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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Cheyne Monroe,
Plaintiff-Appellant,

v.

Chad Chase,
Defendant-Respondent.

Appeal No. 2019AP001918
Circuit Court Case No.
2019CV000790

ON APPEAL FROM AN ORDER ENTERED OCTOBER 1, 2019,
CIRCUIT COURT, BRANCH 3, DANE COUNTY, WISCONSIN,
THE HONORABLE VALERIE BAILEY-RIHN PRESIDING,
DANE COUNTY CASE NO. 2019-CV-790

RESPONSE BRIEF OF DEFENDANT-RESPONDENT CHAD CHASE

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STATEMENT OF ISSUES

1. Did a voluntary dismissal that did not adjudicate the merits of the underlying action constitute a termination of the original proceeding in favor of the Plaintiff-Appellant Cheyne Monroe for purposes of stating a claim for malicious prosecution?

   The circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Respondent Chad Chase believes that oral argument is unnecessary for the resolution of the issues presented to the Court. The briefs should fully present the issues on appeal. Should the Court deem oral argument necessary or desirable, Chad welcomes the opportunity to present the issues to the Court.

Chad believes that the Court's opinion on this appeal need not be published. The issue on this appeal has been previously resolved by the Court of Appeals, following Wisconsin Supreme Court precedent.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff-Appellant Cheyne Monroe ("Cheyne") filed a civil action for malicious prosecution on March 22, 2019. R.1. The Complaint related to a previous action between the same parties, involving a claim by Defendant-Respondent Chad Chase ("Chad") against Cheyne for termination of parental rights. In the present action, Chad filed a Motion to Dismiss on May 23, 2019 due to Cheyne's failure to state a valid claim for relief. R.3. The Motion to Dismiss asserted that Cheyne failed to allege sufficient facts to meet the pleading requirements for a claim of malicious prosecution. Specifically, Chad alleged that Cheyne failed to satisfy the third element of the tort of malicious prosecution, which requires a showing that the prior action terminated in favor of the plaintiff.[1]

B. Procedural Background and Disposition.

Following briefing and extensive oral argument, the circuit court determined that Cheyne had failed to meet one of the elements of malicious prosecution, namely, that the former proceeding must have been terminated in favor of the plaintiff in the current action,

[1] Chad also asserted that Cheyne failed to properly plead the sixth element of malicious prosecution, which requires, *inter alia*, a claim for special damages. However, this basis of Chad's motion is not a subject of appeal.

who was the defendant in the former proceeding. The circuit court therefore dismissed Cheyne's Complaint. On the record, the circuit court stated as follows:

> All right. Though I think your arguments are good, I just think that under *Lechner* that there was an act to prevent action and consideration by the Court because there was never a trial in this issue. It was resolved before trial. And I think under *Tower* and *Pronger*, especially footnote two, a voluntary dismissal that does not adjudicate the merits does not constitute a favorable judicial determination of the action. I think I am bound by those decisions to find that there was not – that element was not met for a malicious prosecution.

R. 13, p. 25:15-24; R-App. 102.

Cheyne now appeals this decision to the Court of Appeals.

ARGUMENT

I. STANDARD OF REVIEW

At question, for purposes of this appeal, is only one of the six elements of a malicious prosecution claim. The circuit court correctly ruled that Cheyne failed to satisfy the third element of a malicious prosecution claim, namely, that the prior action terminated in her favor. The issue before this Court is whether the Complaint states a claim for relief, which is a question of law. *Dull v. Advance Mepco Cent. Lab, Inc.*, 151 Wis. 2d 524, 528, 444 N.W.2d 463 (Ct. App. 1989). Therefore, the Court of Appeals reviews the determination of the circuit court *de novo*, owing no deference to the circuit court. *See*, *e.g.*, *Pronger v. O'Dell*, 127 Wis. 2d 292, 296, 379 N.W.2d 330 (Ct. App. 1985).

II. THE CIRCUIT COURT CORRECTLY FOUND THAT PLAINTIFF-APPELLANT CHEYNE MONROE FAILED TO SHOW THAT THE PRIOR ACTION TERMINATED IN HER FAVOR AND THAT, THEREFORE, SHE FAILED TO STATE A CLAIM OF MALICIOUS PROSECUTION.

The circuit court properly dismissed Cheyne's Complaint. The third element in a malicious prosecution case requires that the former proceeding must have terminated in favor of the plaintiff. *Schier v. Denny*, 9 Wis. 2d 340, 342, 101 N.W.2d 35 (1960). As Cheyne correctly asserts, settlement of a case does not constitute a termination in favor of the plaintiff and does not fulfill the third element. (Plaintiff-Appellant's Initial Brief ("Plaintiff-Appellant's Brief"), pp. 10-15). Similarly, voluntary dismissal does not constitute a favorable termination.[2] Here, the prior case was voluntarily dismissed by Chad, as Cheyne alleges in her Complaint. R. 1: 4 (¶ 13). Therefore, this element has not been properly pled, and the Complaint was properly dismissed.

A. The *Lechner, Tower*, and *Pronger* Cases Control and Require a Favorable Termination of the Prior Case, Which Did Not Occur in the Matter Before the Court.

The third element in a malicious prosecution claim requires that the prior action must have been terminated in favor of the

[2] We note that voluntary dismissal and compromise and settlement are treated similarly under the rules of appellate procedure. *See* Wis. Stat. § 809.18.

plaintiff. *Schier*, 9 Wis. 2d at 342. In *Pronger v. O'Dell*, 127 Wis. 2d 292, 379 N.W.2d 330 (Ct. App. 1985), the court held that the plaintiff's "counterclaim for malicious prosecution was premature since it was instituted prior to a favorable termination." *Pronger*, 127 Wis. 2d at 296. In footnote two (2) to the Pronger decision, the court further explained its holding, noting that "a voluntary dismissal that does not adjudicate the merits of the claim does not constitute a favorable judicial termination of an action sufficient to support a claim for malicious prosecution." *Id.* at 296, n.2.

Pronger is one of the few cases in Wisconsin that deals directly with this issue and is important in understanding Wisconsin's requirement for the third element of a malicious prosecution case. Far from changing Wisconsin law, as suggested by Cheyne, *Pronger* reiterates the longstanding precedent that "where the original proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties, or solely by the procurement of the accused as a matter of favor, or as a result of some act, trick, or device preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of an action for malicious prosecution." *Tower Special Facilities v. Inv. Club*, 104 Wis. 2d 221, 228, 311 N.W.2d 225 (Ct. App. 1981), *quoting Lechner v. Ebenreiter*, 235 Wis. 244, 252, 292 N.W. 913 (1940).

In this matter, Cheyne admits in her Complaint that the prior action was concluded by dismissal of the petition (*see* R. 1:4); therefore, the action was terminated without regard to its merits and Cheyne cannot fulfill the third element of a malicious prosecution claim. For this reason, the circuit court properly dismissed Cheyne's Complaint as a matter of law.

B. The *Pronger* Footnote is Not *Dicta* and is Consistent with Wisconsin Law.

In her brief, Cheyne argues that the footnote in *Pronger* is somehow "clearly *dicta*." (Plaintiff-Appellant's Brief, pg. 17). The *Pronger* case, like the case before this Court, involved the voluntary dismissal of a state court claim. The *Pronger* plaintiff then filed her case in federal court and the defendant subsequently counterclaimed for malicious prosecution. *Pronger,* 127 Wis. 2d at 296.

The Court of Appeals found that the element of "favorable resolution" could not be satisfied because the claim for malicious prosecution was instituted before there was any favorable termination of the proceedings upon which it was based. *Id*. at 296. The Court of Appeals then stated in a footnote: "In addition, we note that a voluntary dismissal that does not adjudicate the merits of the claim does not constitute a favorable judicial termination of an action sufficient to support a claim for malicious prosecution." *Id.* at 296, n.

2, citing *Tower Special Facilities v. Inv. Club*, 104 Wis.2d 221, 228, 311 N.W.2d 225, 229 (Ct. App.1981).

We have found no law indicating that placement of language in a footnote renders that language *dicta*. Cheyne cites to several cases where the Court of Appeals, and in one case, the dissenting opinion in a Supreme Court decision, apparently discounted language of a decision that was "only in a footnote." (*See* Plaintiff-Appellant's Brief at pp. 19-20.) However, none of these decisions ruled that the language was *dicta* because it was contained in a footnote.

In fact, a review of the *Pronger* decision shows that the language in its footnote was not *dicta*. *Dictum* "is a statement or language expressed in a court's opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it." *Estate of Genrich v. OHIC Ins. Co*., 2009 WI 67, ¶ 39, 318 Wis. 2d 553, 769 N.W.2d 481.

In the *Pronger* case, however, the language in the footnote neither "extends beyond the facts in the case" nor "broadens" the ruling set forth in the non-footnoted language. *See Pronger*, 127 Wis. 2d at 296, n. 2. Instead, the footnoted language relies upon the same facts and, if anything, narrows the ruling to cases involving a previous voluntary dismissal.

Cheyne also suggests that the use of the words "[i]n addition, we note that…" indicates that the footnoted language is *dicta*. (Plaintiff-Appellant's Brief at p. 17.) Cheyne fails to recognize that the footnoted language is not only a ruling being made by the court, but also a commentary on prior decisions. The *Pronger* footnote cites *Tower Special Facilities*, 104 Wis. 2d at 228. The *Tower* case made it clear that a dismissal without adjudication of the merits is insufficient for purposes of a malicious prosecution claim. *Id.*

The *Pronger* footnote is not *dicta*, and the decision of the Court of Appeals in the *Pronger* case, which is consistent with the holdings of *Tower* and *Lechner*, is controlling in this case and requires dismissal of Cheyne's claim of malicious prosecution.

C. Although Settlement of a Former Proceeding Does Not Constitute the "Favorable Resolution" Required in a Malicious Prosecution Action, It Does Not Follow that All Cases Terminated Without a Signed Settlement Agreement Do Constitute a "Favorable Resolution"; And, In Fact, They Do Not Under Wisconsin Law.

Cheyne uses a significant portion of her brief to argue that a prior resolution through settlement or stipulation is not sufficient to satisfy the "favorable resolution" element of a malicious prosecution claim. Chad agrees with the assertion that a defendant in a prior lawsuit may not settle that case and then bring an action for malicious prosecution. The case law supports that proposition. *See*, *e.g.*,

Lechner, 235 Wis. at 252; *Elmer v. Chicago & N. W. R. Co.*, 257 Wis. 228, 231, 43 N.W.2d 244 (1950); *Thompson v. Beecham*, 72 Wis. 2d 346, 241 N.W.2d 163 (1976); *Tower Special Facilities, Inc.*, 104 Wis. 2d at 227-28. However, because the Complaint does not allege that the prior action in this matter was resolved by settlement or stipulation, this issue is not relevant to the issue before this Court.

To the extent Cheyne is arguing that only those cases that are resolved by settlement fail to meet the "favorable resolution" standard, such a reading is contradicted by the very cases cited by Plaintiff-Appellant in her brief. In *Lechner*, cited and quoted in Plaintiff-Appellant's brief, the court held:

> It is generally held that where the original proceeding has been terminated without regard to its merits **or** propriety by agreement or settlement of the parties **or** solely by the procurement of the accused as a matter of favor, **or** as a result of some act, trick, or device preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of an action for malicious prosecution.

Lechner, 235 Wis. at 252 (emphases added). In other words, there are four types of termination that generally preclude a finding of favorable resolution of the prior proceeding: (1) the original proceeding has been terminated without regard to its merits; (2) the original proceeding has been terminated without regard to the case's propriety by agreement or settlement of the parties; (3) the original proceeding has been terminated "solely by the procurement of the

accused as a matter of favor"; or (4) the original proceeding has been terminated as a result of "some act, trick, or device preventing action and consideration by the court." *Id. See also Bristol v. Eckhardt*, 254 Wis. 297, 300, 36 N.W.2d 56 (1949).

Thus, although the *Lechner* court cites at least four types of terminations that would not constitute "favorable resolution," in her brief, Cheyne largely ignores all types except where a case is terminated by agreement or settlement of the parties without regard to its propriety. For example, Cheyne ignores a termination that is "without regard to its merits" – except to deny the viability of that language in the *Pronger* footnote, which cites *Tower* for that same proposition.

Similarly, Cheyne ignores the *Lechner* court's holding that there is not a favorable resolution when a former proceeding was terminated as a result of an act preventing consideration by the court. A voluntary dismissal certainly qualifies as an act preventing consideration by the court. The circuit court in the instant case agreed, holding "I think that clearly there was a result of some act by the defendant in this action that prevented the action and consideration by the Court in the previous action." R. 13:28; R-App. 105.

D. *Elmer v. Chicago* is Consistent with *Pronger*.

Interestingly, Cheyne cites to *Elmer v. Chicago & N.W. Ry. Co.*, 257 Wis. 228, 43 N.W.2d 244 (1950), to find a situation where a dismissal did constitute a "favorable resolution." (Plaintiff-Appellant's Brief at p. 13.) However, the claim presented in that case was a criminal matter that was dismissed following a "motion of the district attorney for insufficient evidence." *Elmer*, 257 Wis. at 230. The dismissal of a criminal charge following a motion for insufficient evidence is very different from the matter before this Court, in which the Chad acted to dismiss the case and thereby prevented action or consideration by the court. In the present case, there was no determination as to the sufficiency of the evidence, and certainly no adjudication of the merits.

Further, in the *Elmer* case, the issue of "favorable resolution" was not contested or even addressed by the Court, other than to note that "several of the named essentials are admittedly present in this case." *Id.* at 231-32. To compare a dismissal of a criminal action, following a motion for insufficient evidence, to the matter before this Court demonstrates that the burden of establishing a prior favorable resolution is a heavy one.

E. The Circuit Court Properly Recognized That Public Policy Supports Its Conclusion That Voluntary Dismissal of the Prior Case Does Not Constitute The Favorable Resolution Required for a Malicious Prosecution Action To Proceed.

It is well settled that public and judicial policy favor a rigid threshold for the institution of malicious prosecution claims. Cheyne suggests, however, that a potential lack of an alternative remedy should inspire the Court to ignore precedent. (Plaintiff-Appellant's Brief, pp. 23-27.) However, this argument was considered, and rejected, by the Wisconsin Supreme Court:

> The policy argument that there should be a remedy for every wrong, our prior holdings concluded, was outweighed by the policy that litigants should have the right to sue for legal redress without the substantial likelihood or fear of retaliatory litigation. The Wisconsin or "minority" rule indeed may leave some wrongs unremedied …

Johnson v. Calado, 159 Wis. 2d 446, 461-2, 464 N.W.2d 647 (1991).

In the case before this Court, the circuit court correctly observed that public policy supported its decision, reasoning:

> [O]ne of the public policy reasons at least implicit in I think these type[s] of cases are we want to support and also recommend disposing of these cases prior to trial, prior to having all the parties go through a trial and additionally drag things out. My concern would be, and maybe it doesn't apply in juvenile proceedings, but if parties think that they can get -- they bring an action and, it's clear from *Pronger*, it says that you can -- the evidence must reflect more than the proper use of the process was a bad motive. It has to be not warranted by the terms. Even if that was met, if somebody brought an action and they decided, okay, this was a mistake, I shouldn't have done this, this was wrong, if they knew that if they dismissed it voluntarily they would still get sued for malicious prosecution, one of their thoughts might be we will just roll the dice and see if we will survive this, so therefore we are not going to dismiss it.

> So I think there is some public policy reasons for this language saying as long as it's not tried on the merits and a decision isn't -- a favorable decision isn't granted in favor of the person who is now bringing the malicious prosecution matter, that's the only time you can bring the malicious prosecution matter, because we want to support termination of proceedings regardless of how they are terminated, by settlement, by voluntary dismissal, by compromise, however.

R. 13:26-27; R-App. 103-104 (emphases added).

Cheyne essentially asks the Court to lower the bar for a malicious prosecution action so that her claim may proceed. She claims that not to do so would be against public policy. Chad respectfully disagrees.

First, although Cheyne complains that this Court should allow her to proceed with the malicious prosecution claim as a matter of public policy because of her lack of remedies, she fails to allege in her Complaint that she had no remedies. Nor does she allege in her Complaint that she did anything other than simply acquiesce to a dismissal of the former proceeding.

Second, Cheyne contends that juvenile court proceedings "are generally not governed by the rules of civil procedure." (Plaintiff-Appellant's Brief, p. 24.) However,

> [T]he code of civil procedure applies to "all civil actions and special proceedings" unless a "different procedure is prescribed by statute or rule." Wis. Stat. § 801.01(2). Parental rights termination proceedings under Chapter 48 are civil proceedings, and this general rule of civil procedure applicability has been cited in the context of TPR cases on numerous occasions: *Evelyn C.R.*, 246 Wis.2d 1, ¶ 17, 629 N.W.2d 768 (default judgment as a sanction for violation of a court order pursuant to Wis. Stat. §§ 802.10(7), 804.12(2)(a), and 805.03 is available in

> TPR proceedings; also, the harmless error rule of Wis. Stat. § 805.18(2) applies in TPR cases); *Brandon S.S.*, 179 Wis.2d at 143–44, 507 N.W.2d 94, (citing the general rule that the civil procedure code governs Chapter 48 proceedings but concluding that the general intervention statute, Wis. Stat. § 803.09, conflicts with the exclusive procedure in Wis. Stat. § 48.42(2) for determining proper parties to a TPR proceeding); *Waukesha County DSS*, 124 Wis.2d at 53, 66–70, 368 N.W.2d 47 (rules regarding jury instructions, peremptory strikes and summation pursuant to Wis. Stat. § 805.13(3), 805.08(3), and 805.10 apply in TPR proceedings); *Door County Dep't of Health & Family Servs. v. Scott S.*, 230 Wis.2d 460, 465, 602 N.W.2d 167 (Ct.App.1999) (directed verdict pursuant to Wis. Stat. § 805.14(4) applies in TPR proceedings); *J.A.B. v. Waukesha County Human Servs. Dep't*, 153 Wis.2d 761, 765, 451 N.W.2d 799 (Ct.App.1989) (same).

In re Termination of Parental Rights to Alexander V., 2004 WI 47, ¶ 32, 271 Wis. 2d 1, 18–19, 678 N.W.2d 856. We have found nothing in the Wisconsin Statutes or case law that would have prohibited Cheyne from seeking remedies from the circuit court.

Third, Wisconsin's appellate courts considered and decided the public policy issues long ago. Because malicious prosecution claims are not favored in Wisconsin, the courts impose a "stringent burden." *Kries v. Dayton-Hudson Corp.*, 104 Wis. 2d 455, 460, 311 N.W.2d 641 (1981). As stated in *Yelk v. Seefeldt*, 35 Wis. 2d 271, 277, 151 N.W.2d 4,7 (1967), "[t]here is a strong reason of public policy for thus making it rather onerous for a person to successfully maintain an action for malicious prosecution." Further, the "[Wisconsin] court . . . has repeatedly stated sound judicial policy reasons for adhering to a rule that limits the right to bring actions for malicious prosecution." *Johnson v. Calado*, 159 Wis. 2d 446, 464 N.W.2d 647 (1991).

Rather than supporting a lowering of the bar for claims of malicious prosecution, as Cheyne proposes, public and judicial policy support a high standard for these claims, which standard is not and cannot be met in this case.

CONCLUSION

Plaintiff-Appellant Cheyne Monroe has failed to fulfill the requirements of the third element of a malicious prosecution claim. A failure to properly plead any of the elements results in a deficient complaint. For the reasons stated herein, the circuit court was correct in granting Defendant-Respondent Chad Chase's Motion to Dismiss and dismissing Plaintiff-Appellant Cheyne Monroe's Complaint as a matter of law. Accordingly, Defendant-Respondent Chad Chase respectfully requests that this Court affirm the Circuit Court's dismissal of the Complaint.

March 11, 2020

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I hereby certify that this brief and the accompanying appendix conform to the rules contained in Wisconsin Statutes Sections 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,373 words.

Dated: March 11, 2020

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wisconsin Statutes Section 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: March 11, 2020

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