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## Process - Damages: North Dakota's Exemplary Damages Statute Held Constitutional

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## PROCESS—DAMAGES: NORTH DAKOTA'S EXEMPLARY DAMAGES STATUTE HELD CONSTITUTIONAL

In 1985, Robert L. Stoner was employed as manager of Warehouse Market, a retail grocery store owned by Nash Finch, Inc.<sup>1</sup> Nash Finch officials investigated Stoner's alleged acceptance of premiums offered by vendors as part of sales promotions in violation of Nash Finch policy.<sup>2</sup> Stoner admitted accepting the premiums and was fired.<sup>3</sup> Nash Finch officials determined the total value of premiums Stoner had accepted over the years to be approximately \$6,000.<sup>4</sup> Stoner had also granted a second mortgage to Nash Finch in the amount of \$15,000, on which Stoner owed approximately \$7,500 at the time of his firing.<sup>5</sup> In addition, Nash Finch officials became aware that Stoner was eligible to collect his accumulated profit sharing fund and that the amount in the fund was much greater than the amount Stoner owed from both the mortgage and the premiums.<sup>6</sup> On December 5, 1985, company management met with Stoner and discussed the legal actions the company might take.<sup>7</sup> Stuart Deuring, an attorney for Nash Finch, prepared a demand promissory note and a "Release and Settlement Agreement," which specified the amounts of the

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1. *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 749 (N.D. 1989). The 52-year-old Stoner had been employed by Nash Finch for 17 years and was considered a valued employee. *Id.*

2. Brief for Appellee at 2, *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989) (No. 880239) [hereinafter Brief for Appellee]. Premiums consisting of prizes, trips, appliances, and other incentives were offered by vendors as bonuses to persuade store managers to buy and promote the vendor products. Brief for Appellant at 4, *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989) (No. 880239) [hereinafter Brief for Appellant]. The practice of accepting premiums from vendors, although prohibited by Nash Finch through circulars distributed throughout the company once or twice a year, was known to company management at headquarters in Minneapolis. *Stoner*, 446 N.W.2d at 749. A secret investigation of Stoner was conducted by Ronald Curran, a loss prevention manager for the company. *Id.* Curran determined that Stoner had been accepting premiums for years, and it was decided that Curran and Richard Wallace, Vice President of Warehouse Foods Division, would travel to Bismarck to confront Stoner with the findings. *Id.*

3. *Stoner*, 446 N.W.2d at 749-50. Nash Finch decided to pursue criminal misdemeanor charges against Stoner for theft. *Id.* The option of suing Stoner in a civil proceeding was discussed but rejected as being too "time-consuming." *Id.*

4. *Id.* at 749. Included in the premiums accepted by Stoner were four trips to Hawaii worth \$800 each, which Stoner sold for cash, and an all-terrain vehicle worth \$350, which Stoner also sold for cash. Brief for Appellant, *supra* note 2, at 7.

5. *Stoner*, 446 N.W.2d at 750. Nash Finch prohibited managers from keeping premiums from vendors, because the company feared their inventory buying might be improperly influenced. Brief for Appellant, *supra* note 2, at 5.

6. *Stoner*, 446 N.W.2d at 750.

7. *Id.* Stuart Deuring, house counsel for Nash Finch, and Ronald Curran met with Stoner at a Bismarck motel. *Id.* When Stoner was confronted by Wallace and Curran, he expressed surprise that Wallace inquired about the acceptance of premiums, since Stoner knew through prior discussions with him that Wallace knew that managers and other employees of Nash Finch accepted premiums. Brief for Appellee, *supra* note 2, at 2-3.

accepted premiums and the amount owed on the mortgage.<sup>8</sup> Deuring then told Stoner that if Stoner signed the release and the demand note and pled guilty to a misdemeanor charge of theft, the potential felony charge would not be pursued.<sup>9</sup> Stoner signed the demand note and the release.<sup>10</sup> Immediately after the meeting, Stoner and the Nash Finch officials went to the Bismarck Police Department, where Stoner confessed to the misdemeanor charge of theft.<sup>11</sup> In January 1986, Deuring forced Stoner to obtain a certified check to satisfy the demand note before Deuring would deliver Stoner's profit sharing check in the amount of \$22,000.<sup>12</sup>

Stoner filed claims of malicious prosecution and abuse of process in district court.<sup>13</sup> The jury found for Stoner on the abuse of process claim and awarded \$25,200 in compensatory damages as well as \$200,000 in exemplary damages.<sup>14</sup> Nash Finch appealed, claiming the evidence did not support a finding of abuse of process and alleging that the exemplary damages award was excessive, violating the excessive fines, due process, and equal protection clauses

8. *Stoner*, 446 N.W.2d at 750.

9. *Id.* Deuring told Stoner that the total value of all the items Stoner had accepted would enable Nash Finch to pursue a felony charge, but that the state's attorney had agreed to reduce the charge if Stoner cooperated. *Id.*

10. *Id.*

11. *Id.* On December 18, 1985, Stoner was formally charged with a misdemeanor. *Id.*

12. *Id.* at 751. The demand note included the amount of the unpaid mortgage (approximately \$7,500) and the amount of premiums taken by Stoner (approximately \$6,000). *Id.* at 750. After the dollar amount of a video cassette recorder was crossed off the list, the total of the demand note was \$13,271.45. *Id.* at 750.

13. *Id.*

14. *Id.* at 753, 756-57. The compensatory damages included \$200 for attorney's fees and \$25,000 for "intangible damages such as embarrassment, humiliation, mental grief, and anguish." Brief for Appellee, *supra* note 2, at 33. Nash Finch failed to timely object to the jury instructions regarding attorney's fees. *Stoner*, 446 N.W.2d at 753-54. Consequently, Nash Finch waived its right to appeal the award of attorney's fees to Stoner. *Id.* Exemplary damages were awarded pursuant to North Dakota Century Code section 32-03-07. *Id.* at 756. Section 32-03-07 has been "suspended" from July 8, 1987 through June 30, 1993. Tort Liability, 1987 N.D. Laws ch. 404 § 15. Section 32-03-07 provided, in pertinent part:

In any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

N.D. CENT. CODE § 32-03-07 (1976 and Supp. 1989). The 1987 North Dakota Legislature approved Session Law Chapter 404, which provides:

In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or malice, actual or presumed, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

1987 N.D. Laws ch. 404 § 11. The major change instituted by the Legislature is that the evidence, in order to be sufficient, must now meet the more demanding "clear and convincing" standard. *Id.*

of both the federal and state constitutions.<sup>15</sup> The North Dakota Supreme Court affirmed and *held* that substantial evidence existed to support the jury's finding of abuse of process and that the procedure for assessment of exemplary damages did not violate the excessive fines, due process, or equal protection clauses.<sup>16</sup> *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (1989).

The tort of abuse of process occurs when one takes civil or criminal legal action to accomplish a purpose different from what the legal process is designed to accomplish.<sup>17</sup> Recognition of the tort of abuse of process developed because malicious prosecution claims failed to provide a remedy for civil or criminal proceedings that were set in motion under the proper form and with probable cause but were aimed at satisfying a purpose for which legal procedures were not designed.<sup>18</sup> This abuse of the process leaves the pursuer liable for harm caused by the abuse of process.<sup>19</sup>

In determining whether a valid claim of abuse of process exists, courts have addressed the issue of whether conduct can be considered if it occurs before the actual issuance of the criminal or civil process.<sup>20</sup> Courts usually permit all of the defendant's conduct to be considered, whether it occurred before or after the actual legal process began, as long as the process results from an improper motive.<sup>21</sup> An improper demand for collateral advantage made before actual process has been issued has been seen as actionable if process follows from the demand. This is because an improper motive can be derived from words spoken about the process, and the improper threat itself means the process was

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15. *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 751, 754-57 (N.D. 1989).

16. *Id.* at 753, 757.

17. *See, e.g., Stoner*, 446 N.W.2d at 751 (citing the RESTATEMENT (SECOND) OF TORTS § 682 (1976). Abuse of process usually takes the form of coercion to obtain a collateral advantage, such as the surrender of property or the payment of money, which is improper in the normal legal proceeding. *Id.* (citing W. KEETON, PROSSER AND KEETON ON TORTS § 121, at 898 (1984) [hereinafter PROSSER AND KEETON]).

18. PROSSER AND KEETON, *supra* note 17, at 897. Abuse of process differs from malicious prosecution in that in abuse of process, the claim itself is justified but the process is misused for an altogether improper motive. With malicious prosecution, the claim itself is unjustified from the beginning. *Id.*

19. RESTATEMENT (SECOND) OF TORTS § 682 (1976).

20. *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, \_\_\_, 153 S.E.2d 693, 696 (1967).

21. *Id.* *See also* *Nienstedt v. Wetzel*, 133 Ariz. 348, \_\_\_, 651 P.2d 876, 880 (Ariz. Ct. App. 1982). The *Nienstedt* court stated that "'process' as used in the tort 'abuse of process' is not restricted to the narrow sense of that term. Rather, it has been interpreted broadly, and encompasses the entire range of procedures incident to the litigation process." *Id.* (footnote omitted). *But see* *Herring v. Citizens Bank and Trust Co.*, 21 Md. App. 517, \_\_\_, 321 A.2d 182, 191 (1974) (citing *Earl v. Winne*, 14 N.J. 119, 135, 101 A.2d 535, 544 (1953) (the court concluded that abuse of process action only lies for improper use of process after process has been issued).

being used, even though an actual complaint had not been filed.<sup>22</sup>

One of the essential elements of the tort of abuse of process is an ulterior purpose designed to achieve an end not lawfully warranted by use of the legal process.<sup>23</sup> If the ultimate purpose truthfully sought by the party is one that the law was not intended to effect, the result is a form of extortion.<sup>24</sup> Improper purposes have been found in a variety of contexts.<sup>25</sup> A common example is when a creditor attaches property worth several times more than the debt owed, and the court finds an ulterior purpose of pressuring payment.<sup>26</sup>

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22. See PROSSER AND KEETON, *supra* note 17, at 898. The judicial process must somehow be involved for a successful claim of abuse of process. *Id.* A mere threat that process will be issued, without the showing of an improper objective behind the threat, is insufficient. *Id.*

23. See, e.g., *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, \_\_\_, 153 S.E.2d 693, 695 (1967) (store manager used criminal process for the ulterior purpose of making Huggins pay excessive amounts for merchandise taken, rather than for punishment for shoplifting).

24. *Id.* at \_\_\_, 153 S.E.2d at 696. See also PROSSER AND KEETON, *supra* note 17, at 898. In abuse of process, a form of extortion takes place during the negotiations process rather than in the issuance of the process itself. *Id.* The coercion or compulsion during the "course of negotiation" is what is important, rather than the actual use of legal procedure. *Id.*

25. See *Moore v. Michigan Nat'l Bank*, 368 Mich. 71, \_\_\_, 117 N.W.2d 105, 106 (1962). In *Moore*, the Bank instituted criminal proceedings against Moore for allegedly submitting false financial statements to procure a loan. *Id.* The Michigan Supreme Court determined that improper use of criminal process as a means of collecting a private debt might have been abusive enough to constitute an actionable tort, but the three-year statute of limitations barred recovery. *Id.* See, e.g., *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, \_\_\_, 153 S.E.2d 693, 695 (1967) (a retail store was found to have the improper purpose of collecting \$10 from Huggins by issuing criminal process for merchandise the store manager felt Huggins had taken on previous days); *Nevada Credit Rating Bureau, Inc. v. Williams*, 88 Nev. 601, \_\_\_, 503 P.2d 9, 13 (1972) (property worth over \$30,000 was attached to collect a debt of less than \$5,000 to pressure payment rather than secure a debt); *Italian Star Line v. United States Shipping Bd. Emergency Fleet Corp.*, 53 F.2d 359, 361 (2d Cir. 1931) (attorney's issuance of receivership proceedings against company president was really aimed at gaining access to private company records to pursue contemplated criminal proceedings).

26. See *Blair v. Maxbass Security Bank*, 44 N.D. 12, 176 N.W. 98 (1919). In *Blair*, the Bank foreclosed chattels valued at more than four times what was actually owed. *Id.* at \_\_\_, 176 N.W. at 99. The Bank failed to adequately take care of the livestock and failed to sell the crops that were seized. *Id.* The North Dakota Supreme Court reasoned that the Bank actually sought to cause great financial loss for Blair rather than to collect on the debt owed to the Bank. *Id.* See also *Williams*, 88 Nev. at \_\_\_, 503 P.2d at 13. In *Williams*, property valued at over \$30,000 was attached as security for a debt of less than \$5,000. *Id.* The defendant was deemed to have possessed full knowledge that attachment of Williams' mining equipment would have a devastating effect upon his mining operation. *Id.* The court reasoned the attachment was to pressure payment rather than to secure a debt. *Id.*

However, for a proper purpose, see *Fite v. Lee*, 11 Wash. App. 21, \_\_\_, 521 P.2d 964, 969 (1974). In *Fite*, Betty J. Fite was awarded a total judgment of \$131,800 in a divorce decree. Her ex-husband, Leslie Fite, was to deposit Chevrolet dealership stock with the clerk of court as security. *Id.* Leslie Fite failed to deposit the stock. *Id.* Consequently, writs of garnishment were filed which the lower court ordered effective unless sufficient bond was posted. *Id.* Fite claimed that the amount of assets garnished was grossly excessive and that the improper purpose behind the garnishment was to discourage the appeal and to obtain a favorable negotiating position on the issue of interlocutory support. *Id.* at 970. The court disagreed that an improper purpose existed; rather, the court found a valid garnishment of assets arising from a correct judicially determined process that was allowable under statute. *Id.* The Washington Appellate Court ruled that no improper

An improper purpose was found when a store manager coerced a customer into paying for merchandise the manager felt the customer had previously taken. In *Huggins v. Winn-Dixie Greenville, Inc.*,<sup>27</sup> the manager demanded \$10 when he discovered a customer had taken two packages of boiled ham worth fifty-nine cents apiece. When the customer resisted, the manager had him arrested for petit larceny.<sup>28</sup> The court reasoned that the manager had acted to collect on an account rather than to bring a suspected shoplifter to justice.<sup>29</sup> Therefore, the court determined that the manager had improperly used the criminal process for an ulterior purpose.<sup>30</sup>

Improper purpose alone is insufficient for a claim of abuse of process; a willful act not contemplated by the usual form of process is also required.<sup>31</sup> In *Nevada Credit Rating Bureau, Inc. v. Williams*,<sup>32</sup> the Nevada Supreme Court determined that Nevada Credit Bureau's attachment of Williams' equipment and subsequent refusal to release the equipment amounted to a willful act not proper in the normal proceeding.<sup>33</sup> The mining equipment attached was worth more than six times the debt.<sup>34</sup> The court concluded that the credit bureau should have known the devastating effect attachment would have upon Williams' operation.<sup>35</sup> The definite willful acts of attachment and the subsequent refusal to release showed more than mere bad purpose or bad intent.<sup>36</sup> The

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purpose exists when the trial court sanctions process in an exercise of its statutory authority, when the process is neither excessive in amount nor coercive in nature, and when that process is not improperly alien to the proceedings. *Id.* The defendant lawyer, Lee, was simply using the statutorily correct process towards a justifiable ends—to secure payment of a valid divorce decree. *Id.*

27. 249 S.C. 206, 153 S.E.2d 693 (1967).

28. *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967).

29. *Id.* at \_\_\_, 153 S.E.2d at 695.

30. *Id.* In *Huggins*, the court felt that the store could not divorce itself from responsibility for the proceedings that flowed from the store manager's actions. *Id.* at \_\_\_, 153 S.E.2d at 696. The court found valid the inference that the arrest and charge of petit larceny plus the subsequent arrest, indictment and trial on the charge of shoplifting for only two packages of ham were tainted throughout with the ulterior and improper purpose of forcing Huggins to pay for merchandise that the store manager only "felt" Huggins had previously taken. *Id.* When civil or criminal process is used to reach an end not legitimately within the scope of the process (in this case coercion to pay rather than proper punishment for a crime), then an action will lie for an abuse of process. *Id.*

31. PROSSER AND KEETON, *supra* note 17, at 898. There must be some form of overt act or definite undertaking aimed at an improper objective. *Id.*

32. 88 Nev. 601, 503 P.2d 9 (1972).

33. *Nevada Credit Rating Bureau, Inc. v. Williams*, 88 Nev. 601, \_\_\_, 503 P.2d 9, 13 (1972).

34. *Id.* In *Williams*, the large amount levied, in comparison to the debt, made it impossible for Williams to use his equipment, causing compensable damage. *Id.*

35. *Id.* The *Williams* court concluded that the combined actions taken by the credit bureau showed that malice existed, making the award of punitive damages appropriate. *Id.* at \_\_\_, 503 P.2d at 15.

36. *See id.* The concrete act taken by the credit bureau apparently was sufficient, in

acts amounted to definite undertakings by the credit bureau aimed at harming Williams, an objective that was altogether different from the mere satisfaction of the debt.<sup>37</sup>

No liability will be found, however, where the ultimate aim of the defendant was merely to carry out the process to its legitimate conclusion, whether the process was successful or not.<sup>38</sup> In *Thornton v. Rhoden*,<sup>39</sup> the California Court of Appeals held that merely taking a deposition in a claim in which one of the founders of a large corporation was seeking vast sums of money and stock allegedly owed him was not an improper act.<sup>40</sup> The suing founder Steele, through his attorney, deposed a party who made damaging comments about Thornton.<sup>41</sup> These comments caused Thornton to file a defamation suit and, later, an abuse of process claim.<sup>42</sup> The court held that the taking of ordinary steps in the filing of a deposition showed no definite willful act aimed at an improper objective; Steele was merely taking ordinary, authorized steps to carry out legal process to its authorized conclusion.<sup>43</sup>

Some courts also require the plaintiff to have suffered damage in order to succeed in an abuse of process claim.<sup>44</sup> One court found that no damage resulted when a company instigated a receivership proceeding to collect on an unpaid bill, even though an ulterior purpose for the receivership existed.<sup>45</sup> The court found that the plaintiff had not stated a cause of action for abuse of process, because the seizure of the private papers was not shown to have caused any detriment.<sup>46</sup> In contrast, some authority states

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the court's analysis, to show more than bad purpose. *Id.* The bad purpose was furthered through the definite act of attachment. *Id.*

37. *Id.* See also *Blair v. Maxbass Sec. Bank*, 44 N.D. 12, \_\_\_, 176 N.W. 98, 100 (N.D. 1919). In *Blair*, the fact that the chattel mortgages foreclosed by the bank were worth more than four times the amount owed on the debt and stopped the operations of Blair's farm, showed that the definite act of foreclosure was in furtherance of the improper objective of harming Blair and amounted to more than mere bad purpose alone. *Id.*

38. PROSSER AND KEETON, *supra* note 17, at 898.

39. 245 Cal. App. 2d 80, 53 Cal. Rptr. 706 (1966).

40. *Thornton v. Rhoden*, 245 Cal. App. 2d 80, \_\_\_, 53 Cal. Rptr. 706, 720 (1966). The court in *Thornton* felt that the taking of a deposition was an act that was authorized by the civil process in the defamation suit. *Id.*

41. *Id.* at \_\_\_, 53 Cal. Rptr. at 709.

42. *Id.*

43. *Id.* at \_\_\_, 53 Cal. Rptr. at 720. Apparently, the *Thornton* court felt more was needed to show the furtherance of an improper purpose than the mere deposition of a party. *Id.*

44. *Italian Star Line v. United States Shipping Bd. Emergency Fleet Corp.*, 53 F.2d 359, 362 (2d Cir. 1931).

45. *Id.* The real purpose behind the receivership in *Italian Star Line* was to gain access to company records for a possible criminal prosecution. *Id.* When the attorneys did, in fact, gain access, no damage to the corporation was shown as a result. *Id.*

46. *Id.* (citing *Silverman v. Ufa E. Div. Distribution, Inc.*, 236 N.Y.S. 18 (N.Y. Sup. Ct. 1929) (no arrest or seizure of property was made; the only inconvenience or damage

that damages may be awarded without a showing of specific harm; rather, that damages may be awarded to sustain the integrity of the judicial system.<sup>47</sup>

When the elements of the claim for abuse of process have been satisfied, the court must then determine the appropriate damages.<sup>48</sup> In *Dahlen v. Landis*,<sup>49</sup> an assault and battery case, the North Dakota Supreme Court determined that the amount of compensatory damages need not be decided by precise mathematical calculation; rather, the analysis depends on a case-by-case determination that gives deference to the common sense of the jury.<sup>50</sup> The court found that along with physical harm suffered, the jury could consider feelings of the harmed party, such as mental pain, humiliation, and disgrace, in the determination of compensatory damages.<sup>51</sup> Thus, when determining appropriate compensatory damages, the court allows the jury to take into account all harm suffered by the plaintiff.<sup>52</sup>

In certain cases, exemplary damages may be awarded.<sup>53</sup> Exemplary damages act to punish the wrongdoer and to deter similar conduct by the wrongdoer and others.<sup>54</sup> The North Dakota Supreme Court has noted that an amount sufficient to punish one wrongdoer may be wholly inadequate to punish or deter another.<sup>55</sup> Therefore, evidence of the financial standing of the defendant is properly considered in determining an appropriate punishment.<sup>56</sup> The important inquiry when reviewing the appropriateness of an award is whether the amount is so large as to clearly indicate "passion or prejudice" on the part of the jury.<sup>57</sup>

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suffered was that due to an orderly and regular prosecution of a suit); *Garland v. Wilson*, 289 Pa. 272, 137 A. 26 (1927) (if a person is not arrested and his property is not seized, it is unimportant how futile the proceedings were)).

47. PROSSER AND KEETON, *supra* note 17, at 900.

48. *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 755 (N.D. 1989).

49. 314 N.W.2d 63 (N.D. 1981).

50. *Dahlen v. Landis*, 314 N.W.2d 63, 68 (N.D. 1981) (citing *Lake v. Neubauer*, 87 N.W.2d 888, 891 (N.D. 1958)).

51. *Id.* *Dahlen* was awarded \$20,000 in general damages (for pain, suffering, inconvenience, embarrassment, and humiliation) and \$45,000 in punitive damages, because of a physical beating *Dahlen* endured at the hands of *Landis*. *Id.*

52. See generally *Olmstead v. First Interstate Bank*, 449 N.W.2d 804, 808 (N.D. 1989) (the defendant must compensate the victim for the full extent of the aggravation); *Johnson v. Monsanto Co.*, 303 N.W.2d 86, 92 (N.D. 1981) (the measure of damages is the amount that will compensate the plaintiff for all of the detriment proximately caused by the injury); *Unruh v. Murray*, 84 N.W.2d 730, 732-33 (N.D. 1957) (measure of plaintiff's damages is the detriment suffered by him due to defendant's unlawful act).

53. *Dahlen*, 314 N.W.2d at 68.

54. *Id.*

55. *Id.* (citing *Neidhardt v. Siverts*, 103 N.W.2d 97, 103 (N.D. 1960)).

56. *Dahlen*, 314 N.W.2d at 68 (citing 6 AM. JUR. 2D, *Assault and Battery* § 187 (1967)).

57. *Neidhardt v. Siverts*, 103 N.W.2d 97, 103 (N.D. 1960) (quoting *Bogue v. Gunderson*, 30 S.D. 1, —, 137 N.W. 595, 596 (1912)).

The jury must find oppression, fraud, or malice, actual or presumed, to support an award of exemplary damages.<sup>58</sup> In *Dahlen v. Landis*, the North Dakota Supreme Court determined that the law does not require direct evidence of a malicious mental state of a defendant; rather, the motive and circumstances of the act itself may be examined to determine what influenced the defendant.<sup>59</sup> If the motive is found to be deceitful and incorrect after a consideration of all the elements, then the jury is authorized to find malice.<sup>60</sup>

Allowing jury determination of exemplary damage awards has been attacked on the grounds that it violates the excessive fines clause of the Eighth Amendment of the United States Constitution.<sup>61</sup> In *Browning-Ferris Industries v. Kelco Disposal, Inc.*,<sup>62</sup> the United States Supreme Court addressed the issue of whether a civil jury award of punitive or exemplary damages violates the eighth amendment protection against excessive fines.<sup>63</sup> The Court noted that the eighth amendment was primarily influenced by the Magna Carta and by the English Bill of Rights, which was intended to prevent the King from imposing arbitrary fines upon his enemies.<sup>64</sup> The Court concluded that history supported an interpretation of the excessive fines clause as a limitation on the ability of a sovereign king or government to use its prosecutorial power,

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58. *John Deere Co. v. Nygaard Equip., Inc.*, 225 N.W.2d 80, 95 (N.D. 1974). North Dakota Century Code section 32-03-07 provides that the jury may award exemplary damages upon finding a defendant guilty of "oppression, fraud, or malice, actual or presumed . . ." N.D. CENT. CODE § 32-03-07 (1976 & Supp. 1991). Section 32-03-07 has been "suspended" by the North Dakota Legislature from July 8, 1987 through June 30, 1993. See *supra* note 14 (North Dakota Legislature added a clear and convincing standard for evidence to be sufficient to award exemplary damages).

59. *Dahlen*, 314 N.W.2d at 69 (citing *Neidhardt v. Siverts*, 103 N.W.2d 97, 102 (N.D. 1960)). The circumstances surrounding Landis' assault and battery of Dahlen (the suddenness of the attack along with the profanity and repeated blows) permitted the jury to find that Landis acted maliciously. *Id.*

60. *Id.*

61. See *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60 (1989) (eighth amendment is not applicable to civil cases; rather, the amendment is only considered in criminal contexts). Opinion does exist to the contrary. See Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986) [hereinafter Jeffries]; Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987). The Magna Carta established a general principal that the punishment must be in proportion to the offense. *Id.* at 1716-18. Further, the Magna Carta specifically included civilly assessed sanctions (amercements) within the scope of its prohibition of disproportionate punishments. *Id.* The eighth amendment excessive fines clause was based on the English Bill of Rights, which, in turn, was based on the Magna Carta. *Id.* The clause's roots evince the broader principle that punishment in any form must be proportionate to the misconduct. *Id.*

62. 492 U.S. 257 (1989).

63. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 259 (1989). The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

64. *Id.* (citing L. SCHWOERER, *THE DECLARATION OF RIGHTS*, 1689, at 91 (1981)).

including the power to collect fines, for improper ends.<sup>65</sup> The Court reasoned that the "Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."<sup>66</sup> Therefore, the Court held that the eighth amendment prohibition against excessive fines "does not apply to awards of punitive damages in cases between private parties."<sup>67</sup>

Another argument is that statutes allowing juries discretion in determining exemplary damage awards are vague and arbitrary, thus denying a defendant due process and equal protection under the United States Constitution.<sup>68</sup> Much support exists for the argument that the due process clause forbids statutes that lack objective guidelines by which juries should properly set the amount of exemplary damages.<sup>69</sup> In *Browning-Ferris*, Justice Brennan, in a special concurring opinion joined by Justice Marshall, expressed concern over the absence of standards and guidelines for the jury to act upon in setting the amount of exemplary damages.<sup>70</sup> Justice Brennan felt that the touchstone of due process was the protection of the individual against arbitrary government action, and that without statutory guidelines for the determination of appropriateness of exemplary damages, such arbitrary determinations would violate due process.<sup>71</sup> He felt that damage awards situated within an acceptable range for the stated offense, deliberated and agreed upon by legislatures, would be less arbitrary than awards deter-

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65. *Browning-Ferris*, 492 U.S. at 271-72.

66. *Id.* at 268.

67. *Id.* at 260. The Court followed precedent and held that the eighth amendment is only applicable to criminal process or actions by the government. *Id.*

68. See, e.g., *Horowitz v. Schneider Nat'l, Inc.*, 708 F. Supp. 1573, 1578 (D. Wyo. 1989) (The jury must consider the nature of the tort, the amount of actual damages, and the wealth of the defendant in determining appropriate punitive damages. Therefore, Wyoming law contains adequate standards.); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1536 (D. Minn. 1989) (The Minnesota punitive damages statute was held not to give juries unbridled discretion in awarding punitive damages. First, the court has a duty to grant a new trial upon a finding of punitive damages unsupported by the evidence. Second, the statute lists nine separate factors which the jury should consider.); *Radell v. Comora*, 211 Cal. App. 3d 1244, \_\_\_, 259 Cal. Rptr. 891, 900 (Ct. App. 1989) (statute defining conduct giving rise to liability for punitive damages is not unconstitutionally vague).

69. See *Jeffries*, *supra* note 61, at 139. Professor *Jeffries* proposes that the due process clause requires, in whatever context, that legal procedures be consistent with "fundamental fairness" and with "traditional notions of fair play and substantial justice." *Id.* at 152 (quoting *Lassiter v. Department of Social Service*, 452 U.S. 18, 25 (1981); *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). Under this premise, "fundamental fairness" requires that a state not allow unlimited punitive recovery in tort situations, since a potential defendant would not have any warning of the potential consequences of his actions. *Jeffries*, *supra* note 61 at, 152.

70. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 280-81 (1989) (Brennan, J., concurring specially). Justice Brennan felt that without statutory guidelines, juries are left on their own to make this important and potentially devastating decision. *Id.*

71. *Id.* In *Browning-Ferris*, the jury was sent to deliberations with instructions stating only that they should consider the character of the defendants, the defendant's financial standing, and the nature of the defendant's acts. *Id.*

mined by juries with only "skeletal guidance."<sup>72</sup>

Two years later, the United States Supreme Court addressed the issue of the constitutionality of a punitive damages award. In *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>73</sup> the Court held that punitive damage awards that do not lack objective criteria are not violative of the due process clause of the fourteenth amendment.<sup>74</sup> The Court noted that the common law method of allowing juries to assess punitive damages was well established before the fourteenth amendment was adopted and refused to draw any "mathematical bright line" to determine acceptable punitive awards.<sup>75</sup> The Court reasoned that the jury instructions afforded no more discretion than is allowed with other familiar concepts of the law, such as "the best interests of the child," "reasonable care," or "due diligence."<sup>76</sup>

In *Stoner v. Nash Finch, Inc.*,<sup>77</sup> the North Dakota Supreme Court examined the elements of an abuse of process claim and the constitutionality of a North Dakota statute pertaining to awards of exemplary damages.<sup>78</sup> The court determined that after terminating Stoner's employment for accepting premiums offered by vendors, Nash Finch had improperly used criminal process to obtain repayment of the value of the premiums and repayment of a mortgage.<sup>79</sup> The court reasoned that Nash Finch executives threatened issuance of a felony criminal complaint for the ulterior purpose of obtaining repayment of monies owed the company, a wilful act of using process in furtherance of an improper objective.<sup>80</sup> Using the criminal process to obtain a collateral advantage over Stoner was the outcome of the legal claim rather than the purpose for which criminal process was intended—punishment for theft.<sup>81</sup>

Further, the court found unpersuasive Nash Finch's argument that the jury could only consider conduct of Nash Finch officials

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72. *Id.* See also *Bankers Life and Casualty v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring). Justice O'Connor, joined by Justice Scalia, was concerned that a Mississippi statute was vague in that it failed to give warning to a potential tortfeasor that actual damages of \$20,000 could cause a punitive damage award of \$1.6 million. *Id.*

73. 111 S. Ct. 1032 (1991).

74. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1046 (1991).

75. *Id.*

76. *Id.* at 1044.

77. *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989).

78. *Id.* at 751-57.

79. *Id.* at 751-52.

80. *Id.*

81. *Stoner*, 446 N.W.2d at 751-52. In effect, the court concluded that Nash Finch had pursued a scheme to extort money from Stoner through the use of the criminal process. *Id.* at 754.

which occurred after the date the criminal complaint was filed.<sup>82</sup> The court reasoned that Nash Finch's conduct prior to the issuance of the complaint was essential to determine Nash Finch's true goal and concluded that Nash Finch's restrictive interpretation of the proper time for considering its conduct was unwarranted.<sup>83</sup> Apparently, the court has determined that an expansive reading of the willful act requirement is appropriate. Under such a reading, any conduct which occurs before the issuance of legal process and which shows an improper motive in using the legal process may be taken under consideration.<sup>84</sup>

In determining the existence of malice required for exemplary damages, the court followed *Dahlen v. Landis*.<sup>85</sup> The court concluded that circumstances showed that Nash Finch had, in effect, schemed to extort money from Stoner through the use of the criminal process, and that by doing so, Nash Finch was malicious in its actions.<sup>86</sup> The award of exemplary damages was, therefore, appropriate.<sup>87</sup>

Regarding the constitutionality of the \$200,000 exemplary award, the North Dakota Supreme Court found no violation of the excessive fines, due process, or equal protection clauses.<sup>88</sup> The court followed *Browning-Ferris Industries*<sup>89</sup> and deemed the excessive fines clause only applicable to the criminal process.<sup>90</sup> Regarding the vagueness claim made by Nash Finch, the court disagreed with Nash Finch's assertions that the jury determination of the appropriate exemplary damages was arbitrary and standardless.<sup>91</sup> The court reasoned that the statutory terms required by

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82. *Id.* at 752. The criminal complaint was filed on December 18, 1985. *Id.*

83. *Id.* The *Stoner* court determined that a demand for a collateral advantage which occurred before the issuance of process was sufficient to satisfy the definite willful act requirement. *Id.* (citing PROSSER AND KEETON, *supra* note 17).

84. *Stoner*, 446 N.W.2d at 752.

85. *Id.* at 754 (applying *Dahlen v. Landis*, 314 N.W.2d 63, 69 (N.D. 1981)). The *Dahlen* court declared that the law does not require the direct evidence of a malicious mental state; rather, "the character of the act itself, with all its surrounding facts and circumstances, may be inquired into for the purpose of ascertaining" the true desire or motive. *Dahlen*, 314 N.W. 2d at 69. Once the character of the act has been determined, if the motive is found to be improper, the law authorizes the jury to find it was malicious. *Id.*

86. *Stoner*, 446 N.W.2d at 754.

87. *Id.* The *Stoner* court also found no prejudice or passion on the part of the jury in making its determination, since the jury properly considered Nash Finch's wealth in considering an appropriate award of damages which would serve as punishment. *Id.* The fact that Nash Finch was a large corporation with gross revenue of \$1.3 billion and net profit of \$12 million for the fiscal year 1985 made the \$200,000 award reasonable, in light of Nash Finch's conduct. *Id.*

88. *Stoner*, 446 N.W.2d at 754-55.

89. 492 U.S. 257 (1989).

90. *Stoner*, 446 N.W.2d at 755.

91. *Id.* The *Stoner* court stated that the due process clause requires definiteness of language, so that the language will provide adequate warning of the conduct proscribed

North Dakota Century Code section 32-03-07, "oppression, fraud, or malice," were sufficiently clear to allow persons of ordinary intelligence a reasonable guide and were capable of consistent application.<sup>92</sup> Further, the court reasoned that the jury instructions gave adequate standards to guide the deliberations by requiring clear and convincing proof of oppression or malice for a determination of exemplary damages.<sup>93</sup> Lastly, the court found that the availability of motions for a new trial and for judgment notwithstanding the verdict also acted to limit the jury's discretion by preventing unfair awards of punitive damages.<sup>94</sup>

By upholding the constitutionality of North Dakota's exemplary damages statute, the North Dakota Supreme Court has deferred to the jury's ability to contemplate the proper size and severity of an award.<sup>95</sup> The implication of this deferential stance is that the court has more confidence in individuals' ability to contemplate appropriate punitive damages in civil actions than it has in predetermined legislative standards and, as a result, large awards may follow from the finding of a malicious tort.

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and will make the boundaries sufficiently distinct to allow judges and juries to fairly administer the law. *Id.* (citing *State v. Schwalk*, 430 N.W.2d 317, 319 (N.D. 1988)).

92. *Stoner*, 446 N.W.2d at 756. In *Stoner*, the court stated that a statute is not unconstitutionally vague merely because it does not specify conduct by which the statute is violated. *Id.* at 755 (citing *State v. Beyer*, 441 N.W.2d 919, 921 (N.D. 1989)). Justice Levine, in dissent, felt from reading the separate opinions in *Browning-Ferris* and *Bankers Life and Casualty*, that a majority of the court would find the absence of standards unfair and contrary to the due process clause. *Stoner*, 446 N.W.2d at 758-60 (Levine, J., dissenting) (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life and Casualty v. Crenshaw*, 486 U.S. 71 (1988)). Justice Levine felt North Dakota juries are left completely to their own discretion without any objective standards to guide their determination, thus causing juries' decisions to be unduly influenced by passion and prejudice. *Stoner*, 446 N.W.2d at 760. Justice Levine saw the failure to instruct the jury on the economic position of Nash Finch and on the "nature" of Nash Finch's actions as a total lack of guidance, allowing the jury to do what it merely thought would be "best." *Id.* at 759.

93. *Stoner*, 446 N.W.2d at 756 n.7.

94. *Id.* at 757.

95. *Id.* at 759 (Levine, J., dissenting).