CHAPTER 17

MALICIOUS PROSECUTION AND ABUSE OF PROCESS

A. MALICIOUS PROSECUTION

B. ABUSE OF PROCESS

A. MALICIOUS PROSECUTION

17:1 ELEMENTS OF LIABILITY

For the plaintiff, *(name)***, to recover from the defendant,** *(name)***, on (his) (her) claim of malicious prosecution, you must find that all of the following have been proved by a preponderance of the evidence:**

1. A criminal case was brought against the plaintiff;

2. The criminal case was brought as a result of (an) oral or written statement(s) made by the defendant;

3. The criminal case ended in favor of the plaintiff;

4. The defendant's statement(s) against the plaintiff (was) (were) made without probable cause;

5. The defendant's statement(s) against the plaintiff (was) (were) motivated by malice towards the plaintiff; and

6. As a result of the criminal case, the plaintiff had damages.

If you find that any one or more of these *(number)* **statements has not been proved, then your verdict must be for the defendant.**

On the other hand, if you find that all of these *(number)* **statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to plaintiff's claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Because criminal cases are more frequently the basis for malicious prosecution claims, this instruction and the remaining instructions in this Part A have been drafted for use in malicious prosecution actions arising out of criminal, rather than civil, cases. The Colorado Supreme Court has recognized, however, that a malicious prosecution action may be based on a prior civil action, implying that the elements of liability are the same. **Hewitt v. Rice**, 154 P.3d 408 (Colo. 2007) (plaintiff's claim for malicious prosecution based on filing notice of *lis pendens* required showing that action underlying notice of *lis pendens* was terminated in favor of

plaintiff; citing this instruction with approval). *See also* **Thompson v. Maryland Cas. Co.**, 84 P.3d 496 (Colo. 2004); **Westfield Dev. Co. v. Rifle Inv. Assocs.**, 786 P.2d 1112 (Colo. 1990) (filing of *lis pendens* in civil action may be actionable as malicious prosecution); **Slee v. Simpson**, 91 Colo. 461, 15 P.2d 1084 (1932); **Waskel v. Guaranty Nat'l Corp.**, 23 P.3d 1214 (Colo. App. 2000), *cert. denied* (2001); **Walford v. Blinder, Robinson & Co.**, 793 P.2d 620 (Colo. App.), *cert. denied* (Colo. 1990), *cert. dism'd*, 498 U.S. 977 (1990) (judicially enforceable arbitration proceedings may form basis for malicious prosecution action); RESTATEMENT (SECOND) OF TORTS §§ 674-681B (1977); W. PROSSER & W. KEETON, TORTS § 120 (5th ed. 1984). In such a case, this instruction (and, when necessary, any of the remaining instructions in this Part A) must be appropriately modified. For other forms of abuse of process, the instructions in Part B of this chapter should be used rather than this instruction.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see Notes on Use to Instruction 4:20.

3. Omit any numbered paragraphs, the facts of which are not in dispute.

4. In appropriate cases, the language in numbered paragraph 4 should read: "If the complaint was filed with probable cause, the defendant continued to prosecute the criminal action after (he) (she) no longer had probable cause to believe the plaintiff guilty."

5. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.

6. Though mitigation of damages is an affirmative defense (see Instruction 5:2), only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

7. Other appropriate instructions defining the terms used in this instruction, e.g., Instruction 17:2, defining "probable cause," must also be given with this instruction.

Source and Authority

1. This instruction is supported by **Montgomery Ward & Co. v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954). *See also* **Hewitt v. Rice**, 154 P.3d 408 (Colo. 2007) (citing this instruction); **Thompson v. Maryland Cas. Co.**, 84 P.3d 496 (Colo. 2004); **Lounder v. Jacobs**, 119 Colo. 511, 205 P.2d 236 (1949); **Wigger v. McKee**, 809 P.2d 999 (Colo. App. 1990), *cert. denied* (1991) (action for malicious prosecution requires proof that plaintiff was prosecuted without probable cause); **B & K Distrib., Inc. v. Drake Bldg. Corp.**, 654 P.2d 324 (Colo. App.), *cert. denied* (1982) (lack of probable cause is necessary requirement of liability); **Sancetta v. Apollo Stereo Music Co.**, 44 Colo. App. 292, 616 P.2d 182, *cert. denied* (1980) (citing this instruction); RESTATEMENT (SECOND) OF TORTS § 653 (1977); W. PROSSER & W. KEETON, TORTS § 119 (5th ed. 1984).

2. In **McDonald v. Lakewood Country Club**, 170 Colo. 355, 363, 461 P.2d 437, 441 (1969), the court adopted the rule that "prosecuting attorneys are not liable in a civil action for malicious prosecution where they act in their official capacity, even though they act with malice and without probable cause. . . . This privilege does not embrace a situation [however] of a prosecutor acting clearly outside the duties of his office." The privilege accorded in **McDonald** to prosecuting attorneys does not extend to other administrative officials such as brand inspectors. **Hartford Fire Ins. Co. v. Kolar**, 30 Colo. App. 1, 488 P.2d 1114 (1971).

3. For a further discussion of an official's immunity as a prosecutor in the context of liability under 42 U.S.C. § 1983, see **Higgs v. District Court**, 713 P.2d 840 (Colo. 1985).

4. In **Wagner v. Board of County Commissioners**, 933 P.2d 1311 (Colo. 1997), the court held that plaintiff's claim for malicious prosecution based solely upon the defendant's grand jury testimony was properly dismissed by the trial court because a witness before a grand jury is absolutely immune from civil liability for his or her testimony even if such testimony is knowingly false and malicious.

5. The plaintiff does not have to prove that he or she received a verdict of "not guilty." It is necessary, however, that the plaintiff prove a termination of the case in his favor, for example, that "the court passed on the merits of the charge or claim against him under such circumstances as to show one's innocence or nonliability, or show that the proceedings were terminated or abandoned at the instance of the defendant in circumstances that fairly imply the plaintiff's innocence." 1 F. HARPER, F. JAMES & O. GRAY, TORTS § 4.4 (2d ed. 1986). In **Hewitt v. Rice**, 154 P.3d 408 (Colo. 2007), the court held that a favorable termination of the case must be a resolution on the merits, determined as a matter of law, and rejected a totality-of-the-circumstances examination for deciding the issue. *See also* **Bell Lumber Co. v. Graham,** 74 Colo. 149, 219 P. 777 (1923) (voluntary settlement of parties' differences resulting from negotiation or compromise is not a favorable termination for purposes of malicious prosecution claim); **Schenck v. Minolta Office Sys., Inc.**, 802 P.2d 1131 (Colo. App.), *cert. denied* (1990); **Land v. Hill**, 644 P.2d 43, 45 (Colo. App. 1981), *cert. denied* (1982). Nor is a dismissal "in the interest of justice" at the prosecution's request sufficient unless the facts demonstrate that the dismissal represented a favorable determination on the merits of the case. **Allen v. City of Aurora**, 892 P.2d 333 (Colo. App. 1994), *cert. denied* (Colo. 1995), *cert. denied*, 516 U.S. 885 (1995).

6. There is no requirement of a favorable termination where the claim is as to ex parte proceedings. **Hewitt**, 154 P.3d 408; **Thompson v. Maryland Cas. Co.**, 84 P.3d 496 (Colo. 2004). A claim based on improper filing of a *lis pendens* is not an ex parte proceeding. **Hewitt**, 154 P.3d 408.

7. For purposes of complying with the 180-day notice required under the Colorado Governmental Immunity Act, see § 24-10-109, C.R.S., a claim for malicious prosecution accrues on the date when the claimant is aware that allegedly improper charges had been filed against him. *See* **Masters v. Castrodale**, 121 P.3d 362 (Colo. App. 2005).

17:2 PROBABLE CAUSE — DEFINED

Probable cause means that the defendant, *(name)*, in good faith believed, and that a reasonable person, under the same or similar circumstances, would also have believed, that the plaintiff, *(name)*, was guilty of the offense with which (he) (she) was charged.

Notes on Use

1. Note 1 of Notes on Use to Instruction 17:1 is also applicable to this instruction.

2. Whenever this instruction is given, Instruction 17:3 should also be given.

3. This instruction should be given only if the facts and circumstances relied upon as constituting "lack of probable cause" are in dispute. Where there is no factual dispute, the question is one of law to be resolved by the court and the court should, if it finds "lack of probable cause" to exist, instruct the jury accordingly.

Source and Authority

This instruction is supported by **Konas v. Red Owl Stores, Inc.**, 158 Colo. 29, 404 P.2d 546 (1965). *Accord* **Montgomery Ward & Co. v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954); **Gurley v. Tomkins**, 17 Colo. 437, 30 P. 344 (1892).

17:3 PROBABLE CAUSE NOT DEPENDENT ON RESULT OF CRIMINAL CASE

The fact that the criminal case (may have) ended in favor of the plaintiff, *(name)***, does not in itself prove a lack of probable cause.**

Notes on Use

1. Note 1 of the Notes on Use to Instruction 17:1 is also applicable to this instruction.

2. When Instruction 17:2 is given, this instruction should also be given.

3. Use the parenthetical phrase "may have" if there is a dispute as to how the criminal case ended.

Source and Authority

This instruction is supported by **Montgomery Ward & Co. v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954). Other cases that support this instruction in varying degrees are **Flader v. Smith**, 116 Colo. 322, 181 P.2d 464 (1947); **Climax Dairy Co. v. Mulder**, 78 Colo. 407, 242 P. 666 (1925). *See also* W. PROSSER & W. KEETON, TORTS § 119 (5th ed. 1984) and, as to the first paragraph, RESTATEMENT (SECOND) OF TORTS § 667(b) (1977).

17:4 PRESENCE OF MALICE

The defendant, *(name)***, was motivated by malice if (his) (her) primary motive was a motive other than a desire to bring to justice a person (he) (she) thought had committed a crime.**

Notes on Use

1. Note 1 of the Notes on Use to Instruction 17:1 is also applicable to this instruction.

2. Whenever this instruction is given, Instruction 17:5 should also be given.

3. This instruction must be appropriately modified if there is a dispute as to whether the defendant made the statements that caused the criminal case to be brought against the plaintiff.

Source and Authority

This instruction is supported by **Suchey v. Stiles**, 155 Colo. 363, 394 P.2d 739 (1964); **Montgomery Ward & Co. v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954); **Lounder v. Jacobs**, 119 Colo. 511, 205 P.2d 236 (1949); W. PROSSER & W. KEETON, TORTS § 119 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 653 (1977).

17:5 PROOF OF MALICE

A lack of probable cause may indicate malice. However, before you find malice based on a lack of probable cause, you must consider all the circumstances surrounding the filing and prosecution of the criminal case.

Notes on Use

1. Note 1 of the Notes on Use to Instruction 17:1 is also applicable to this instruction.

2. This instruction should be given whenever Instruction 17:4 is given.

Source and Authority

This instruction is supported by **Koch v. Wright**, 67 Colo. 292, 184 P. 363 (1919). *See also* **Sancetta v. Apollo Stereo Music Co.**, 44 Colo. App. 292, 616 P.2d 182, *cert. denied* (1980); **Florence Oil & Ref. Co. v. Huff**, 14 Colo. App. 281, 59 P. 624 (1900); W. PROSSER & W. KEETON, TORTS § 119 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 669 (1977).

17:6 LACK OF PROBABLE CAUSE NOT TO BE INFERRED FROM MALICE ALONE

Malice alone is not enough to prove lack of probable cause.

Notes on Use

1. Note 1 of the Notes on Use to Instruction 17:1 is also applicable to this instruction.

2. This instruction should be given whenever Instructions 17:2 and 17:4 are given.

Source and Authority

This instruction is supported by **O'Malley-Kelley Oil & Auto Supply Co. v. Gates Oil Co.**, 73 Colo. 140, 214 P. 398 (1923); **Gurley v. Tomkins**, 17 Colo. 437, 30 P. 344 (1892); W. PROSSER & W. KEETON, TORTS § 119 (5th ed. 1984).

17:7 AFFIRMATIVE DEFENSE — ADVICE OF ATTORNEY

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of malicious prosecution if you find that the defendant has proved the affirmative defense of advice of attorney. This affirmative defense is proved if you find all of the following:**

1. The defendant made a full, fair, and honest disclosure to an attorney of all the facts the defendant knew or reasonably should have known concerning the guilt or innocence of the plaintiff;

2. The attorney (advised the defendant that there were reasonable grounds to believe that the plaintiff may have committed a crime) (or) (recommended the defendant take the action that was a cause of the criminal case being brought against the plaintiff); and

3. The defendant acted in good faith on the attorney's advice in causing the case to be brought against the plaintiff.

Notes on Use

1. Note 1 of the Notes on Use to Instruction 17:1 is also applicable to this instruction.

2. Use whichever parenthesized clauses in numbered paragraph 2 are appropriate.

3. Advice of counsel is an affirmative defense on which the defendant has the burden of proof.

4. This instruction is not applicable unless the lawyer consulted is disinterested. **Smith v. Hensley**, 107 Colo. 180, 109 P.2d 909 (1941); W. PROSSER & W. KEETON, TORTS § 119 (5th ed. 1984).

Source and Authority

This instruction is supported by **Van Meter v. Bass**, 40 Colo. 78, 90 P. 637 (1907); W. PROSSER & W. KEETON, TORTS § 119; RESTATEMENT (SECOND) OF TORTS § 666 (1977). *See also* **Antolovich v. Brown Group Retail**, 183 P.3d 582 (Colo. App. 2007), *cert. denied* (2008) (in dicta, reliance on advice of counsel is affirmative defense to malicious prosecution); Reliance on advice of prosecuting attorney as defense to malicious prosecution action, 10 ALR2d 1215.

17:8 AFFIRMATIVE DEFENSE — ADVICE OF PROSECUTING ATTORNEY

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of malicious prosecution if you find that the defendant has proved the affirmative defense of advice of a prosecuting attorney. This affirmative defense is proved if you find all of the following:**

1. The defendant made a full, fair, and honest disclosure to a prosecuting attorney of all the facts the defendant knew or reasonably should have known concerning the guilt or innocence of the plaintiff;

2. On the basis of these facts, the prosecuting attorney determined there were reasonable grounds to believe that the plaintiff may have committed a crime; and

3. The prosecuting attorney (brought) (advised bringing) the criminal case against the plaintiff.

Notes on Use

1. Use whichever parenthesized words are appropriate.

2. Advice of a prosecuting attorney is an affirmative defense on which the defendant has the burden of proof.

Source and Authority

1. This instruction is supported by several Colorado cases. *See* **Montgomery Ward & Co. v. Pherson**, 129 Colo. 502, 272 P.2d 643 (1954); **Wyatt v. Burdette**, 43 Colo. 208, 95 P. 336 (1908); **Van Meter v. Bass**, 40 Colo. 78, 90 P. 637 (1907); **B & K Distrib., Inc. v. Drake Building. Corp.**, 654 P.2d 324 (Colo. App.), *cert. denied* (1982). *See also* W. PROSSER & W. KEETON, TORTS § 119, at 879 (5th ed. 1984).

2. In support of the proposition that reliance on the advice of the prosecuting attorney is an affirmative defense, see **Antolovich v. Brown Group Retail**, 183 P.3d 582 (Colo. App. 2007), *cert. denied* (Colo. 2008) (in dicta). *See also* Reliance on advice of prosecuting attorney as defense to malicious prosecution action, 10 ALR2d 1215.

17:9 ACTUAL DAMAGES

Plaintiff, *(name)***, has the burden of proving the nature and extent of (his) (her) damages by a preponderance of the evidence. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the malicious prosecution of the plaintiff by the defendant(s),** *(name(s))***, (and) (the** *[insert appropriate description, e.g., "negligence"]***, if any, of any designated nonparties).**

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: physical and mental pain and suffering, fear, anxiety, humiliation, embarrassment, indignity, public disgrace, and any loss to plaintiff's reputation which were caused by the malicious prosecution.

2. Any economic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: court costs, reasonable attorney fees and any other reasonable expenses which the plaintiff has had in defending (himself) (herself) in the criminal case against (him) (her), a reasonable amount for the time the plaintiff necessarily lost in preparing for and in attending the trial of the criminal case, loss of income, damage to (his) (her) business, (and) *(insert any other items of special damage of which there is sufficient evidence)* **which were caused by the malicious prosecution.**

Notes on Use

1. Notes on Use to Instruction 6:1 and Notes 1 and 2 of Notes on Use to Instruction 17:1 are also applicable to this instruction.

2. The appropriate instruction relating to causation (see Instructions 9:18-9:21) should also be given with this instruction.

3. Use whichever parenthesized words are appropriate.

4. Omit any particular element of damages for which there is insufficient evidence to support a jury finding. Note, however, that in a malicious prosecution suit based on a criminal proceeding, an inference or presumption of injury to the plaintiff's reputation and of the existence of humiliation and hurt feelings may be based on the occurrence of the criminal proceeding alone. W. PROSSER & W. KEETON, TORTS § 119 (5th ed. 1984). *Accord* **Bernstein v. Simon**, 77 Colo. 193, 235 P. 375 (1925) (as to injured reputation).

5. Because "the elements of the torts of intentional interference with contract and malicious prosecution are not the same[,] the damages caused by the conduct constituting each tort may not be identical." **Westfield Dev. Co. v. Rifle Inv. Assocs.**, 786 P.2d 1112, 1119 (Colo. 1990). Therefore, when both torts are involved in the same suit, the factfinder should make specific findings of fact with respect to the damages for each.

6. Comparative negligence is not a defense to an intentional tort claim. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (Colo. App. 1979). Therefore, the first paragraph of this instruction varies from the comparable damage instructions in "simple" negligence cases by eliminating any reference to plaintiff's own negligence.

Source and Authority

This instruction is supported by **Murphy v. Hobbs**, 7 Colo. 541, 5 P. 119 (1884). **Bernstein v. Simon**, 77 Colo. 193, 235 P. 375 (1925), is in accord as to counsel fees and loss of reputation. *See also* **Johnston v. Deideshimer**, 76 Colo. 559, 232 P. 1113 (1925); **Exchange Nat'l Bank v. Cullum**, 114 Colo. 26, 161 P.2d 336 (1945); **Hartford Fire Ins. Co. v. Kolar**, 30 Colo. App. 1, 408 P.2d 1114 (1971); W. PROSSER & W. KEETON, TORTS § 119 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS §§ 670-671 (1977).

B. ABUSE OF PROCESS

17:10 ELEMENTS OF LIABILITY

For the plaintiff, *(name)***, to recover from the defendant,** *(name)***, on (his) (her) claim of abuse of process, which in this case is claimed to be** *(describe the particular abuse)***, you must find that all of the following have been proved by a preponderance of the evidence:**

1. The defendant intentionally caused *(insert an appropriate description of the legal process which plaintiff claims the defendant abused, e.g., "a subpoena to be served upon the plaintiff directing him to . . .")***;**

2. The principal reason for defendant's action was other than to *(insert an appropriate description of the proper legal purpose of the process, e.g., "obtain the plaintiff's testimony as a witness in . . .")***; and**

3. This action of the defendant caused the plaintiff (injuries) (damages) (losses).

If you find that one or more of these *(number)* **statements has not been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

On the other hand, if you find that all of these *(number)* **statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to plaintiff's claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see Notes on Use to Instruction 4:20.

3. If the defendant has put no affirmative defense in issue or if there is insufficient evidence to support such a defense, the last two paragraphs should be omitted.

Source and Authority

1. This instruction is supported by **Hewitt v. Rice**, 154 P.3d 408, 414 (Colo. 2007) (distinguishing between abuse of process and malicious prosecution); **Sterenbuch v. Goss**, 266

P.3d 428 (Colo. App. 2011); **Mintz v. Accident & Injury Med. Specialists, P.C.**, 284 P.3d 62 (Colo. App. 2010), *aff'd on other grounds*, 2012 CO 50, 279 P.3d 658; **Palmer v. Diaz**, 214 P.3d 546 (Colo. App. 2009) (citing instruction); **James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail**, 892 P.2d 367 (Colo. App. 1994), *cert. denied* (1995); **Salstrom v. Starke**, 670 P.2d 809 (Colo. App. 1983); **Aztec Sound Corp. v. Western States Leasing Co.**, 32 Colo. App. 248, 510 P.2d 897 (1973). *Accord* **American Guar. & Liab. Co. v. King**, 97 P.3d 161 (Colo. App.), *cert. denied* (2004).

2. To establish a claim for abuse of process, the plaintiff must show "(1) an ulterior purpose in the use of judicial proceedings; (2) willful actions by the defendant in the use of process that are not proper in the regular conduct of the proceedings; and (3) damages." **Hewitt v. Rice**, 154 P.3d 408, 414 (Colo. 2007) (distinguishing between abuse of process and malicious prosecution); **Mackall v. JPMorgan Chase Bank**, 2014 COA 120 ¶ 39; **Colo. Cmty. Bank v. Hoffman**, 2013 COA 146. Although subjective motive is important in determining whether there was an ulterior purpose, it must also be established that, viewed objectively, there was an improper use of legal process. **Walker v. Van Laningham**, 148 P.3d 391 (Colo. App. 2006). Although an ulterior motive may be inferred from the wrongful use of process, the wrongful use may not be inferred from the motive. **Colo. Cmty. Bank v. Hoffman**, 2013 COA 146 (Even if evidence allowed an inference that the sole intent was to divest defendants of their ownership interests in property, this evidence would establish only that the intervenors had an ulterior motive in bringing the action, and does not establish the requisite improper use of process).

3. The essence of the tort is the use of legal process "against another primarily to accomplish a purpose for which it was not designed. . . ." RESTATEMENT (SECOND) OF TORTS § 682 (1977). Thus, unlike the tort of malicious prosecution, for the plaintiff to establish a claim for abuse of process, it is not necessary to prove that the proceedings in which the process was used terminated in plaintiff's favor, or that the process was obtained or proceedings started without probable cause. **Coulter v. Coulter**, 73 Colo. 144, 214 P. 400 (1923). Examples of process that have been abused are attachment, execution, garnishment, sequestration, arrest warrants, and subpoenas. W. PROSSER & W. KEETON, TORTS § 121 (5th ed. 1984). Although a judicial order, such as a temporary restraining order, was properly issued, its improper use may form the basis of an abuse of process claim. *See* **Trask v. Nozisko**, 134 P.3d 544 (Colo. App. 2006). However, improper administration of a workers' compensation claim cannot support an abuse of process claim. **Moore v. Western Forge Corp.**, 192 P.3d 427 (Colo. App. 2007), *cert. denied* (2008).

4. Even if the party being sued for abuse of process has an ulterior purpose in bringing the action, if that action is confined to its regular and legitimate function in relation to the claim for relief asserted, the party is not liable. **Mintz**, 284 P.3d 62.

5. When a claim for abuse of process is based on the use of a process that constitutes the exercise by the defendant of a First Amendment right to petition the government for redress of grievances, plaintiff must meet a "heightened standard" sufficient to show that the defendant's petitioning activities were not immunized from liability under the First Amendment. **Protect Our Mtn. Env't, Inc. v. District Court**, 677 P.2d 1361, 1369 (Colo. 1984) ("**POME**"). *See also* **General Steel Domestic Sales v. Bacheller**, 291 P.3d 1, 8 (Colo. 2012). Specifically, a plaintiff must show that "(1) the defendant's administrative or judicial claims were devoid of reasonable

factual support or lacked any cognizable basis in law; (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to affect adversely a legal interest of the plaintiff." **POME**, 677 P.2d at 1369. This standard applies when the abuse challenged involves the filing of a lawsuit, as the "right to petition extends to all departments of the Government," and "[t]he right of access to the courts is . . . but one aspect of the right of petition." **California Motor Transport Co. v. Trucking Unlimited**, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L.Ed.2d 642 (1972); **General Steel**, 291 P.3d at 7.

6. The heightened standard articulated in **POME** does not apply where the alleged abuse of process involves a purely private as opposed to a public dispute. **Boyer v. Health Grades, Inc.**, 2015 CO 40 (finding the heightened standard articulated in **POME** "to be inapplicable to a resort to administrative or judicial process implicating purely private disputes" in suit alleging breach of fiduciary duty and misappropriation of trade secrets against former employees of plaintiff); **General Steel Domestic Sales v. Bacheller**, 291 P.3d 1, 8 (Colo. 2012) (declining to extend the heightened standard articulated in **POME** where the underlying alleged petitioning activity was the filing of an arbitration complaint in a purely private dispute). *But see* **In re Foster**, 253 P.3d 1244 (Colo. 2011) (concluding that First Amendment and due process concerns identified in **POME** are equally applicable in the context of an attorney discipline case as they are in a civil case).

7. Malice is not an essential element for liability for abuse of process. **Martinez v. Continental Enter.**, 697 P.2d 789 (Colo. App. 1984), *aff'd in part, rev'd in part on other grounds*, 730 P.2d 308 (Colo. 1986). It is sufficient if the defendant's principal purpose was other than a proper legal one. **Salstrom v. Starke**, 670 P.2d 809 (Colo. App. 1983) (jury could reasonably have found plaintiff liable on counterclaim for abuse of process for having intentionally filed, for an "ulterior purpose," *lis pendens* notice that caused the defendant damage).

8. In addition to the authorities cited above, see **Aztec Sound Corp. v. Western States Leasing Co.**, 32 Colo. App. 248, 510 P.2d 897 (1973); RESTATEMENT (SECOND) OF TORTS § 682 (1977).

17:11 ACTUAL DAMAGES

Plaintiff, *(name)***, has the burden of proving the nature and extent of (his) (her) damages by a preponderance of the evidence. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the abuse of process by the defendant(s),** *(name(s))***, (and) (the** *[insert appropriate description, e.g., "negligence"]***, if any, of any designated nonparties).**

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: any physical pain and suffering, mental anguish, fear, anxiety, humiliation, embarrassment, indignity, and public disgrace, and any loss to the plaintiff's reputation which were caused by the abuse of process.

2. Any economic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: court costs, reasonable attorney fees, and any other reasonable expenses the plaintiff has had in defending (himself) (herself) in any (proceeding) (or) (trial) against (him) (her), (and) a reasonable amount for the time (he) (she) lost in preparing for and in attending the proceeding or trial of the case, loss of income, damage to (his) (her) business, (and) *(insert any other items of special damage of which there is sufficient evidence)* **which were caused by the abuse of process.**

Notes on Use

1. Notes on Use to Instruction 17:9 are also applicable to this instruction.

2. Comparative negligence is not a defense to an intentional tort claim. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (Colo. App. 1979). Therefore, the first paragraph of this instruction varies from the comparable damages instructions in "simple" negligence cases by eliminating any reference to plaintiff's own negligence.

Source and Authority

This instruction is supported by **Hewitt v. Rice**, 154 P.3d 408, 414 (Colo. 2007). *See also* **Technical Computer Servs., Inc. v. Buckley**, 844 P.2d 1249 (Colo. App. 1992), *cert. denied* (1993) (plaintiff may recover attorney fees incurred in defending against earlier litigation wrongfully instituted by defendant); Source and Authority to Instruction 17:9; W. PROSSER & W. KEETON, TORTS § 121 (5th ed. 1984).