misleading unsworn statements made during the course of the underlying litigation, are absolutely privileged and cannot form the basis of a separate tort action.

In Idaho, the only relevant privilege previously recognized, which is based on public policy, concerns defamatory statements made during judicial proceedings. The Court of Appeals, in *Malmin v. Engler*, 124 Idaho 733, 864 P.2d 179 (Ct.App. 1993), stated that "`with certain exceptions, unimportant here, defamatory matter published in the due course of a judicial proceeding, having some reasonable relation to the cause, is absolutely privileged and will not support a civil action for defamation although made maliciously and with knowledge of its falsity. . . .'" *Id.* at 736 (quoting *Richeson v. Kessler*, 73 Idaho 548, 551-52, 255 P.2d 707, 709 (1953) (citations omitted). However, no Idaho court has extended this defamation privilege to IIED claims that are based on conduct occurring during litigation.

Other courts have recognized that the defamation privilege for statements made during a judicial proceeding extends beyond defamation claims to encompass other tort claims, such as IIED. *See, e.g., Hampe v. Foote*, 47 P.3d 438 (Nev. 2002) (although this case was decided based on a statutory privilege barring any civil litigation based on underlying judicial communication); *DeBry v. Godbe*, 992 P.2d 979 (Utah 1999) (the judicial proceeding privilege extends not only to defamation claims but to all claims arising from the same statements, including IIED); *Paulson v. Sternlof*, 15 P.3d 981 (Okla.Ct.App. 2000) (there is an absolute privilege for communications made preliminary to proposed judicial or quasi-judicial proceedings in favor of attorneys, parties and witnesses which bars defamation actions as well as those for IIED).

However, while these courts have been willing to extend the immunity for statements made during judicial proceedings to other tort claims besides defamation, some have continued to recognize tort liability for attorneys and their clients who engage in a course of intentional wrongful conduct during litigation. In *Ulmer v. Frisard*, 694 So.2d 1046 (La.App. 1997), the court noted that the Louisiana Supreme Court found in *Penalber v. Blount*, 550 So.2d 577, 582 (La. 1989), that "intentionally tortious actions, ostensibly performed for a client's benefit, will not shroud an attorney with immunity." 694 So.2d at 1048; *See also Schick v. Lerner*, 238 Cal.Rptr. 902 (Cal.Ct.App. 1987) (an attorney may not, with impunity, in the course of his representation of a client, engage in intentional tortious conduct against third persons).

The policy reasons supporting the privilege in defamation actions should no longer apply at the point where the conduct is extreme and outrageous and the parties and/or counsel are intentionally engaged in tortious activity. Moreover, even if we were to follow other jurisdictions in extending the defamation immunity to other tort actions, that immunity has narrowly been defined in terms related to statements made during the course of litigation, not conduct. Here, the Cunninghams' allegations relate to conduct, not statements, during the course of litigation. Therefore, we decline to extend the defamation privilege to the IIED claim in this case and the district court's order dismissing this claim is vacated.

IV. CONCLUSION

Since we have more fully defined the scope of an abuse of process claim and the legal requirements for pleading the cause of action, the district court's order dismissing the Cunninghams' claims for abuse of process and conspiracy to commit abuse of process is vacated and the case is remanded to allow the Cunninghams an opportunity to amend their complaint in accordance with the legal principles set forth in this opinion. The district court's order dismissing the Cunninghams' claim for intentional infliction of emotional distress is also vacated. We award costs on appeal to the Cunninghams.

Chief Justice SCHROEDER and Justice Pro Tem KIDWELL **CONCUR.**

Justice JONES, CONCURRING IN PART AND DISSENTING IN PART.

The Court has done an admirable job of laying out the elements of, and the pleading standards for, the tort of abuse of process. However, while the traditional view of "process" was too narrow, the majority's view is too broad. In my mind, the process that is the subject of the abuse must be such that the tortfeasor is misusing the authority of the court. It should not encompass the entire range of procedures incident to the litigation process. Further, I disagree with the conclusion that the district court's order dismissing the complaint should be vacated. I would affirm.

In Part A.1, the Court correctly states that the modern trend among appellate courts is to interpret abuse of process more broadly so that an ulterior, improper motive can include "legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process." (quoting *General Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297 (3d Cir. 2003)). The pleading requirements laid out by the majority are appropriate in order to minimize the potential abuse or misuse of this cause of action. This part of the opinion is apt and well stated and I concur.

However, I disagree with the majority's definition of "process" in Part A.2. The statement that process includes "the entire range of procedures incident to the litigation process" is too expansive and amorphous to be of much utility. A fairly generic phrase, it (or a substantially similar version thereof) is found in many of the cases explaining the term process. *See, e.g., Food Lion, Inc. v. United Food Commercial Workers Int'l Union*, 567 S.E.2d 251, 253 (S.C.Ct.App. 2002); *Neinstedt v. Wetzel*, 651 P.2d 876, 880 (Ariz.Ct.App. 1982); *General Refractories, supra.* The phrase means little by itself; indeed, courts generally recite it as a general principle and follow it with an examination of whether the allegations in the particular case constitute process. In this case, the opinion does not conduct such an examination, except to say that delay in filing an answer and responding to discovery requests and refusing to appear at depositions is not process. The opinion does direct the reader to a handful of cases and offers parenthetical summaries of their general holdings. But these do little to assist in determining what in the "entire range of procedures incident to the litigation process" constitutes process and what does not. Seemingly, everything is included.

The definition of "process" should be limited to those acts which distort the legal process by misusing the authority of the court. I would not define it to include literally the *entire* range of procedures incident to the litigation process. For instance, referring to the parenthetical summaries of the cases referenced by the majority, it is difficult to conceive of an instance where serving an unreasonable offer in bad faith, asserting bogus defenses, or exercising procedural rights, could constitute a misuse of the court's authority (although misusing some procedural processes might qualify). Making misrepresentations to opposing counsel and the court is certainly reprehensible, but there are other remedial measures available to address this type of wrongdoing. Rather than alluding to certain procedures that have been considered by other courts to have been abused, we should focus on a criteria that will get to the nub of the issue and will allow a party to seek appropriate redress where judicial procedures have been misused for an ulterior, improper purpose.

"`Process is a means whereby a court compels a compliance with its demands.'" *Abraham v. Lancaster Community Hospital*, 217 Cal. App.3d 796, 828, 266 Cal. Rptr. 360, 380 (Cal.Ct.App. 1990). As the California Court of Appeals has explained, "the essence of the tort `abuse of process' 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 perpetrating an injustice." *Meadows v. Bakersfield Sav. Loan Ass'n*, 250 Cal.App.2d 749, 753, 59 Cal.Rptr. 34, 37 (Cal.Ct.App.

1967). It requires that "the person to whom [the procedures incident to litigation] are directed perform or refrain from performing some prescribed act." *Wells v. Waukesha County Marine Bank*, 401 N.W.2d 18, 25 (Wis.Ct.App. 1986) (citing *Younger v. Solomon*, 38 Cal.App.3d 289, 296-97, 113 Cal.Rptr. 113, 117-18 (Cal.Ct.App. 1974)). This is the all-important characteristic the majority's rule lacks.

So, for example, in *Wells*, the Wisconsin Court of Appeals held that serving copies of a nonjudicial body's decision on the plaintiffs was not process because they "were not documents issued by a court; they did not purport to exercise jurisdiction over the recipients or their property or command appearance, action, or inaction under pain of judicial sanction or other penalty." *Wells*, 401 N.W.2d at 26. Filing a notice of *lis pendens* has been held not to constitute process, "because it does not require a party to take affirmative action." *City of Angoon v. Hodel*, 836 F.2d 1245, 1248 (9th Cir. 1988). In *Younger v. Solomon*, on the other hand, the California Court of Appeals ruled that using written interrogatories, specifically authorized by that state's Code of Civil Procedure and enforced with sanctions, did fall within "the range of procedures incident to litigation . . ." *Younger*, 38 Cal.App.3d at 296-7, 113 Cal.Rptr. at 118. In another case, that court offered another example of how it is an abuse of the court's authority that triggers the tort:

> Although the giving of a notice that a deposition will be taken is not `process' in the strictest sense of the word, we are inclined to the belief that in a proper case an abuse of the powers which a litigant derives from the taking of a deposition on proper notice gives such notice the status of `process' for the purpose of the tort under consideration.

Thornton v. Rhoden, 245 Cal.App.2d 80, 94-95, 53 Cal.Rptr. 706, 717 (Cal.Ct.App. 1966) (court assumed, without deciding, that the tort could include the taking of a deposition for the sole purpose of bringing out defamatory matter which could then be publicized). Yet another case from the California Court of Appeals, *Carney v. Rotkin, Schmerin McIntyre*, 206 Cal.App.3d 1513, 254 Cal.Rptr. 478 (Cal.Ct.App. 1988), demonstrates that not literally "the entire range of procedures incident to litigation" constitutes process. In *Carney* the plaintiff alleged the defendant committed abuse of process when it served false notice to her that the court had issued a bench warrant for her arrest upon her failing to show at a debtor's exam. This was not abuse of process:

> Plaintiff does not allege defendants' false notice to her that the court had issued a bench warrant constituted `process' as that term is used in the tort of abuse of process. She merely makes a conclusionary allegation that, in falsely telling her the court had issued a bench warrant, defendants `misused the order for appearance of judgment debtor.' At issue, however, is not the court order for plaintiff's appearance at the judgment-debtor examination, but the false representation by defendants that the court had issued a bench warrant. In making that false statement, defendants did not take any action pursuant to the authority of the court. Thus, there was no abuse of any judicial process.

206 Cal.App.3d at 1526, 254 Cal.Rptr. at 485.

I hesitate to hypothesize which of the myriad "procedures incident to the litigation process" would be process and which would not. I would hold simply that an abuse of process plaintiff must allege that the process complained of involves an abuse of the court's authority, as explained above. Although I disagree with the majority's conception of "process", as set out in paragraphs 1 and 2 of Part A.2, I agree with the definition of the tort of abuse of process, as set forth in the third paragraph of Part A.2.

Turning to this case, a look at the plaintiffs' complaint reveals they have failed to allege facts that would constitute abuse of process. I agree with the majority that delay in filing an answer and responding to discovery requests and refusal to appear at depositions do not constitute abuse of process. However, the "motions and pleadings" the majority suggests would constitute use of process, are not specified in the complaint. Plaintiffs do not identify the motions and pleadings that allegedly abused the court's authority. Further, as the majority points out, plaintiffs have failed to plead the improper purpose of any misuse of process. Indeed, the plaintiffs do not allege that any specific process was used (or misused) for any specific improper purpose. Finally, plaintiffs allege their damages to have been "significant and needless delays" in the litigation, causing loss of the anticipated trial date and certain collateral consequences of that. Delays often occur in the course of litigation, resulting in collateral consequences. In an abuse of process case the damages external to the litigation must be the direct and intended result of the misuse of process. Under either the *Badell v. Beeks* rule or the majority's new formulation, no abuse of process claim has been adequately alleged.

The *General Refractories* case is instructive in this regard. There, the trial court summarized the defendant's actions, as follows:

> `The sad history of defendant's discovery responses in this case reveals a clear pattern of delay, stonewalling, deception, obfuscation and pretense. Defendant intentionally withheld critical documents, ignored court orders, permitted false testimony at depositions and misrepresented facts to opposing counsel and the court . . .'

Id. at 301. The trial court had granted a 12(b)(6) motion based upon a traditional view of abuse of process, such as articulated in *Badell v. Beeks.* The Third Circuit said it was likely that the state of Pennsylvania would take a broader view of the tort, somewhat similar to, but more expansive than, the majority's view in this case, but opined that the complaint was still defective — too vague — even under the expanded view. The court noted, "The Complaint does not contain the necessary allegations that legal processes were not employed to achieve their intended purposes." *Id.* at 309. The court went on to say, "While a court must construe a complaint liberally . . . it may not rewrite a plaintiff's allegations." *Id.* The court concluded that the trial court had not erred in dismissing the complaint "because it fell short of making the necessary allegations." *Id.* However, the Third Circuit then went on to allow the plaintiff to amend the complaint but only because the plaintiff, apparently recognizing the failings of its complaint, had filed a motion to amend, which the trial court had inappropriately denied. Here, the plaintiffs should not be rescued from their failure to properly state a claim in their complaint because, unlike in *General Refractories*, they had no motion to amend pending at the time their complaint was dismissed for failure to state a claim.

The plaintiffs have failed to allege that any specific process was used by defendants for any specific improper purpose, resulting in damage external to the litigation. Therefore, the complaint did not state a claim upon which relief could be granted, the abuse of process claim was properly dismissed, and plaintiffs should not be permitted to amend. Thus, I dissent from Part A.3 of the majority's opinion. Likewise, I dissent from Part B, since the civil conspiracy claim depends on the abuse of process claim.

I also dissent from Part C, which reverses the district court's dismissal of plaintiffs' claim for intentional infliction of emotional distress. The district court correctly ruled that the conduct alleged in the complaint fails to rise to the level of extreme and outrageous conduct necessary to establish a claim for intentional infliction of emotional distress.

In *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 179-180, 75 P.3d 733, 740-741 (2003), this Court stated the following with regard to this cause of action:

> In Idaho, four elements are necessary to establish a claim of intentional infliction of emotional distress: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe. *Curtis v. Firth*, 123 Idaho 598, 601, 850 P.2d 749, 751 (1993). Justification for an award of damages for emotional distress seems to lie not in whether distress was actually suffered by a plaintiff, but rather the quantum of outrageousness of the defendant's conduct. *Brown v. Fritz*, 108 Idaho 357, 362, 699 P.2d 1371, 1376 (1985). `Although a plaintiff may in fact have suffered extreme emotional distress . . . no damages are awarded in the absence of extreme and outrageous conduct by a defendant.' *Id.* Courts have required very extreme conduct before awarding damages for the intentional infliction of emotional distress. *See Rasmuson v. Walker Bank Trust Co.*, 102 Idaho 95, 100, 625 P.2d 1098, 1103 (1981).
>
> Summary judgment is proper when the facts allege conduct of the defendant that could not reasonably be regarded as so extreme and outrageous as to permit recovery for intentional or reckless infliction of emotional distress.
>
> It is for the court to determine, in the first instance, where the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Restatement (Second) of Torts, § 46 comment h (1965).

The allegations of the complaint simply do not meet the necessary standard. The plaintiffs alleged the following:

> 22. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.
>
> 23. The conduct of the Defendants was intentional and/or reckless.
>
> 24. The conduct of the Defendants was extreme and/or outrageous.
>
> 25. The conduct of the Defendants directly resulted in the Plaintiffs suffering extreme emotional and physical distress.
>
> 26. The emotional distress suffered by the Plaintiffs was and continues to be, severe.
>
> 27. The Defendants knew or should have known that their conduct, collectively and individually, would cause the Plaintiffs to suffer emotion distress.
>
> 28. The emotional distress began at the time the Defendants failed to file a timely answer and has continued to the date of the filing of this complaint. It is anticipated that emotional distress, and its' consequences, will perpetuate into the unforeseen future.
>
> 29. The Plaintiffs, as a direct and proximate result of the Defendants' intentional infliction of emotional distress, have been required to retain the services of licensed professionals in an attempt to resolve the physical and emotional problems caused by the Defendants.

Other than claiming fairly generic emotional consequences, the plaintiffs state no facts constituting outrageous conduct, other than those alleged in the abuse of process claims. That is, that the defendants delayed filing an answer, delayed discovery proceedings, failed to respond to discovery requests, presented false and perjured

testimony, and filed motions and pleadings not intended to advance the litigation. In the conspiracy count, plaintiffs allege that the litigation was delayed in an attempt to wear down the plaintiffs and to defeat them, not on the merits, but by winning a battle of fiscal and emotional attrition. If this type of conduct is declared to constitute intentional infliction of emotional distress, the courts may soon be flooded by such claims.

There are remedial measures in existence to regulate the conduct of parties and their attorneys in proceedings under the jurisdiction and supervision of the courts. If a person fails to timely file an answer, default is available. I.R.C.P. 55(a)(1). If a person fails to timely respond to discovery, sanctions are available. I.R.C.P. 37. If papers are signed for the purpose of harassing, causing unnecessary delay, or increasing the cost of litigation, sanctions are available. I.R.C.P. 11(a). Indeed, substantial sanctions were imposed against the defendants in the underlying litigation.

While it would not be impossible for conduct in the course of litigation to rise to the level necessary to qualify for the tort of intentional infliction of emotional distress, the conduct alleged here falls substantially short of the mark. To set the bar at the level suggested by the majority, we risk, on the one hand, inviting suits where lawyers act very badly but not to the extent of acting intentionally or recklessly and in an extreme and outrageous manner, and, on the other hand, infusing a chill into the legal process, causing attorneys to provide tentative, rather than zealous, representation of their clients. The plaintiffs have failed to allege the type of conduct necessary to constitute the tort of intentional infliction of emotional distress and, therefore, I dissent with respect to Part C.

Justice EISMANN **CONCURS.**