STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2019AP1918
Circuit Court Case No. 2019 CV 790

CHEYNE MONROE,

Plaintiff-Appellant

- v. -

CHAD CHASE,

Defendant/Respondent

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 INITIAL BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

This appeal presents a single issue: Does a unilateral decision to request dismissal of a prior termination of parental rights action satisfy the third element of the tort of malicious prosecution, which requires a showing that the prior action terminated in favor of the tort plaintiff?

The trial court answered "No."

STATEMENT ON ORAL ARGUMENT/PUBLICATION

Oral argument is often helpful when, as hear, competing public policy issues are involved.

Publication is recommended, as clarifying the issue will provide statewide guidance. The undersigned counsel has had two cases in the past few years where this issue was presented to Dane County trial courts, with varying outcomes, suggesting that it is an issue likely to reoccur.

STATEMENT OF THE CASE

Plaintiff/Appellant ("Cheyne") filed a Summons and Complaint [R:1] on March 22, 2019, alleging the tort of malicious prosecution. She alleged that Defendant/Respondent ("Chad") maliciously filed a termination of parental rights ("TPR") action without probable cause. The third element of the tort of malicious prosecution required a showing that the TPR action terminated in Cheyne's favor.

To meet this requirement, the Complaint alleged that Defendant/Respondent withdrew the TPR petition:

> *Despite the obvious contradiction between his claims in the TPR case and the truth, as established by his sworn affidavit in the Minnesota case, his self-reporting to FCS and other evidence, despite the stipulation to on-going placement in Minnesota, despite multiple requests from Cheyne's Wisconsin counsel to drop the TRP, and despite a recommendation from the guardian ad litem that the juvenile court action be dismissed, Chad refused to dismiss the TPR proceedings. Instead, it would be over 6 additional months before, on the cusp of a court hearing, Chad finally withdrew the petition for termination of parental rights. [R:1,¶13]*

The Complaint additionally alleged that *"[t]he dismissal was not the result of any settlement or stipulation; rather, it was Chad's unilateral decision to request its dismissal* [R:1:¶18].

Chad filed a Motion to Dismiss [R:3] on May 23, 2019, asserting in relevant part that his unilateral withdrawal of the termination of parental rights petition did not satisfy the third element of the tort of malicious prosecution because it was not an outcome in Cheyne's favor. The issue was briefed [R:6 and 8], argued orally on September 16, 2019 [R:9], and dismissed by written order on October 1, 2019 [R:11]. The trial court's decision concluded that Chad's voluntary withdrawal of the termination of parental rights action was not a termination in Cheyne's favor.

Cheyne timely filed a Notice of Appeal on October 8, 2019 [R:12]. After briefing was completed, the Court of Appeals certified the appeal to the Supreme Court on August 13, 2020, which accepted the case by order dated October 21, 2020.

STATEMENT OF FACTS

This trial court granted Chad's motion to dismiss for failure to state a claim for relief. As a result, the only facts are those in the Complaint [R:1], which must be taken as true for purposes of the dismissal motion (*see infra*). The pertinent facts, with the paragraph numbers taken from the Complaint, are:

¶3 Cheyne and Chad were divorced in the State of Minnesota.

¶4 Under the stipulated terms of the divorce judgment, Chad was granted primary placement of C.C., a 7 year old girl, and Cheyne was permitted periods of non-primary placement.

¶5 In 2016, Cheyne contacted Chad in order to set up a regular placement schedule for herself with C.C.

¶6 Chad's response was to tell Cheyne that she should get a lawyer. He then hired Wisconsin counsel (having moved to Wiseonsin after the Minnesota divorce was granted) and filed an aetion against Cheyne in Dane County Circuit Court. A copy of the pleadiugs in that action was filed by Chad in the Minnesota divorce court, which shows that it was an action for the termination of Cheyne's parental rights to C.C., alleging abandonment as the pertinent grouuds. [Footnote omitted.]

¶7 According to the copy of the petition for termination of parental rights that Chad filed in Minnesota, Chad alleged that Cheyne had abandoned C.C. Specifically, he alleged that there had been no contact between C.C. and Cheyne for approximately 3 years, in person and by calls and/or letters.

¶8 This allegation was false and was known to be false at the time it was made.

¶9 In the same time period, Cheyne filed a motion in the parties' Minnesota divorce proceedings to establish a set placement schedule. In response, Chad filed an affidavit that admitted to some contact between C.C. and Cheyne and acknowledged that Cheyne had sent written communications to C.C. on multiple occasions.

¶10 Shortly thereafter, Chad stipulated to a specific

placement schedule on an interim basis, which stipulation was approved by the Minnesota family court. Part of the stipulation included the transfer of jurisdiction over the family proceedings to Dane County, where Chad and C.C. resided.

¶11 In addition, Chad alleged that grounds for termination of Cheyne's parental rights existed pursuant to §48.415(6), which requires proof that Cheyne never had a substantial parental relationship with C.C.

¶12 However, Chad was aware that Cheyne had stayed home with C.C. while he worked full time outside of the home after C.C. was born, until the parties separated in September, 2011, roughly 17 months after C.C.'s birth. Moreover, Chad was aware that the parties exercised equal placement for a period of time after their separation.

¶13 Despite the obvious contradiction between his claims in the TPR case and the truth, as established by his sworn affidavit in the Minnesota case, his self-reporting to FCS and other evidence, despite the stipulation to on-going placement in Minnesota, despite multiple requests from Cheyne's Wisconsin counsel to drop the TPR, and despite a recommendation from the guardian *ad litem* that the juvenile court action be dismissed, Chad refused to dismiss the TPR proceedings. Instead, it would be over 6 additional months before, on the cusp of a court hearing, Chad finally withdrew the petition for termination of parental rights.

¶14 From approximately July of 2016 to March 28, 2017 (when the TPR was dismissed), the family court proceedings in Dane County were stayed by court order because the pending juvenile court proceedings were paramount.

....

¶17 The tort of malicious prosecution requires proof of six elements:

- There must have been a previous judicial proceeding brought against the victim.
- The previous proceeding must have brought by the defendant in the malicious prosecution lawsuit.
- The previous proceeding must have resulted in a judgment or ruling in favor of the defendant in the malicious prosecution lawsuit.
- There must have been malice in instituting the previous proceeding.
- There must have been lack of probable cause supporting the former proceeding.
- There must have been injury or damage resulting to the victim from the former proceedings

¶16[1] The previous judicial proceeding relied upon by Cheyne is the Dane County termination of parental rights action. This satisfies the first element.

¶17 The second element is satisfied inasmuch as Chad was the petitioner in the termination of parental rights action and Cheyne was the respondent.

¶18 The third element is satisfied by the dismissal of the petition, which occurred on March 28, 2017. The dismissal was not the result of any settlement or stipulation; rather, it was Chad's unilateral decision

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[1] The Complaint erroneously misnumbered paragraphs: there are two paragraphs #16 and #17. The misnumbering is kept here so that the references to the Complaint are consistent.

to request its dismissal.

¶19 The fourth element, malice, is clearly present.

a. Chad filed the action knowing that Cheyne was pursuing placement of C.C.

b. He filed the action knowing that the only possible basis for such an action was to claim that Cheyne had abandoned C.C., which requires proof that the parent has failed to visit or communicate with the child for a period of 6 months or longer. He alleged that Cheyne had not contacted C.C. but in a separate and sworn document acknowledged that she had done so repeatedly.

c. Moreover, Chad then tried to nse the pendency of the TPR action as a reason to deny placement to Cheyne in the Minnesota divorce action, violating §48.299(1)(b), *Stats.*, which provides: "... *any person who divulges any information which would identify the child, the expectant mother or the family involved in any proceeding under this chapter shall be subject to ch. 785.*" The filing of the TPR petition in the Minnesota court, which occurred without an order permitting such filmg by the Dane County Juvenile Court, also violated §48.396(2)(a), *Stats.*, which provides in rclevant part: "*Records of the court assigned to exercise jurisdiction under this chapter ... shall not be open to inspection or their contents disclosed except by order of the court assigned to exercise jurisdiction under this chapter....*"

d. Additionally, Chad (either directly or via counsel) would have received a copy of the Dane County family court order staying the

family court proceedings while the TPR action was pending; Chad took advantage of that stay for at least 8 additional months while knowing that his factual allegations in support of the TPR action were false.

¶20 The fifth element is established by Chad's own affidavit, which establishes that there were multiple communications by Cheyne to C.C. during the applicable time period (precluding a finding of abandonment) and uncontroverted evidence that Cheyne played a substantial parental role in C.C.'s upbringing, including equal or fully shared placement from her birth in May, 2010 until late 2011.

¶21 Finally, there has been considerable damage:

a. Cheyne incurred substantial legal fees and costs defending against the action. Her costs include costs billed to her by counsel, travel expenses (airline tickets, hotels, etc.) in order to appear in Wisconsin to defend against the action, and lost income from missed work (both her own and her husband's, who traveled with her for emotional support and as a witness). Fees related to the TPR action are estimated at between $20,000 and $30,000; costs are estimated at $1,500; lost income is estimated at $1,000 (closer to $2,500 if her husband's use of leave/sick time is considered).

b. The delay in the family court proceedings delayed her ability to obtain increased periods of placement. Lost time with C.C. can never be made up.

c. The threat of losing her parental rights caused Cheyne substantial emotional distress. She engaged in counseling to support herself (and

> incurred the expense), but nonetheless experienced severe symptoms of hopelessness, despair, and anxiety at the thought of losing her daughter. The impact on Cheyne was markedly greater because she was already diagnosed with PTSD as a result of domestic abuse by Chad during the marriage.

ARGUMENT

OVERVIEW

In a malicious prosecution action, the plaintiff must show that a previous action terminated in her favor. At issue is whether a unilateral dismissal or withdrawal of the earlier action by the plaintiff in the previous action is, or can be, a termination favorable enough to support a malicious prosecution action.

The trial court felt compelled to dismiss Cheyne's action for malicious prosecution based on a footnote in *Pronger v. O'Dell*, 127 Wis. 2d 292, 297, 379 N.W.2d 330 (Ct. App. 1985), notwithstanding apparent contradiction between that footnote and this Court's earlier decisions. Because the Court of Appeals is generally required to adhere to their own precedent, *Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246, 255 (1997), there appeared to be two choices available to the Court of Appeals:

apply the language of the footnote or distinguish it and apply the language of this Court's earlier cases. Thus, the parties' briefs focused on the weight that the footnote ought be given, with only moderate attention to the underlying policy considerations and almost none given to the treatment of this issue in other jurisdictions.

Recognizing an apparent contradiction between *Tower* and earlier decisions, the Court of Appeals certified the issue to this Court, which has the authority to overrule or distinguish prior decisions of the Court of Appeals, and may modify even its own precedent when circumstances support doing so. This Brief will therefore go beyond what was argued before the Court of Appeals and discuss the varying approaches taken among the states as well as the underlying policy considerations.

I. BECAUSE THE FACTS ARE UNDISPUTED, THE ISSUE PRESENTS A QUESTION OF LAW WHICH THIS COURT REVIEWS *DE NOVO*.

When the issue *"entails the application of a set of undisputed facts to a legal standard, it is a question of law which [the appellate courts] answer without deference to the trial court...." Towne Realty v. Zurich Insurance Co.*, 201 Wis.2d 260, 270, 548 N.W.2d 64 (1996).

In *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987), this Court stated:

> *In testing the sufficiency of a complaint, we take all facts pleaded by plaintiffs and all inferences which can reasonably be derived from those facts as true. Pleadings are to be liberally construed, with a view toward substantial justice to the parties. Section 802.02(6), Stats. The complaint should be dismissed as legally insufficient only if it is quite clear that under no circumstances can plaintiffs recover.*

Since the only facts are those in the Complaint which must be taken as true, the facts are undisputed. Accordingly, the sufficiency of the Complaint presents a question of law which this Court reviews without deference to the trial court.

II. PLAINTIFFS IN MALICIOUS PROSECUTION ACTIONS MUST SHOW THAT THE PRIOR ACTION TERMINATED IN THEIR FAVOR.

Cheyne's malicious prosecution action alleges that Chad, knowing that she sought a specific placement schedule for their minor child in their Minnesota divorce action, filed a Wisconsin termination of parental rights ("TPR") action based on knowingly false factual representations. He then utilized the TPR action's 8 month pendency to delay Wisconsin family court proceedings, withdrawing the petition immediately before a court

hearing on Cheyne's motion to dismiss.[2]

Six elements must be proven to establish the tort of malicious prosecution, *Schier v. Denny,* 9 Wis. 2d 340, 342, 101 N.W.2d 35 (1960); *see also Wisconsin Pub. Serv. Corp. v. Andrews,* 316 Wis. 2d 734, 766 N.W.2d 232 (2009). They are:

1) Prior institution of legal proceedings against Plaintiff;

2) Such proceedings must have been by or at the instance of Defendant;

3) The prior proceedings must have terminated in Plaintiff's favor;

4) The prior proceedings must have been initiated with malice;

5) There must have been a lack of probable cause to initiate the prior action; and

6) The former proceedings must have caused injury or damage to Plaintiff.

The trial court held that the Complaint failed to establish the third such element, that the TPR initiated by Chad terminated in Cheyne's favor.

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[2] A termination of parental rights action is commenced by filing a petition that must contain facts establishing one or more of the statutory grounds listed in §48.415. *See:* §48.42(1)(c)2.

III. IN WISCONSIN, A PARTY CANNOT SETTLE THE PRIOR ACTION AND THEN BASE A MALICIOUS PROSECUTION CLAIM ON THAT SETTLED ACTION.

Wisconsin case law is clear that a defendant in a particular action cannot settle the case and thereafter bring an action for malicious prosecution. Nearly 80 years ago, this Court decided *Lechner v. Ebenreiter*, 235 Wis. 244, 252, 292 N.W. 913 (1940). It said:

> *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. 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.]

Lechner further explained, *supra* at 252:

> *This rule is stated in 38 C. J. p. 443, § 95, as follows:*
>
> *"Where the termination of a criminal prosecution or civil action has been brought about by the*

> *procurement of defendant therein,* ***or by compromise and settlement****, an action for malicious prosecution cannot be maintained. A limitation of the rule, recognized by some decisions, is that the procurement or compromise must be voluntary." Id.* [Emphasis added.]

The *Lechner* court was considering a case where the district attorney had dismissed larceny charges against a defendant (the plaintiff in the malicious prosecution action). The record showed that the dismissal was accompanied by an agreement that certain certificates allegedly stolen by the defendant in the criminal case would be turned over to a third party. The defendants in the malicious prosecution action argued that this was an agreement that precluded using the criminal action as the predicate for a malicious prosecution action.

The *Lechner* court disagreed, stating 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.]

It focused on the difference between an action that admitted the alleged larceny and the agreement to turn the certificates over to a third party, which merely admitted that there was no on-going right to possess them

and did not admit that they were stolen. *Id.*, at 254-55. Because there was no admission to larceny, the agreement between the district attorney and criminal defendant was not an agreement or settlement that admitted probable cause.

Nine years later, the Wisconsin Supreme Court decided *Bristol v. Eckhardt*, 254 Wis. 297, 36 N.W.2d 56 (1949). In *Bristol*, the tort plaintiff had been charged criminally and incarcerated. He worked out an agreement with the district attorney that resulted in his release from jail in order to obtain refinancing and pay off the underlying obligation, resulting in dismissal of the criminal charge. He then filed a malicious prosecution action. The Wisconsin Supreme Court agreed with the trial court's dismissal:

> *[W]e are forced to conclude that the release of plaintiff was at his procurement and that of the district attorney as part of a transaction amounting to a compromise or settlement of the difficulties between the parties and that this is not such a termination of the proceedings favorable to plaintiff as can form the basis for an action for malicious prosecution.* [Emphasis added.]

The next relevant case is *Elmer v. Chicago & N. W. R. Co.*, 257 Wis. 228, 43 N.W.2d 244 (1950). In this case, the defendant had also caused the plaintiff to be criminally charged. However, prior to the trial of

the criminal case, it was dismissed by the district attorney for lack of evidence, and the defendant in the criminal case became the plaintiff in an action for malicious prosecution. The Wisconsin Supreme Court observed:

> *The former proceeding terminated in favor of the defendant therein as the criminal charge was dismissed on motion of the district attorney for insufficient evidence. Id.*, at 232.

Then, in 1976, the Wisconsin Supreme Court, in *Thompson v. Beecham*, 72 Wis.2d 346, 360, 241 N.W. 2d 163 (1976), cited *Lechner* for the proposition that a voluntary compromise or settlement of the former action precludes a claim for malicious prosecution and stated:

> *A necessary element of a cause of action for malicious prosecution is that the former proceedings must have terminated in favor of the defendant therein, the plaintiff in the action for malicious prosecution.* ***A voluntary compromise and settlement of the prior suit is not a favorable termination,*** *and in such circumstances a suit for malicious prosecution cannot be maintained.* [Emphasis added.]

In disallowing the malicious prosecution action, the *Thompson* court added:

> *Each party gave up a claim, and each party received a benefit. No trial on the merits was ever had. The prior proceedings were terminated by* ***a voluntary compromise and settlement,*** *and not by a disposition favorable to the plaintiffs.* [Emphasis added.]

Thompson v. Beecham, supra at 361.

More recently, the Court of Appeals decided *Tower Special Facilities, Inc. v. Inv. Club, Inc.*, 104 Wis. 2d 221, 227-28, 311 N.W.2d 225 (Ct. App. 1981). There, the Court of Appeals stated:

> *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.]

Thus, from at least 1940, the law was well settled in Wisconsin that when the original action is terminated by *"agreement," "compromise," "stipulation" or "settlement"* (all of these words are found in the above cases), a subsequent claim of malicious prosecution cannot be brought. The entering into a stipulation or settlement is *"an admission that there was probable cause that the plaintiff cannot afterwards retract." Lechner, supra* at 252.

IV. DISMISSALS NOT RESULTING FROM STIPULATIONS OR SETTLEMENTS COULD FORM THE BASIS OF A MALICIOUS PROSECUTION ACTION UNDER *LECHNER* AND ITS PROGENY.

Lechner, supra at 252, identifies three circumstances where a dismissed prior action cannot form the basis for a malicious prosecution action: first, when it is dismissed *"by agreement or settlement of the parties"*; second, when it is dismissed *"solely by the procurement of the accused as a matter of favor"*; and third, when it is dismissed *"as a result of some act, trick, or device preventing action and consideration by the court."* At least implicitly, dismissals *not* resulting from one of these three circumstances *could* form the basis of a malicious prosecution action.

For example, in *Lechner,* the criminal action (the previous action) was dismissed when the defendant therein (who became the tort plaintiff) agreed to turn over certain disputed property to a third party. *Lechner* explained that the settlement of the criminal action was, unlike some settlements, one that did not admit to the existence of probable cause for the charged offense of larceny (it was at most an admission that the defendant had no ownership right to the property, not an admission that he acquired it illegally). Thus, a malicious prosecution action was not barred.

Lechner instructs us that the reason that settlements preclude a subsequent action for malicious prosecution is that settlements (in general) admit that there is something to settle.

> *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.***

18 R.C.L., p. 25, §13, quoted in *Lechner, supra* at 252 (emphasis added).

If the agreement leading to the dismissal of criminal charges in *Lechner* was not construed as one that admits or waives anything (and therefore did not preclude a malicious prosecution action), a dismissal or withdrawal by the plaintiff in the underlying action obtained unilaterally cannot be deemed a waiver by the defendant in the underlying action, nor can it be deemed an admission of probable cause by the defendant in the underlying action.

In the present case, Chad dismissed the TPR action by unilaterally withdrawing the petition; it was not dismissed by any action taken by Cheyne, nor was it dismissed as a result of some act, trick or device. Thus, since no agreement or stipulation was involved, Cheyne's cause of action

was valid under *Lechner*.

V. A PASSING FOOTNOTE IN A 1985 COURT OF APPEALS' DECISION OMITTED THE *"BY COMPROMISE OR SETTLEMENT"* LANGUAGE FOUND IN PRIOR CASES.

In 1985, the Court of Appeals decided *Pronger v. O'Dell*, 127 Wis. 2d 292, 297, 379 N.W.2d 330 (Ct. App. 1985). In *Pronger*, the tort defendant had filed a state court action against the tort plaintiff for sexual harassment. Later, she dismissed the state claim in order to proceed in federal court. O'Dell, the defendant in the sexual harassment lawsuit, counterclaimed for malicious prosecution. The *Pronger* court wrote (citations omitted):

> *Pronger argues that O'Dell's counterclaim for malicious prosecution fails because there was no termination of a prior proceeding in favor of O'Dell. 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.... A cause of action for malicious prosecution will lie only when the judicial proceeding upon which the claim is based is begun with malice, without probable cause, and finally ends in failure.... A claim for malicious prosecution cannot be interposed into the very proceedings that form the basis for the claim.... 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.[2]

n2: 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... Tower Special Facilities v. Investment Club, 104 Wis. 2d 221, 228, 311 N.W.2d 225, 229 (Ct. App. 1981).

This footnote fails to distinguish between dismissals that are by agreement, compromise, settlement or stipulation and dismissals that represent abandonment of the underlying action by the plaintiff or are taken unilaterally. Taken literally, it applies to *all* voluntary dismissals of the prior action no matter how the dismissal occurred. The trial court concluded that this footnote was binding on it, and accordingly dismissed Cheyne's action [R:13: 25].

VI. THE *PRONGER* FOOTNOTE SHOULD BE GIVEN LITTLE WEIGHT.

While this Court has the authority to overrule a prior decision of the Court of Appeals, it none the less will consider the reasoning of the lower court and give it such weight as it deems appropriate. Cheyne asserts that the *Pronger* footnote should be given little weight because it appears likely

that its failure to include the phrase "by agreement or settlement" was inadvertent. Seven arguments support this position.

A. The *Pronger* Footnote Is Dicta.

The footnote in *Pronger* is clearly dicta, even stating *"we note that ...."* The decision's primary focus was on the premature nature of the malicious prosecution action. The underlying case had been dismissed in state court in favor of federal court, where it was pending. The *Pronger* court would not permit a malicious prosecution action to be based on the dismissal of the state court proceedings in light of their continuation in federal court. No claim was made in the action that there was or was not an agreement or stipulation for the state court dismissal.

B. The *Pronger* Decision Contains No Indication Of Any Intent To Modify Existing Law.

The *Pronger* court did not indicate any intention of changing, clarifying or modifying established law. It did not discuss the history of how Wisconsin courts have handled the third malicious prosecution element. It did not attempt any explanation of why the "agreement or settlement" language in *Lechner* should be abandoned. Given that *Lechner* was a Wisconsin Supreme Court decision, one would certainly expect *some*

discussion by the Court of Appeals of its authority (or lack of authority) to modify case law laid down by the Supreme Court, but none is found. In sum, nothing in the decision remotely suggests any intent to modify existing law.

C. The Only Case Cited In The Footnote Does Not Support The Purported Change In The Law.

The *Pronger* footnote cited *Tower Special Facilities, supra,* for its conclusion. However, as quoted above, *Tower* twice referenced the existence of a stipulation for dismissal (first, "*The record in this case reveals that the original proceeding was* ***terminated pursuant to a stipulation***"; and second, "*the dismissal was ordered* ***pursuant to stipulation***"). *Tower, supra* at 104 Wis. 2d 227 (bolding added). Nothing in *Tower* supports the elimination of the "*by stipulation or agreement*" language in *Lechner* and its progeny. That the *Pronger* court would cite *Tower* – and only *Tower* – in the footnote lends support for the conclusion that it was not seeking to substantively affect long-standing case law.

D. Language In A Footnote Is Less Weighty Than In The Body Of An Opinion.

While a footnote is still part of an appellate court's decision, a

footnote appears to carry less weight. For example, in *Wood v. Propeck*, 299 Wis. 2d 470, 479-480 728 N.W.2d 757 (Ct. App. 2007), the Court of Appeals stated (in language equally applicable to *Pronger*):

> *Our analysis in Ondrasek did not focus on the limited or one-sided nature of the exceptions the parties had agreed to. As William himself points out, we mentioned the exceptions* ***only in a footnote*** *and did not discuss them at all in our analysis.* (Emphasis added).

In the same case, the Court of Appeals stated, *Propeck, supra* at Note 4:

> *The dispute in Chen, however, was over whether one of the parents was "shirking" when she discontinued full-time employment in order to become "an at-home full-time child care provider," not over whether the parties could "waive" child support.... The court mentioned the waiver issue* ***only in a footnote***. (Emphasis added, citations omitted.)

Similarly, in *Northern Air Servs. v. Link*, 336 Wis. 2d 1, 81-82, n.6, 804 N.W.2d 458 (2011), the dissenting opinion included the following:

> *Notably, the court of appeals' decision in Granado makes no mention of the word "ministerial." The majority too dismisses the concept, acknowledging* ***only in a footnote*** *that the acts of the clerk of circuit court are ministerial and clerical.* (Emphasis added, citations omitted.)

See also: Bicknese v. Sutula, 260 Wis. 2d 713, 660 N.W.2d 289 (2003).

It is improbable that the authors of the *Pronger* decision intended

to both change existing a Wisconsin Supreme Court holding 45 years after its issuance AND intended to do so only via a footnote lacking any substantive discussion. That the language that Chad claims changed the law is only found in a footnote highly supports the conclusion that the omission of the "agreement or stipulation" language used in previous cases was inadvertent.

E. Cases Should Not Be Interpreted In A Manner That Renders Language Often Used In Prior Cases Entirely Superfluous.

If every dismissal without an adjudication on the merits is insufficient to support a malicious prosecution action, the references in *Elmer, Thompson* and *Tower* to agreements, stipulations, voluntary compromises, and settlements would be surplusage. Moreover, when *Lechner* explained the general rule, it included an exception, bolded below:

> *This rule is stated in 38 C. J. p. 443, § 95, as follows:*
>
> *"Where the termination of a criminal prosecution or civil action has been brought about by the procurement of defendant therein, or by compromise and settlement, an action for malicious prosecution cannot be maintained.* ***A limitation of the rule, recognized by some decisions, is that the procurement or compromise must be voluntary."***

Lechner, supra at 252 (Emphasis added.) If all dismissals preclude a

subsequent action for malicious prosecution, what matter whether the dismissal was voluntary, involuntary, unilateral, or by stipulation? The *Pronger* footnote, if a correct statement of law, would render "voluntary" and "compromise and settlement" meaningless despite the use of those terms in the multiple Wisconsin cases cited *supra.*

F. Pronger Did Not Examine Or Discuss The Reason For The "By Stipulation Or Agreement" Language In *Lechner*.

In *Lechner, supra* at 252, this Court explained why dismissals resulting from agreements or settlements should not be outcomes that permit a subsequent malicious prosecution action.

> *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."*

As discussed above, *Lechner* hinged on whether the agreement that resulted in dismissal of the initial action was one that admitted probable cause for the charged offense or could fairly be construed as a waiver by the defendant (tort plaintiff). The Court wrote, *Lechner, supra* at 254:

> *And it is further to be noted that nothing whatever was settled or compromised between Ebenreiter or*

> *the bank [the tort defendants] and the plaintiff. There was nothing between them to settle. The plaintiff owed neither of them anything, and he did not pay or agree to pay anything to either of them.*

In any event, *Pronger* never mentioned the concepts of waiver or admission of probable cause inherent to agreements or stipulations that resolve the predicate action. It seems highly improbable that the *Pronger* court would fail to discuss the reasons for the *Lechner* language while intentionally changing the rule in that case.

G. Because the Court of Appeals Cannot Overrule A Wisconsin Supreme Court Decision, The *Pronger* Court Presumably Did Not Intend To Do So.

In *Lechner*, the malicious prosecution action was allowed to proceed despite the dismissal of the prior action without a finding on the merits. The Wisconsin Supreme Court determined that the dismissal was not the result of any stipulation or agreement that impliedly admitted probable cause. *Lechner* stands for the principle that when party enters into an agreement to resolve a case, that party implicitly admits that there was a reasonable basis for the case to be brought. As the Court stated, *Lechner, supra* at 252, citing (18 R. C. L. p. 25, § 13 with approval):

> *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.* [Bolding added]

Thus, in *Lechner*, the malicious prosecution action was allowed to proceed despite the dismissal of the prior action without a finding on the merits. The Wisconsin Supreme Court found that the dismissal of the prior action was not the result of any stipulation or agreement that impliedly admitted probable cause. *Lechner, supra* at xx.

> *The implied promise of plaintiff to return the certificates to Owens, if such promise be implied, considered as an admission, cannot be considered as an admission of the larceny of the certificates, but only as an admission that the plaintiff had no right to possession of them as against the defendants without furnishing Ebenreiter or Ankerson satisfactory evidence that the Owens had told him to get them from the bank. The plaintiff was not charged with wrongfully taking or retaining possession of the certificates, but with larceny of them.*

Applying *Pronger* to the facts in *Lechner* would result in the opposite outcome. Under *Pronger*, any dismissal of the initial action not on the merits precludes a subsequent action for malicious prosecution. The dismissal of the larceny charge against Mr. Lechner was not a dismissal on the merits. The Wisconsin Supreme Court analysis of what was and what

was not admitted by the agreement by Mr. Lechner to return the certificates would be meaningless under *Pronger*. No authority is granted to the Court of Appeals to overturn a Supreme Court decision. Rather than concluding that the *Pronger* court exceeded its authority, this Court should conclude that no such intention existed, and that the *Pronger* footnote was inadvertently incomplete.

* * * * * * *

Accordingly, this Court should decline to read the *Pronger* footnote as an attempt to change what has been the law in this State since at least 1940: that a dismissal, *if entered into by settlement, compromise or agreement,* is not a favorable outcome, but a dismissal without such settlement, compromise or agreement is indeed an outcome favorable to the plaintiff in a malicious prosecution case.

VII. THE GREAT WEIGHT OF LEGAL AUTHORITY SUPPORTS CHEYNE'S RIGHT TO PROSECUTE HER MALICIOUS PROSECUTION ACTION.

The certification from the Court of Appeals correctly observes that there is no Wisconsin precedent that addresses whether a voluntary dismissal may satisfy the requirement that the prior proceeding terminate

in favor of the tort plaintiff. As the certification indicates, there are many other jurisdictions that have addressed the issue. For an exhaustive compilation of cases, one can simply review Vitauts M. Gulbis, *Nature of Termination of Civil Action Required to Satisfy Element of Favorable Termination to Support Action for Malicious Prosecution*, 30 A.L.R. 4th 572, §2 [a] (2020), which updates the original authored in 1984. This Brief will not string-cite these cases, but will instead focus on a few that are most significant.

Before doing so, it makes sense to start with the language in the Restatement (Second) of Torts, §674, Comment "j" (1977), which provides:

> *Civil proceedings may be terminated in favor of the person against whom they are brought by (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his failure to prosecute them. A favorable adjudication may be by a judgment rendered by a court after trial, or upon demurrer or its equivalent. In either case the adjudication is a sufficient termination of the proceedings, unless an appeal is taken.*
>
> *Whether a withdrawal or an abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought and whether the withdrawal is evidence of a lack of probable cause for their initiation, depends upon the*

> *circumstances under which the proceedings are withdrawn.*

Thus, under the Restatement's approach, Chad's withdrawal of the TPR petition could support the conclusion that Cheyne was successful in that action.[3]

In *Cult Awareness Network v. Church of Scientology Int'l,* 685 N.E.2d 1347 (Ill. 1997), the Illinois Supreme Court quoted extensively from the Restatement. In that state, a series of decisions from lower appellate courts had rejected predicate cases that were dismissed for reasons other than on the merits, effectively limiting malicious prosecution actions to when the prior action was dismissed after trial or on a motion for summary judgment. For example, in *Savage v. Seed,* 401 N.E.2d 984 (Ill. App. 1980), the predicate action was voluntarily dismissed by the plaintiff in that action. This was held to preclude a subsequent action for malicious prosecution.

The Illinois Supreme Court reversed. It adopted the approach taken

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[3] We use the phrase "could support" because it would be up to the fact-finder to conclude whether the withdrawal was a successful outcome for Cheyne, which in turn would depend on the circumstances surrounding the withdrawal. For purposes of the motion challenging the sufficiency of the pleadings, however, the conclusion that a fact finder *could* find in Cheyne's favor is sufficient to require denial of the motion.

by the Restatement, noting that it was the position of many other states (citations omitted):

> *[T]he Restatement approach, which has been expressly adopted by various courts across the nation, allows dispositions which do not reach the merits of the underlying case to satisfy the favorable termination requirement in certain circumstances. Under this approach, whether or not the requirement is met is to be determined not by the form or title given to the disposition of the prior proceeding, but by the circumstances under which that disposition is obtained. In addition to the above cases, we note that other courts, while not expressly referring to the Restatement by name, have followed its approach. Like those courts which have expressly adopted the Restatement, these courts also recognize that the existence of a favorable termination turns upon the circumstances under which the disposition is obtained. As a result, terminations which do not rise to the level of adjudications on the merits may satisfy the favorable termination requirement.*

Id., at 1352-53. It went on to conclude:

> *We agree with the reasoning espoused by the courts of our sister states. We regard the Restatement's treatment of the favorable termination requirement as more balanced than our appellate court's interpretation as set forth in Siegel.... In our view, the Restatement's position best balances the right of citizens to have free access to our courts and the right of the individual to be free from being haled into court without reason, thereby better serving the interests of justice.*

Id., at 1353.

In *Nelson v. Miller*, 607 P.2d 438 (Kan. 1980), the Kansas Supreme Court discussed that state's long history of permitting malicious prosecution actions to proceed under circumstances that lacked a decision on the merits of the underlying action. It observed, at 446:

> *The issue of "termination favorable to plaintiff" was thoroughly discussed in an early Kansas case, Marbourg v. Smith, 11 Kan. (1873). In Marbourg, an action for slander was dismissed as to defendant Smith, but without his agreement or authorization. In Smith's action against Marbourg for malicious prosecution, dismissal of the prior action for slander was held to be no bar to Smith's action. The requirement of a termination favorable to plaintiff was explained as follows:*
>
> *"But it is not necessary that there should have been a trial upon the merits of the alleged malicious prosecution. If the action has been dismissed, as in this case, that is sufficient, if the action has not been commenced again. [Citations omitted.] The reasons why an action should be terminated in favor of a defendant before the defendant can commence an action for malicious prosecution would seem to be as follows: First, if the action is still pending, the plaintiff therein may show in that action that he had probable cause for commencing the suit by obtaining a judgment therein against the defendant, and he should not be called upon to show such fact in a second action until he has had this opportunity of showing it in the first; second, and if the action has terminated against the defendant, then there is already an adjudication against him, showing conclusively that the plaintiff had probable cause for commencing the action. When neither of these reasons apply, we suppose the action for malicious prosecution may be maintained, if the other*

> *necessary facts can be shown. If the plaintiff has neither shown nor is attempting to show, by an action in which he is plaintiff, that he had probable cause for commencing his action, then the defendant may show, in an action brought by himself, that the plaintiff did not have probable cause. But suppose the law were otherwise. Suppose that the party commences an action maliciously, and without probable cause, and then, for the purpose of harassing the defendant, gives notice that he will take depositions in several remote places in the United States, and thereby puts the defendant to great trouble, inconvenience, and expense in attending himself, or employing counsel to attend, for the purpose of cross-examining the witnesses, etc.; and then suppose that no such depositions are taken, or were intended to be taken, -- can the plaintiff relieve himself from liability to an action for malicious prosecution by simply dismissing his action? Will the defendant have no remedy in such a case?"*
>
> *It is thus the law that a voluntary dismissal of the prior action without prejudice may be a termination in favor of the person against whom that action was brought.*

Consistent with the Restatement's approach, that a dismissal not on the merits *may* support the conclusion that the tort plaintiff prevailed in the predicate action, the *Nelson* court remanded the issue for further proceedings.[4]

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[4] In fact, subsequent proceedings concluded that the dismissal of the predicate action was a settlement, and the malicious prosecution action was again dismissed (and that dismissal affirmed in *Nelson v. Miller*, 660 P.2d 1361 (Kan. 1983).

Relying on California precedent. Arizona has adopted the approach taken in the Restatement (Second) of Torts. requiring an examination of the circumstances surrounding a dismissal to determine if reflects on the merits of the case. *Frey v. Stoneman*, 722 P.2d 274 (Ariz. 1986). There, the Arizona Supreme Court wrote:

> *Whether a voluntary dismissal is a favorable termination is a matter of first impression in Arizona, although other forms of termination have been considered in this context. For instance, if an appeal is pending, a malicious prosecution action is premature. A malicious prosecution action is also premature if it is asserted in a counterclaim to the original action. On the other hand, a judgment on the merits after a trial is always a favorable termination. Restatement § 674 comment j.*
>
> *The case before us, however, falls between these poles. When is a determination on less than the merits a favorable termination? California has a well-developed jurisprudence in this area which we have relied on in the past. We begin our analysis with the Restatement....*
>
> [The decision quotes the Restatement (Second) at length; the quote is found *supra* at 30.]
>
> *When a termination or dismissal indicates in some fashion that the accused is innocent of wrongdoing it is a favorable termination. However, if it is merely a procedural or technical dismissal it is not favorable. Thus, a dismissal pursuant to a statute of limitations is not a favorable termination. A dismissal for failure to prosecute is not procedural, and is a favorable termination which indicates the innocence of the accused if it reflects on the merits of the action.*

At first blush, some of the cases involving dismissal seem to hold that a voluntary dismissal is a per se favorable termination. Closer analysis indicates, however, that the well-reasoned cases do not establish a per se rule when there has been no adjudication of the merits of the underlying action. The question is whether, under the particular circumstances and merits of the underlying case, termination was actually favorable. Since the form of the prior termination is not critical, there is no bright line which can be drawn to determine when a termination on less than adjudication of the merits is favorable. This concept has been articulated in several cases. If entry of summary judgment was merely the formal means of securing the parties' settlement benefits, the judgment cannot form the basis for a malicious prosecution action." "A termination without a trial on the merits may be a favorable termination of the litigation if [the circumstances] indicate the innocence or freedom from liability of the defendant."

All of the cases we have cited have a common element in that a termination prior to trial on the merits is favorable if it "reflects on the merits of the matter," that is, if it had been "pursued it would [have] result[ed] in a decision in favor of defendant."

We conclude that where there has been no adjudication on the merits the existence of a "favorable termination" of the prior proceeding generally must be found in the substance rather than the form of prior events and often involves questions of fact. In such cases, as in the one before us, it will be necessary to determine what actually occurred. If the action was dismissed because of voluntary withdrawal or abandonment by the plaintiff, the finder of fact may well determine that this was, in effect, a confession that the case was without merit.

> *However, there may be many reasons, other than lack of merit, for such withdrawal or abandonment. For instance, the plaintiff might have had insufficient funds to pursue the action or could have decided that a possible recovery was not worth the cost, pecuniary or emotional, of litigating; the plaintiff might have decided to forgive and forget or the defendant may have paid smart money or taken other measures, such as apology, to assuage plaintiff's anger. None of these factors alone may be determinative, and thus it may actually be necessary to try a case within the case, as is often done in legal malpractice claims.*

Thus, the law among the 50 states can be summarized as follows:

- The considerable majority of states follow the approach set forth in the Restatement (Second) of Torts. A withdrawal or voluntary dismissal of an action *may* permit a finding that the prior action was resolved in favor of the defendant (tort plaintiff).

- Almost all states, including Wisconsin, preclude a malicious prosecution action if the predicate action was resolved by a voluntary agreement or stipulation, with (as in *Lechner*) some leeway when the agreement is not between the tort parties.

- Some states will permit even stipulated dismissals to satisfy the requirement of a successful outcome in the predicate action. Conversely, what would ordinarily be proof of a successful outcome (e.g. a granted motion for summary judgment) may in fact be part of a settlement that ought bar a subsequent malicious prosecution action. These states reason that the circumstances, not the form, is what is important. *See: Frey, supra; see also Parks v. Willis*, 853 P.2d 1336 (Ore. 1993), and 30 A.L.R. 4th 572, §15 (2020)

- A minority of states require that the merits of the underlying action be addressed squarely, limiting malicious prosecution

> actions to actions where the case was dismissed for lack of evidence or a favorable verdict was obtained. Thus, Ohio law provides as follows: *" In sum, we hold that the voluntary dismissal of a complaint is not a termination in favor of a party who later asserts a malicious-prosecution claim."* *Miller v. Unger,* 950 N.E.2d 241, 244 (Ohio App. 2011).

Accordingly, were this Court to adhere to the language in the *Pronger* footnote and hold that a unilateral withdrawal or abandonment of the predicate lawsuit can never be a successful outcome for the defendant in that action, it would adopt a position wholly inconsistent with both the Restatement and the clear majority of jurisdictions across the country.

VIII. OVERALL, PUBLIC POLICY SUPPORTS CHEYNE'S RIGHT TO ASSERT HER CLAIM.

This appeal presents several competing public policies. The first stems from the *Wisconsin Constitution,* Article I, §9, which provides:

> *Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.*

While this provision does not create new legal rights, it stands as eloquent evidence that Wisconsin disfavors denial of relief to victims when relief is available.

Note: The term "victims" is used deliberately. In Wisconsin, as in most jurisdictions, some sort of special damages must be proven in order to prevail in a malicious prosecution action. Special damages means something more than what any litigant will face (money spent on lawyers and experts, time lost in litigation, etc.). *Schier v. Denny*, 9 Wis. 2d 340, 345, 101 N.W.2d 35 (1960).

Wisconsin offers *some* protection against baseless lawsuits, including the possibility of recovering fees pursuant to §802.05(3) (though that option is apparently never used in TPR cases to the best of the author's knowledge). However, there is no statutory provision permitting recovery of special damages other than pursuant to a tort action.

Here, Cheyne was deprived of the family court forum where she sought to pursue placement of her daughter from July, 2016 until March, 2017 [R:1, ¶14]. Instead, she was limited to what she could negotiate in juvenile court while the TPR action was pending. Lost time with a young child can never be made up. A parent's right to parent is a fundamental right. *See, e.g.: Evelyn C.R. v. Tykila S. (in Re Jayton S.)*, 246 Wis. 2d 1, 13-14, 629 N.W.2d 768 (2001). Additionally, ¶21© of the Complaint [R:1, ¶21©] asserts other special damages :

> *The threat of losing her parental rights caused Cheyne substantial emotional distress. She engaged in counseling to support herself (and incurred the expense), but nonetheless experienced severe symptoms of hopelessness, despair, and anxiety at the thought of losing her daughter. The impact on Cheyne was markedly greater because she was already diagnosed with PTSD as a result of domestic abuse by Chad during the marriage.*

As with the lost companionship of her child, these special damages cannot be recovered under §802.05(3) or any other

First, a malicious prosecution plaintiff must show that the underlying action was unsupported by probable cause. Probable cause is a low bar to meet, and demonstrating its lack is therefore a high bar to meet for the tort plaintiff. Probable cause exists when the facts and circumstances support a "fair probability" that the matter alleged is true. *Illinois v. Gates*, 462 U.S. 213 (1983). It is a lower standard that proof by a preponderance of the evidence. Thus, only when there is a lack of probable cause to bring the underlying action will a malicious prosecution action be viable. Second, a malicious prosecution plaintiff must also show that the underlying action was motivated by malice. If a lawsuit is initiated by mistake or misunderstanding (such as believing that an individual is responsible instead of a corporation), it is not malicious and no subsequent claim for malicious prosecution will lie. Combined with the requirement of special damages, these two elements severely limit the remedy of a malicious prosecution lawsuit.

In sum, a malicious prosecution action will only lie when the initial lawsuit was brought without probable cause and with malice. Supreme Court Rules 20:3(1)(a)2 and 20:3(1)(a)3 preclude attorneys from *"knowingly advanc[ing] a factual position unless there is a basis for doing*

non-tort remedy.

The second policy consideration bears upon our judicial system. If for no reason other than judicial efficiency, courts should discourage baseless litigation brought for tactical reasons without a basis in law or fact. Other jurisdictions have observed that absent a possibility of being sued for malicious prosecution, a litigant might feel free to harass, damage and potentially destroy an opponent by bringing a frivolous action, taking steps to run up the opposition's costs, and then dismissing it before a final hearing on the merits. *See e.g. Nelson v. Miller, supra* at 607 P.2d 446.[5]

Third, some states have expressly recognized an "*interest in freedom from unjustifiable litigation*" for its citizens. *See, e.g.: O'Brien v. Behles*, 464 P.3d 1097 (Ct. App. New Mex. 2020). This proposition ought be true everywhere.

The foregoing three public policy considerations support permitting withdrawal or abandonment of an action to be a successful outcome for the tort plaintiff as the circumstances permit. In opposition, it may be argued

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[5] *See also: Kennedy v. Byrum*, 201 Cal. App. 2d 474, 480 (Cal. App. 1962), where that court noted that a malicious litigant could bring action after action, dismissing each one to avoid a counter-lawsuit for malicious prosecution.

that making a malicious prosecution claim too easy would have a chilling effect on a party's willingness to bring a meritorious claim. This argument is most often used in criminal cases, where there is a stronger public policy for encouraging victims of crime to come forward. *See, e.g.: Siebel v. Mittlesteadt,* 161 P.3d 527 (Cal. Sup. Ct. 2007), though even the *Siebel* court observed, at 530 (citations omitted):

> *However, we have noted that this principle "'should not be employed to defeat a legitimate cause of action' or to 'invent[] new limitations on the substantive right, which are without support in principle or authority.'"*

One could argue that easing the requirements for malicious prosecution actions could open the floodgates of litigation, with more and more lawsuits followed by counter-lawsuits alleging malicious prosecution (and theoretically, a counter-counter-lawsuit alleging malicious prosecution for bringing an unsuccessful malicious prosecution action).

The fears raised by #4 and #5 can be quickly dispelled. The requirement that the predicate action terminate in favor of the defendant (the tort plaintiff) is only one of the 6 elements that must be established. Two of the remaining elements clearly serve as a means of filtering out all but the most egregious actions.

First, a malicious prosecution plaintiff must show that the underlying action was unsupported by probable cause. Probable cause is a low bar to meet, and demonstrating its lack is therefore a high bar to meet for the tort plaintiff. Probable cause exists when the facts and circumstances support a "fair probability" that the matter alleged is true. *Illinois v. Gates*, 462 U.S. 213 (1983). It is a lower standard that proof by a preponderance of the evidence. Thus, only when there is a lack of probable cause to bring the underlying action will a malicious prosecution action be viable. Second, a malicious prosecution plaintiff must also show that the underlying action was motivated by malice. If a lawsuit is initiated by mistake or misunderstanding (such as believing that an individual is responsible instead of a corporation), it is not malicious and no subsequent claim for malicious prosecution will lie. Combined with the requirement of special damages, these two elements severely limit the remedy of a malicious prosecution lawsuit.

In sum, a malicious prosecution action will only lie when the initial lawsuit was brought without probable cause and with malice. Supreme Court Rules 20:3(1)(a)2 and 20:3(1)(a)3 preclude attorneys from *"knowingly advanc[ing] a factual position unless there is a basis for doing*

so that is not frivolous" and from *"fil[ing] a suit ... when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another."* When such an action is brought, and when such an action causes special damages to the innocent part, should a last minute abandonment of the action insulate the plaintiff who brought the wrongful lawsuit from possible liability? We say "no."

When this Court balances competing public interests, it is useful to look at how the decision will impact on the particulars of the case before the Court for decision. Because terminations of parental rights implicate fundamental liberty interests protected by both the Wisconsin and Federal constitutions, *see, Evelyn C.R., supra,* intentional misuse of a TPR action has the potential of causing grave harm to the other parent. The authority of the juvenile court after the filing of a petition for termination of parental rights supercedes that of a family court; §48.15 provides: *"Except as provided in s. 48.028 (3), the jurisdiction of the court assigned to exercise jurisdiction under this chapter and ch. 938 is paramount...."* Here, as alleged in ¶14 of the Complaint [R:1], the filing of the termination of parental rights petition resulted in a stay of the pending family court proceedings for approximately 8 months.

The facts (and inferences from those facts) in the Complaint are taken as true for purposes of the dismissal motion. The Complaint alleges that Chad filed the termination of parental rights action against Cheyne based on knowingly false representations after she began seeking shared placement of their daughter. He then attempted to use that action to block her efforts, first in Minnesota and then in Wisconsin, only withdrawing the action at the last moment (and after 8 months of denying Cheyne a family court forum) before a hearing was scheduled.

If the trial court's decision is upheld, what disincentive exists for individuals like Chad? Removing the possibility of being sued for damages for bringing an action on false pretenses would only encourage the behavior. Individuals like Chad would have an incentive to use knowingly false information in court filings, knowing that they could just withdraw the action after months (8 months, in the present case) of benefitting from its pendency, and face no consequences.

When a person files a termination of parental rights action, the judicial system incurs a cost: a file is opened, a judge is assigned, hearings must be scheduled, and so forth. Chad's commencement of a termination of parental rights action on knowingly false facts (the facts he later

admitted to would have precluded the termination action) caused such costs to be incurred by the system. The effect of the trial court's ruling is to let Chad retain the benefit (delay of the family court process) of his malicious initiation of an action on knowingly false facts with no adverse consequences; conversely, both Cheyne – who was directly victimized by Chad's misconduct – and Dane County pay the price with no remedy available. Public policy cannot support this.

CONCLUSION

The third element of malicious prosecution was met in this case when Chad unilaterally withdrew his termination of parental rights action. The *Pronger* footnote, suggesting that all dismissals not on the merits, even those that are unilaterally obtained by the plaintiff in the original action, preclude a malicious prosecution action, should be held to be an incomplete statement of Wisconsin law. Wisconsin should align with the great majority of state jurisdictions and the with the Restatement (Second) of Torts by treating withdrawals, abandonments and voluntary dismissals as successful outcomes for the tort plaintiff unless circumstances establish that the outcome was part of a settlement or agreement between the parties to the predicate action.

This Court should therefore reverse the dismissal of the action by the circuit court and remand the matter for further proceedings.

Dated this __ day of November, 2020.

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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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Dated this __ day of November, 2020.

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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 (except that the included Appendix is separately e-filed).

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 __ day of November, 2020.

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