

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

MEGHAN A. ADAMS  
JUDGE

LEONARD L. WILLIAMS JUSTICE CENTER  
500 NORTH KING STREET, SUITE 10400  
WILMINGTON, DELAWARE 19801  
(302) 255-0634

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Adam F. Wasserman, Esq.  
Ciconte Wasserman & Scerba, LLC  
1300 N. King Street  
P.O. Box 1126  
Wilmington, DE 19899

Timothy S. Martin, Esq.  
Daryll M. Hawthorne-Searight, Esq.  
White and Williams, LLP  
Courthouse Square  
600 N. King Street, Suite 800  
Wilmington, DE 19801

RE: *Gina Cantatore v. University of Delaware*  
C.A. No.: N20C-06-241 MAA

Dear Counsel:

This is my decision on Officer Morgan Fountain’s (“Officer Fountain” or “Fountain”) partial motion to dismiss in the above-referenced action. The plaintiff, Gina Cantatore (“Cantatore”), brought this action as a result of her on-campus arrest by Newark Police Department’s Officer Fountain at the University of Delaware (the “University” or “UD”). Although this decision takes the form of a letter opinion, it has the same force and effect as any other form of opinion.

For the reasons that follow, I conclude that the Amended Complaint<sup>1</sup> fails to state a reasonably conceivable claim for abuse of process. Officer Fountain’s motion is granted with prejudice.

### **I. Background<sup>2</sup>**

On September 14, 2019 around 11:30 p.m., Officer Fountain observed two female UD students walking in a poorly-lit section of East Cleveland Avenue in Newark, Delaware.<sup>3</sup> Upon encountering the students and announcing herself, one student ran away, and the other, on crutches, remained.<sup>4</sup> Fountain, believing that the student who fled was in possession of alcohol, asked the student on crutches to identify the other student.<sup>5</sup> The student on crutches identified the student who fled as Gina Cantatore.<sup>6</sup> Officer Fountain then went to the University of Delaware Police Department where, with the assistance of a UD police officer, accessed the school’s student database to look up Cantatore’s name, address, date of birth, and

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<sup>1</sup> See C.A. No. N20C-06-241 MAA, Docket (“Dkt.”) 23, Amended Complaint (“Am. Compl.”).

<sup>2</sup> For the purposes of this motion, I draw the facts from Cantatore’s Amended Complaint.

<sup>3</sup> Am. Compl. ¶¶ 7–8.

<sup>4</sup> *Id.* ¶ 9.

<sup>5</sup> *Id.* ¶ 10.

<sup>6</sup> *Id.*

photograph.<sup>7</sup> She used Cantatore’s school photo to identify her as the student who fled.<sup>8</sup>

Fountain completed an initial crime report on September 15, which listed Cantatore’s alleged offenses: underage consumption of alcohol, possession of an open container, resisting arrest, and littering.<sup>9</sup> A few days later on September 18, an employee of UD’s Office of Student Conduct informed Cantatore that she was being charged with violations of the University’s alcohol and disruptive conduct policies as a result of the September 14 incident.<sup>10</sup> The employee also told Cantatore that a hearing on the conduct violations would be held on September 26, 2019 so that Officer Fountain could attend.<sup>11</sup> Fountain received notice of the hearing date.<sup>12</sup>

On the morning of September 24, Cantatore received a missed call from Fountain.<sup>13</sup> She also received an email from Officer Fountain which stated, “Please contact me via telephone as soon as possible.”<sup>14</sup> Fountain subsequently secured an

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<sup>7</sup> *Id.* ¶ 11.

<sup>8</sup> *Id.* ¶ 12.

<sup>9</sup> *Id.* ¶ 13.

<sup>10</sup> *Id.* ¶ 17.

<sup>11</sup> *Id.* ¶ 23.

<sup>12</sup> *Id.* ¶ 24.

<sup>13</sup> *Id.* ¶ 25.

<sup>14</sup> *Id.* ¶ 26. Cantatore was not aware of the email before her arrest. *Id.* ¶ 27.

arrest warrant for Cantatore.<sup>15</sup> Later that day, Fountain, along with a UD police officer, entered Cantatore’s classroom and asked a professor whether Cantatore was in class.<sup>16</sup> Having identified Cantatore through a teaching assistant, Fountain escorted her outside of the classroom and then told Cantatore she was under arrest and had to go the police station.<sup>17</sup>

Prior to being handcuffed and still holding her phone, Cantatore asked Fountain if she could call her father.<sup>18</sup> Fountain tried to grab the phone from Cantatore’s hand.<sup>19</sup> Fountain then pushed Cantatore against a wall, causing injury to Cantatore’s shoulder.<sup>20</sup> Fountain then tightly handcuffed Cantatore and held onto her arms and hands while escorting her out of the building, leading to further pain and injury.<sup>21</sup>

Once inside the police car, Officer Fountain insulted Cantatore, implying that she was stupid, a bad friend, and should feel embarrassed.<sup>22</sup> After arriving at the station, Fountain continued to insult Cantatore, using the term “crippled”

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<sup>15</sup> *Id.* ¶ 28. The charges included underage consumption of alcohol, possession of an open container, resisting arrest, and littering.

<sup>16</sup> *Id.* ¶¶ 30, 33.

<sup>17</sup> *Id.* ¶¶ 35–37.

<sup>18</sup> *Id.* ¶ 38.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* ¶ 39.

<sup>21</sup> *Id.* ¶ 39, 42.

<sup>22</sup> *See id.* ¶ 44.

pejoratively in reference to her friend, teasing her about the manner in which the arrest transpired, and laughing at the loss of her “perfect cheerleader reputation.”<sup>23</sup> Ultimately, the criminal charges stemming from the September 14 incident were dismissed.<sup>24</sup>

Cantatore filed suit on June 22, 2020.<sup>25</sup> Officer Fountain filed a motion to dismiss in response to the Complaint on September 4, 2020,<sup>26</sup> and the parties engaged in subsequent motion to dismiss briefing.<sup>27</sup> On November 20, 2020, the parties submitted a joint stipulation stating that Cantatore could file an amended complaint, and that Fountain’s motion to dismiss<sup>28</sup> would be withdrawn without prejudice to be renewed upon the filing of Cantatore’s Amended Complaint.<sup>29</sup> Cantatore filed the Amended Complaint on November 24, 2020.<sup>30</sup> Officer Fountain filed a new motion to dismiss (the “Motion”) on December 14, 2020.<sup>31</sup> The Court held oral argument on March 8, 2021.

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<sup>23</sup> See *id.* ¶ 45.

<sup>24</sup> *Id.* ¶ 47.

<sup>25</sup> Dkt. 1, Complaint (“Compl.”).

<sup>26</sup> See Dkt. 10.

<sup>27</sup> See Dkts. 16; 19.

<sup>28</sup> The stipulation also permitted the University of Delaware, one of the other parties to the litigation that has filed a pending motion to dismiss, to withdraw its motion pending the filing of an amended complaint.

<sup>29</sup> See Dkt. 21. This was granted on November 23, 2020. See Dkt. 23.

<sup>30</sup> Dkt. 23.

<sup>31</sup> Dkt. 29.

## II. Legal Analysis

Officer Fountain has moved to dismiss Count V of the Amended Complaint (abuse of process) pursuant to Superior Court Rule 12(b)(6). In resolving a motion to dismiss for failure to state a claim:

(i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and ([iv]) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible to proof.<sup>32</sup>

“But the rules of this Court, even in the context of notice pleading, will not countenance a complaint which rests its claims for relief solely upon conclusory allegations of fact; such allegations will not be accepted as true.”<sup>33</sup>

Under Delaware law, the elements of abuse of process are: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings.<sup>34</sup> The tort addresses abusive litigation<sup>35</sup> and it is chiefly

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<sup>32</sup> *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002) (internal citations and quotation marks omitted).

<sup>33</sup> *Savor, Inc. v. FMR Corp.*, 2001 WL 541484, at \*2 (Del. Super. Apr. 24, 2001), *aff'd*, 812 A.2d 894 (Del. 2002).

<sup>34</sup> *Pfeiffer v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 7062498, at \*5 (Del. Super. Dec. 20, 2011), *aff'd*, 45 A.3d 149 (Del. 2012).

<sup>35</sup> *Spence v. Spence*, 2012 WL 1495324, at \*3 (Del. Super. Apr. 20, 2012) (“[Abuse of process] is very similar to a claim for malicious prosecution in that both address the same wrong, abusive litigation; and it is only a matter of timing between the two.”); *see also Adams v. Aidoo*, 2012 WL 1408878, at \*13 (Del. Super. Mar. 29, 2012), *aff'd*, 58 A.3d 410 (Del. 2013), *as revised* (Jan. 3, 2013) (“[A]buse of

concerned with “perversion of the process after it has been issued.”<sup>36</sup> Satisfaction of the first element, ulterior purpose, may be “inferred from the fact that the process [was] misused,” but the reverse is not true: “if the act of the prosecutor is in itself regular, his motive, ulterior or otherwise, is immaterial.”<sup>37</sup> In other words, a “definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required.”<sup>38</sup> For that reason, “[m]erely carrying out the process to its authorized conclusions, even though with bad intentions, will not result in liability.”<sup>39</sup> Rather, “[s]ome form of coercion to obtain

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process addresses a litigant’s use of the legal system to perpetuate an improper purpose to sue by using, or abusing, the imposition of proceedings that accompany litigation upon an individual.”)

<sup>36</sup> *Pfeiffer*, at \*16. This is in comparison to the tort of malicious prosecution which focuses on “the initiation of that process.” *Preferred Inv. Servs., Inc. v. T & H Bail Bonds, Inc.*, 2013 WL 3934992, at \*23 (Del. Ch. July 24, 2013), *aff’d*, 108 A.3d 1225 (Del. 2015).

<sup>37</sup> *Korotki v. Hiller & Arban, LLC*, 2016 WL 3637382, at \*2 (Del. Super. July 1, 2016) (citing *Stevens v. Indep. Newspapers, Inc.*, 1988 WL 25377, at \*8 (Del. Super. Mar. 10, 1988)).

<sup>38</sup> *Preferred Inv. Servs., Inc. v. T & H Bail Bonds, Inc.*, 2013 WL 3934992, at \*23.

<sup>39</sup> *Id.*

collateral advantage, not properly involved in the proceeding itself, must be shown.”<sup>40</sup> In essence, some form of extortion is required.<sup>41</sup>

To support her claim, Cantatore argues that Officer Fountain’s ulterior purpose in arresting her “in class and in front of her peers” was “to cause [her] embarrassment, humiliation, mental anguish and emotional distress.”<sup>42</sup> This purpose, Cantatore argues, “was clear from [Fountain’s] conduct, and [Fountain’s] own statements made during and after [Cantatore’s] arrest.”<sup>43</sup> Cantatore also asserts that Fountain’s conduct was “willful” and that Fountain’s “objective for arresting her in such a manner is not proper or legitimate in the use of the process.”<sup>44</sup> She

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<sup>40</sup> *Id.* Cantatore misstates Delaware case law regarding the necessity of showing some form of coercion to obtain collateral advantage, suggesting that it is “simply an ‘example’ of how process may be used improperly” and that it “is not a required element of the claim.” Plaintiff’s Response in Opposition to Defendant’s Partial Motion to Dismiss Amended Complaint (“Pl.’s Opp.”), at ¶ 13 (citing *Rhinehardt v. Bright*, 2006 WL 2220972, at \*4 (Del. Super. July 20, 2006); *Stevens v. Indep. Newspapers, Inc.*, 1988 WL 25377, at \*8). This is incorrect; Delaware courts have made clear that some form of coercion to obtain collateral advantage is in fact necessary to adequately plead a claim for abuse of process. *See, e.g., Unit, Inc. v. Kentucky Fried Chicken Corp.*, 304 A.2d 320, 331 (Del. Super. 1973), *overruled on other grounds, Mann v. Oppenheimer & Co.*, 517 A.2d 1056 (Del. Super. 1986) (citation omitted); *BRP Hold Ox, LLC v. Chilian*, 2018 WL 5734648, at \*6 (Del. Super. Oct. 31, 2018); *Dayton v. Collison*, 2020 WL 3412701, at \*14 (Del. Super. June 22, 2020) (citing *Aidoo* at \*13; *Nix v. Sawyer*, 466 A.2d 407, 412 (Del. Super. 1983)).

<sup>41</sup> *Id.*

<sup>42</sup> Am. Compl. ¶ 79.

<sup>43</sup> *Id.* ¶ 80.

<sup>44</sup> *Id.* ¶ 81.



further added that Fountain chose to arrest Cantatore, as opposed to allowing her to turn herself in, “for the purpose of initiating a confrontation, exerting physical force over [her], and to ‘show [her] who’s boss.’”<sup>45</sup>

Cantatore’s abuse of process claim fails for reasons large and small. In both her papers and at oral argument, Cantatore’s claim centers mainly around the manner of her arrest, but not the process itself. Cantatore does not allege that her arrest warrant or arrest was illegitimate. Because the process itself was not misused, as in *Korotki*, Fountain’s motive is immaterial.<sup>46</sup> Importantly, Cantatore also does not allege any form of coercion, nor a collateral advantage to Officer Fountain from said coercion.<sup>47</sup> As such, Officer Fountain’s conduct does not rise to the level of liability for an abuse of process claim. There is no allegation that that Fountain arrested Cantatore for any reason other than the law intended.<sup>48</sup>

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<sup>45</sup> *Id.* ¶ 53.

<sup>46</sup> The type of ulterior purpose alleged by Cantatore here is not the type of “ulterior purpose” contemplated by the tort. Cantatore’s claim again primarily focuses on Fountain’s ulterior purpose for arresting her at a certain location and in a certain manner, but not Fountain’s ulterior purpose for effectuating the arrest itself.

<sup>47</sup> *See Nix v. Sawyer*, 466 A.2d at 12.

<sup>48</sup> As Judge Dalzell pointed out in *Adams v. Selhorst*, a District of Delaware case deciding an abuse of process claim under Delaware law, a question exists as to whether Fountain herself would be liable at all in this scenario. *See Adams v. Selhorst*, 779 F. Supp. 2d 378, 390 (D. Del. 2011), *aff’d sub nom. Adams v. Officer Eric Selhorst*, 449 F. App’x 198 (3d Cir. 2011) (“Adams presents no evidence, nor alleges any facts, that suggest that Officer Selhorst prosecuted her for any reason other than the one the law intended. And it would not have been Officer Selhorst who chose to abuse the criminal process, but rather the prosecuting attorney. It is

Because I find that Cantatore failed to adequately plead an abuse of process claim, I will not address whether Cantatore adequately pleaded her claim so as to overcome the immunity afforded to Fountain by the Delaware Tort Claims Act.<sup>49</sup>

### **III. Conclusion**

For the foregoing reasons, Officer Fountain's partial motion to dismiss is granted with prejudice.

**IT IS SO ORDERED.**

  
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**Meghan A. Adams, Judge**

cc: Prothonotary  
James D. Taylor, Esq. (by File&ServeXpress)

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therefore a legal impossibility that Officer Selhorst would be liable for violating Adams's rights on this claim.").

<sup>49</sup> See 10 *Del. C.* §§ 4011–4012.