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Malicious Prosecution—Necessity of Alleging Arrest or Property Seizure—Exceptions

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COMMENTS

MALICIOUS PROSECUTION—NECESSITY OF ALLEGING ARREST OR PROPERTY SEIZURE—EXCEPTIONS*—The courts disagree as to what is necessary before a cause of action for malicious prosecution of a civil suit will lie. The argument used most frequently against these actions is that by injudiciously permitting them, the courts would throw themselves open to every litigant who had been successful in a prior action brought against him.[1] As are most *in terrorem* arguments, this is justified by looking to the underlying public policy, which is held to be the undesirability of deterring an honest suitor from litigating his rights out of fear of a later suit against him for malicious prosecution.[2] One of the controlling elements in determining whether or not to allow the cause of action is the manner in which the malicious prosecution was carried out. American jurisdictions are split on the issue of allowing a malicious prosecution action without allegation and proof of arrest or seizure of property, or special injury. A numerical majority,[3] and the *Re-*

* Landavazo v. Credit Bureau, 72 N.M. 456, 384 P.2d 891 (1963).

1.

> If the rule were established that an action could be maintained simply upon the failure of a plaintiff to substantiate the allegations of his complaint in the original action, litigation would become interminable, and the failure of one suit, instead of ending litigation, which is the policy of the law, would be a precursor of another; and, if that suit perchance should fail, it would establish the basis for still another.

Abbott v. Thorne, 34 Wash. 692, 76 Pac. 302, 303 (1904); *accord*, Mayer v. Walter, 64 Pa. 283 (1870); Smith v. Hintrager, 67 Iowa 109, 24 N.W. 744 (1885); McNamee v. Minke, 49 Md. 122 (1878).

2.

> If such actions are allowed, it might oftentimes happen that an honest suitor would be deterred from ascertaining his legal rights through fear of being obliged to defend a subsequent suit, charging him with malicious prosecution.

Smith v. Michigan Buggy Co., 175 Ill. 619, 628, 51 N.E. 569, 571 (1898); Wetmore v. Mellinger, 64 Iowa 741, 744, 18 N.W. 870, 871 (1884):

> [T]here should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts. He ought not, in *ordinary* cases, to be subject to a suit for bringing an action, and be required to defend against the charge of malice and the want of probable cause. [Emphasis added.]

Accord, Abbot v. Thorne, 34 Wash. 692, 76 Pac. 302 (1904).

3. Annot., 150 A.L.R. 897, 899 (1944):

> In what is at least a numerical majority of the jurisdictions, it has been held that an action of malicious prosecution will lie for the institution of a civil action maliciously and without probable cause, even though there has been no

statement of Torts,[4] are in favor of permitting the action without such an allegation. Others, following the English example,[5] require the allegation.[6]

In 1943, New Mexico aligned itself with the so-called English or "strict" theory and does not permit the action in the absence of a showing of arrest or property seizure, or other special injury.[7] The supreme court followed the public policy justification by reference to the arguments of other courts.[8]

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interference with the person or property of the defendant in the original suit and no special injury is shown.

States holding that the allegations of arrest or property seizure are unnecessary are: Alabama, Arizona, California, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Tennessee, and Vermont. *Id.* at 899-900. The reason for the majority rule is expressed by Kolka v. Jones, 6 N.D. 461, 71 N.W. 558, 560 (1897):

> A wise policy requires that the honest claimant should not be frightened from invoking the aid of the law by the statutory threat of a heavy bill of costs against him in case of defeat. But certainly no such policy demands that malice should, by the assurance of protection in advance, be encouraged to vex, damage, and even ruin a peaceful citizen by the illegal prosecution of an action upon an unfounded claim.

4. Restatement, Torts § 674 (1938):

> One who initiates or procures the initiation of civil proceedings against another is liable to him for the harm done thereby, if
>
> (a) the proceedings are initiated
>
> (i) without probable cause, and
>
> (ii) primarily for a purpose other than that of securing the adjudication of the claim on which the proceedings are based, and
>
> (b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

5. Quartz Hill Consol. Gold Mining Co. v. Eyre, 11 Q.B.D. 674, 682-83 (1883):

> [A]lthough civil proceedings are taken falsely and maliciously and without reasonable or probable cause, nevertheless no action will lie in respect of them, unless they produce some damage of which the law will take notice. . . . [T]he 'extra costs' are not damage caused by the unjust litigation, and therefore they are not damage for which an action will lie.

6.

> A suit for malicious prosecution of a civil suit without probable cause cannot be maintained where the action upon which it is grounded is an *ordinary* civil action, begun by summons and not accompanied by arrest of the person or seizure of his property, or by special injury not necessarily resulting in any and all suits prosecuted to recover for like causes of action. [Emphasis added.]

Schwartz v. Schwartz, 366 Ill. 247, 8 N.E.2d 668, 670 (1947); *accord*, Peckham v. Union Fin. Co., 48 F.2d 1016 (D.C. Cir. 1931); Melvin v. Pence, 130 F.2d 423 (D.C. Cir. 1942); Schulman v. Modern Industrial Bank, 178 Misc. 847, 36 N.Y.S.2d 591 (Sup. Ct. 1942).

States other than New Mexico that require the allegations before allowing the action are: Georgia, Illinois, Iowa, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, Washington, and Wisconsin. Annot., 150 A.L.R. 897, 901-03 (1944).

7. Johnson v. Walker-Smith Co., 47 N.M. 310, 142 P.2d 546 (1943).

8. *Id.* at 313, 142 P.2d at 548, citing Abbott v. Thorne, 34 Wash. 692, 76 Pac. 302 (1904):

Having established New Mexico's position on the side of the strict rule, the court's opinion is well supported by massive and respectable authority.[9] Despite equally impressive authority to the contrary,[10] the New Mexico rule regarding the necessary of alleging arrest or property seizure or special injury was set forth in *Johnson v. Walker-Smith Co.*[11] as follows:

> [A]n action will not lie for the prosecution of a civil action with malice and without probable cause where there has been no arrest of the person or seizure of the property of the defendant, or where the defendant has suffered no injuries except those which are the necessary result in all *ordinary* law suits.[12] [Emphasis added.]

In *Landavazo v. Credit Bureau*,[13] the defendant, Credit Bureau, had written the plaintiff in 1955 in an effort to collect certain bills. The plaintiff went to the defendant's place of business to settle the matter. During the meeting, the defendant's agent and the plaintiff discovered that the bills were owed by another person with the plaintiff's surname. The plaintiff was able to produce cancelled checks proving that he had paid his gas bills and did not owe the Southern Union Gas Company $49.50 as claimed by the defendant. The defendant's agent told the plaintiff that he would see that the records were put in order. However, in 1959, when the plaintiff attempted to buy a house, the defendant listed the $49.50 bill to the gas company in the credit report. Another agent of the defendant told the plaintiff: "Whether you owe it or not, you should come and pay the bill, it should be worth it to you paying $49 to get the loan through." This statement was not denied by the defendant during the hearings. The defendant proceeded against the plaintiff to collect this $49.50, but later dismissed the action. The plaintiff then brought this action for malicious prosecution. The trial court rendered a judgment for

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> While it is, no doubt, true that in some instances the peril of costs is not a sufficient restraint, and the recovery of costs is not an adequate compensation for the expenses and annoyances incident to the defense of a suit, yet all who indulge in litigation are necessarily subject to burdens, the exact weight of which cannot be calculated in advance, and a rule must be established which, as a whole, is the most wholesome in its effects, and accords in the greatest degree with public policy.

The New Mexico court also used the policy arguments of the *Peckham*, *Wetmore*, and *Schwartz* decisions, cited in notes 2 and 6 *supra*.

9. See note 6 *supra*.
10. See note 3 *supra*.
11. 47 N.M. 310, 142 P.2d 546 (1943).
12. *Id.* at 316, 142 P.2d at 547.
13. 72 N.M. 456, 384 P.2d 891 (1963).

the plaintiff. On appeal to the New Mexico Supreme Court, *held*, Reversed.[14] The supreme court reasoned that the complaint failed to state a cause of action in that it alleged neither arrest nor seizure of property and was therefore barred by the rule of the *Johnson* case.[15] Although the court's tone was one of regret, it considered itself bound to apply the strict rule and dismissed the claim.

By refusing to consider the case on its merits, the supreme court has offered collection agencies a benediction for any harassment that they may heap upon innocent persons fearful for their credit standing. Although one might resist attempts at collection of a fictitious bill by threat of suit, the knowledge that he may be forced to litigate an unfounded claim without legal recourse against the agency may influence him to pay a bill which amounts to less than the cost of litigation. The supreme court, in *Landavazo*, stated:

> [I]t would serve no useful purpose to restate the facts out of which this suit arose. It is sufficient to point out that they clearly establish an *inexcusable* and highly improper course of conduct, including recourse to court procedure by defendant intended to force plaintiff to pay a bill which he clearly did not owe.[16] [Emphasis added.]

With no restraint except the extortion provisions of the criminal code,[17] *Landavazo* appears to give collection agencies the opportunity to attempt to recover payment from one person the debt owed by another. Such an obvious misuse of legal procedure is contrary to public policy; it is apparent that the main argument upon which the *Johnson* decision was based (the policy argument supported by a minority of American jurisdictions[18]) shrinks in significance when applied to the specific facts of *Landavazo*.

There are two lines of reasoning that would lead to a more satisfying result and yet not disturb the general rule established by the *Johnson* case. The first approach is to rely upon exceptions to the strict general rule. The foundation for this line of reasoning is re-

14. *Ibid.*

15. *Id.* at 457, 384 P.2d at 891.

16. *Ibid.* Having called the defendant's conduct *inexcusable*, the court then proceeds to excuse it!

17.

> Extortion consists of the communication or transmission of any threat to another by any means whatsoever with intent thereby to wrongfully obtain anything of value or to wrongfully compel the person threatened to do or refrain from doing any action against his will.

N.M. Stat. Ann. § 40A-16-8 (Repl. 1964).

18. See note 2 *supra*.

vealed by examining the rulings of jurisdictions that require the alleging of either arrest or seizure of property before the action will lie. In several of these jurisdictions, the courts admit an exception to this "strict" general rule and allow the action. Typically, the exception is recognized when the defendant has harassed the plaintiff by bringing several actions on the same (unfounded) claim.[19] However, in *Davis v. Boyle Bros., Inc.*,[20] a case similar to *Landavazo*, the action was allowed because the defendant knowingly prosecuted the plaintiff for a debt that she did not owe. The defendant in that case had similarly acknowledged the fact that the plaintiff did not owe the money prior to bringing the action. Although the court relied on the "multiple action" exception in allowing the suit, they stressed the prior acknowledgment of the defendant as an important element in granting the plaintiff relief.[21]

It would seem to follow that the underlying public policy rule is not inflexible. When a countervailing policy appears as it does in *Landavazo*, other jurisdictions have been willing to depart from the strict rule.

The other argument against the supreme court's dismissal is presented by the dissenting opinion in *Landavazo*. District Judge Gallegos, in his examination of the *Johnson* case, emphasized the exact wording of the court's holding. The judge points out that in the *Johnson* decision the phrases "prosecuted in the usual manner"[22] and "not common to the ordinary law suit"[23] are sufficient to distinguish the cases. Similar wordings of other decisions relying on the "strict" rule might support this reasoning.[24] *Landavazo* is no "ordinary" case, he argues, because the parties involved had unequal bargaining power and the facts involve unusual public policy questions. The *Johnson* case dealt with two parties and an action for "simple debt." In *Landavazo*, the Credit Bureau existed primarily for the purpose of collecting debts; it abused its privilege of litigation. Because the Credit Bureau functions by means of legal proceedings to collect

19. American Optometric Ass'n v. Ritholtz, 101 F.2d 883 (7th Cir. 1939); Soffos v. Eaton, 152 F.2d 682 (D.C. Cir. 1945); Shedd v. Patterson, 302 Ill. 355, 134 N.E. 705 (1922).

20. 73 A.2d 517 (D.C. Munic. Ct. 1950).

21. *Id.* at 520:

> It involves something more than the usual suit brought maliciously and without probable cause. . . . [A]n employee of the store acknowledged the error and promised that the suit would be dismissed.

22. Johnson v. Walker-Smith Co., 47 N.M. 310, 316, 142 P.2d 546, 550 (1943).

23. *Ibid.*

24. See notes 2 and 6 *supra*.

debts, Judge Gallegos thinks it is not unreasonable to hold them to a stricter standard than the defendants in "ordinary" cases.

Once the case is distinguished from *Johnson*, by either line of reasoning, the supreme court is free to reexamine the arguments for both sides and reach a decision on the merits. This is infinitely more satisfactory than the supreme court's weak protest that it is bound by precedent and therefore must permit an undeniable abuse of the legal process.

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