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**STATE OF WISCONSIN**
**COURT OF APPEALS**
**District IV**
**Appeal No.: 2019AP1918**
**Circuit Court Case No. 2019 CV 790**

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**CHEYNE MONROE,**

**Plaintiff-Appellant**

**- v. -**

**CHAD CHASE,**

**Defendant/Respondent**

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**Appeal From A Decision Dated October 1, 2019, By The Circuit Court For Dane County, Wisconsin, The Honorable Valerie Bailey-Rihn Presiding**

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# PLAINTIFF/APPELLANT'S REPLY BRIEF

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## ARGUMENT

## INTRODUCTION

The parties agree that in an action for malicious prosecution, the plaintiff must establish that the prior action was terminated in her favor. Chad asserts that his voluntary dismissal of the prior action for termination of Cheyne's parental rights precludes a finding that the action was terminated in Cheyne's favor, relying (as expected) on Footnote 2 in *Pronger v. O'Dell,* 127 Wis.2d 292, 296, 379 N.W.2d 330 (Ct. App. 1985).

In her Initial Brief, Cheyne asserted that said footnote ran counter to existing Wisconsin court decisions, citing among others *Lechner v. Ebenreiter*, 235 Wis. 244, 252, 292 N.W. 913 (1940), *Thompson v. Beecham,* 72 Wis.2d 346, 360, 241 N.W. 2d 163 (1976), and *Tower Special Facilities, Inc. v. Inv. Club, Inc.*, 104 Wis. 2d 221, 227-28, 311 N.W.2d 225 (Ct. App. 1981). Cheyne also argued that Footnote 2 in *Pronger* was dicta and should not control.

In response, Chad contends that Footnote 2 is consistent with the cited precedent and is not dicta. Chad is wrong on both counts.

## I. CHAD'S ANALYSIS OF *LECHNER* IS FLAWED.

Both parties address language used in *Lechner v. Ebenreiter*, 235 Wis. 244, 252, 292 N.W. 913 (1940), where the Wisconsin Supreme Court quoted from Ruling Case Law (a compendium of American case law published in the early 20th century), stating:

> *The general rule relied on by defendants as to this effect is stated in 18 R. C. L. p. 25, § 13:*
>
> *"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."*

Chad claims that *"there are four types of termination that generally preclude a finding of favorable resolution of the prior proceeding,"* showing the above quote with emphasis (Chad's Brief, p. 8) (numbering added):

> *"It is generally held that where the original proceeding has been terminated* (1) *without regard to its merits* ***or*** (2) *propriety by agreement or settlement of the parties,* ***or*** (3) *solely by the procurement of the accused as a matter of favor,* ***or*** (4) *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."*

By parsing the language in this manner, Chad causes the phrase "by agreement or settlement of the parties" to modify only "propriety," leaving "terminated without regard to its merits" unmodified. This approach is flawed.

### A. Chad Ignores The *Lechner* Court's Use Of Commas To Differentiate Between Clauses.

As a general rule, when a sentence sets forth several examples, they are separated by commas. The *Lechner* language is no different: there is a comma after the phrase *"terminated without regard to its merits or propriety by agreement or settlement of the parties,"* another comma after the phrase *"solely by the procurement of the accused as a matter of favor,"* and a third comma after the phrase *"as a result of some act, trick, or device preventing action and consideration by the court,..."* In contrast, there is no comma following *"without regard to its merits* (*"terminated without regard to its merits or propriety ..."*).

Thus, the phrase *"terminated without regard to its merits or propriety by agreement or settlement of the parties"* is a single clause, with *"by agreement or settlement of the parties"* modifying the phrase *"without regard to its merits or propriety."* [1]

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[1] Grammarians would break down the quoted sentence as follows.

### B. Chad Ignores Other Language In *Lechner.*

Chad's construction is inconsistent with following language in the quoted paragraph, which reads:

> *"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*

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- The phrase *"It is generally held that where the original proceeding has been terminated..."* would be labeled the **main or independent clause.**

- The three following phrases, *"without regard to its merits or propriety by agreement or settlement of the parties," "solely by the procurement of the accused as a matter of favor;"* and *"as a result of some act, trick, or device preventing action and consideration by the court,"* would each be labeled **restrictive relative clauses.** A "restrictive relative clause" is a kind of subordinate clause that restricts the meaning of the main clause.

  The combination of the main/independent clause and the restrictive clauses taken together is the **protasis**: the clause or clauses expressing the original conditions in a conditional sentence.

- The concluding clause, *"there is no such termination as may be availed of for the purpose of an action for malicious prosecution,"* is the **apodosis**: the main consequent clause of a conditional sentence.

Thus, the apodosis (here, the statement of when a termination of the prior action is not one on which the third element of malicious prosecution may be based) is conditioned on the protasis (here, when the prior action is terminated by one of the three listed restrictive relative clauses, including termination without regard to its merits by agreement or settlement of the parties).

> *prosecution.* ***The reason for this rule is that where the termination of the case is brought about by a compromise or settlement between the parties,*** *understandingly entered into, it is such an admission that there was probable cause that the plaintiff cannot afterwards retract it and try the question, which by settling he waived."* [Emphasis added.]

With the emphasized words, the *Lechner* court directly ties the termination of the original action to *"a compromise or settlement between the parties."* Chad's construction would limit this explanation to terminations tied to the action's propriety only. However, *Lechner* addressed whether there was a settlement or agreement that would bar the subsequent malicious prosecution action. There was no question regarding the propriety of the prior action.

The *Lechner* court also stated at 254:

> *Referring to the statement quoted above from Ruling Case Law to the effect that* ***a dismissal based upon agreement or settlement*** *or one procured by the accused as matter of favor* ***constitutes an admission of probable cause,*** *the proceedings evidenced as above stated cannot be considered such admission as matter of law.* [Emphasis added.]

The rationale behind the rule, as the *Lechner* court explained, was that parties who enter into settlements, including settlements that result in dismissal, are effectively admitting that there is some validity to the case and, accordingly, cannot later take a contrary position. This language makes no sense if the "agreement or settlement"

requirement only modified terminations based on the propriety of the prior action.

### C. <u>Chad's Construction Of The *Lechner* Language Is Strained.</u>

A careful reading of the *Lechner* language shows that the phrasing only makes sense interpreted as three phrases, not the four proposed by Chad. The paragraph starts with *"[w]here the original proceeding has been terminated...."* We can separate the clauses that follow thus:

1. **"[w]here the original proceeding has been terminated"** *"without regard to its merits or propriety by agreement or settlement of the parties"*;

2. **"[w]here the original proceeding has been terminated"** *"solely by the procurement of the accused as a matter of favor"*; and

3. **"[w]here the original proceeding has been terminated"** *"as a result of some act, trick, or device preventing action and consideration by the court."*

No additional language is required – each of the three restrictive relative clauses (*see* fn 1) can be read in combination with the main clause independently of the other restrictive relative clauses.

In contrast, Chad's approach turns Clause #1 into two different restrictive relative clauses:

1a. **"[w]here the original proceeding has been terminated"** *"without regard to its merits"*; and

1b. **"[w]here the original proceeding has been terminated"** ... *"propriety by agreement or settlement of the parties."*

While 1a is readable without inserting additional language, 1b is obviously incomplete. What is missing is *"without regard to its ...."*[2] But, *"without regard to its ..."* is found **before** *"to its merits."* The language *"without regard to its merits or propriety"* must be treated as a single clause, a clause which is restricted by the phrase *"by agreement or settlement of the parties."*

Therefore, this Court should undertake its analysis of the present appeal secure in the conclusion that the *Lechner* court only precluded malicious prosecution actions when the original action was terminated without regard to its merits ***by settlement or agreement of the parties.***

## II. CHAD'S ANALYSIS OF *TOWER* IS ALSO FLAWED.

Chad also attempts to harmonize Footnote 2 in *Pronger* with *Tower Special Facilities, Inc. v. Inv. Club, Inc., supra,* a case decided only 4 years before *Pronger*. He

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2 As in: **"[w]here the original proceeding has been terminated"** *"without regard to its propriety."* Indeed, Chad's Brief, at 9, adds these words, asserting that Cheyne *"ignores all types except where a case is terminated by agreement or settlement of the parties* ***without regard to its*** *propriety."* [Emphasis added.]

argues that *Tower* is consistent with the *Pronger* footnote in which it is cited (Chad's Brief, at 7). It is not. The *Tower* court wrote at 104 Wis. 2d 227-28:

> *The record in this case reveals that the original proceeding was terminated pursuant to a stipulation, entered into by Tower and the defendants in the instant action, for dismissal with prejudice and without costs to any party to the stipulation. There was no action and consideration by the court in the original proceeding, and the* ***dismissal was ordered pursuant to stipulation, without regard to the merits or propriety of the proceeding.*** *For the purposes of a malicious prosecution claim, there was no termination of the original proceeding in favor of Tower.* [Emphasis added.]

Clearly, the *Tower* court relied on the existence of a stipulation for dismissal as the reason to preclude the subsequent malicious prosecution action, the position taken by *Lechner* and consistent with Cheyne's argument. That is, it is the existence of a stipulation or agreement for dismissal that disqualifies the prior action from having been resolved favorably to the tort plaintiff if the dismissal was without regard to the merits or propriety of the prior action. *Tower* drew no distinction between "merits" and "propriety," treating them both as tied to the dismissal stipulation.

Thus, *Tower* does not lead to the conclusion in the *Pronger* footnote that all dismissals not on the merits preclude a subsequent malicious prosecution action; on the contrary, it carried forward the *Lechner* holding that such dismissals must be by agreement or stipulation.

## III. FOOTNOTE 2 IN *PRONGER* IS DICTA.

In *Pronger,* this Court considered a malicious prosecution counterclaim in a state lawsuit. After the voluntary dismissal of the state claim so that the plaintiff in the original action could proceed in federal court, the counterclaim was tried in state court, with a judgment entered against the plaintiff in the original action. She appealed.

The decision held *"[a] claim for malicious prosecution cannot be interposed into the very proceedings that form the basis for the claim."* The decision also held that the original action must "finally end in failure," and went on: "*We **hold** that O'Dell's counterclaim for malicious prosecution was premature since it was instituted prior to a favorable termination of the proceedings upon which it was based.*" *Pronger, supra* at 297 [emphasis added]. The *Pronger* court then inserted the footnote, which begins: "*In addition, we **note** that* ...." *Id.* (emphasis added). With its own words, the *Pronger* court distinguished between what it was **holding** and what it was **noting.**

Using the definition of dicta identified by Chad – *"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,"*[3] the *Pronger* footnote is dicta.

In *Pronger*, the final outcome was unknown; the dispute had simply moved from state to federal court. The malicious prosecution claim was *"premature"* because *"it was instituted prior to a favorable termination of the proceedings upon which it was based."* As the court stated, *"Pronger contends that her voluntary dismissal of the state court claim in order to enable her to proceed in federal court does not constitute a termination in O'Dell's favor. We agree." Pronger, supra* at 296.

Accordingly:

- The footnote extended beyond the facts in the case. The court had already concluded that the litigation on Pronger's claim was not final. Whether Pronger's case would be tried, or whether she would ultimately dismiss that claim as well, remained to be seen.

- The footnote was broader than necessary and not essential – the outcome was determined by the conclusion that the transfer from state to federal court to allow the same claim to be litigated there was not a termination in O'Dell's favor.

The discussion of malicious prosecution in *Pronger* is a single paragraph. The decision cites no Supreme Court cases on point nor provides *any* explanation for

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[3] This definition is from *Estate of Genrich v. OHIC Ins. Co.*, 318 Wis.2d 553, 769 N.W.2d 481 (2009). As the concurring opinion observed, the decision includes 4 different definitions/phrases defining dicta. The analysis above is applicable to all such definitions.

Footnote 2's conclusion. Despite no decision on the merits in *Lechner,* the malicious prosecution action proceeded – where is the attempt to harmonize this outcome with the footnote? *Lechner* and its successors are based on the concept of waiver – a party who settles (even with a dismissal) waives the right to thereafter claim that the action lacks probable cause. Unilateral dismissals are inconsistent with waiver by the non-participating party, so why is this not even mentioned in *Pronger*? Indeed, both parties to this appeal debate public policy considerations – there is no mention of public policy in the *Pronger* footnote. Surely, such discussion would be found had the *Pronger* court intended to modify *Lechner.*

## IV. NO "ACT" WITHIN THE MEANING OF "*LECHNER*" PREVENTED CONSIDERATION.

In passing, Chad argues that his dismissal of the action "qualifies as an act preventing consideration by the court," referring to the *Lechner* language: "*as a result of some act, trick, or device preventing action.*" Here, "act" refers to something shady or inappropriate (it is used in the same phrase as "trick" or "device") and does not refer to conduct of the *plaintiff* in the original action – why would a plaintiff be insulated from being sued for malicious prosecution by engaging in trickery? Rather, it is intended to preclude a *defendant* in the original action from bringing about the

dismissal of the original action by trickery and then using that dismissal as a springboard for a malicious prosecution action.[4]

Furthermore, the request for dismissal may not have prevented the juvenile court from acting. Chad argues that Chapters 801 *et segue* are applicable to TPR actions. If correct, §805.04(2) would allow the TPR court to dismiss the matter with prejudice, or even to deny dismissal entirely.[5] That the TPR court *chose* to dismiss the matter upon Chad's request does not establish that the TPR court was prevented from acting.

## V. THOUGH COMPETING PUBLIC POLICY CONSIDERATIONS EXIST, IT IS IN THE PUBLIC'S INTEREST THAT CASES LIKE CHEYNE'S BE PERMITTED TO PROCEED.

There are public policy considerations supporting both parties' positions. We recognize that expansion of the tort of malicious prosecution is not favored; however, Cheyne's position is not one of expansionism but merely one of preserving actions countenanced by *Lechner*. Too, while we agree with Chad's argument that not every wrong

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[4] For example, suppose that the defendant in the original action falsely caused the plaintiff to believe that he was dead, so that the plaintiff dismissed the action. Such trickery should not thereafter be rewarded by the right to sue for bringing the original action.

[5] The extent to which the various provisions in Chapters 805 and 814 apply in TPR cases is unclear. Sections 48.427 and 48.43 describe the content of dispositional orders; payment of costs is not included.

requires a remedy, providing a remedy for a clear wrong is nonetheless a good thing.

It is argued that there may be a chilling impact on a person's willingness to seek judicial assistance if failure is too readily followed by a suit for damages for trying. However, this case demonstrates why there remains value in permitting claims for malicious prosecution to be brought. Chad, simply by falsely alleging certain facts in a TPR petition, blocked consideration of placement by the family court for over 8 months, used the pending TPR in the Minnesota family court case, caused Cheyne to bear substantial attorney's fees, and created incredible emotional distress requiring treatment. [R:1, ¶19c and ¶21]. He chose to withdraw the TPR action at the penultimate moment, but withdrawing the TPR petition does not undo the harm. Whatever placement of the minor child that Cheyne lost can never be made up; there is a reason why a parent's right to parent is deemed a fundamental right.

Thus, when asked the simple question – "Should one parent be able ***with total impunity*** to falsely, maliciously and intentionally seek to terminate the parental rights of the other parent and thereby damage that other parent financially, emotionally and by blocking access to the family court of this State? – this Court should answer "no," because encouraging such conduct is antithetical to the public's interest.

## CONCLUSION

This Court should reverse, holding that the *Pronger* footnote was incomplete and reaffirming the long-stated rule that dismissals entered into by agreement or stipulation that cannot thereafter be the action on which a malicious prosecution lawsuit is based.

Dated this 23rd day of March, 2020.

**AUERBACH & PORTER, s.c.**

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# CERTIFICATION

I, Richard J. Auerbach, Attorney for Plaintiff/Appellant, certify that this Brief was produced using the following font in compliance with §809.19(8)(b):

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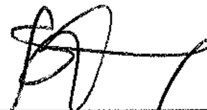
**BY:** 

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# CERTIFICATION OF E-FILING

I, Richard J. Auerbach, attorney for Plaintiff/Appellant, certify that in compliance with Rule 809.19(12), I have submitted an electronic copy of this Brief which complies with the requirements of §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 Certification has been served with the paper copies of this Brief filed with the Court and served on opposing counsel.

Dated this 23rd day of March, 2020.

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