Appeal No. 2019AP1918

SUPREME COURT OF WISCONSIN

Cheyne Monroe,

Plaintiff-Appellant,

v.

Chad Chase,

Defendant-Respondent.

**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

In its Order dated October 21, 2020, this Court granted the court of appeals' request for certification and issued an order on briefing. In the Order, this Court stated that the parties shall be notified of the date and time for oral argument in this appeal in due course.

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. Chad ultimately dismissed that proceeding without a determination on the merits. R. 1: 4 (¶ 18).

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. In the Motion to Dismiss, 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]

[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.

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, who was the defendant in the former proceeding. The circuit court therefore dismissed Cheyne's Complaint. R. 11. 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 filed a Notice of Appeal on October 8, 2019. R. 12. Following briefing by the parties, the court of appeals

requested certification of the appeal to the Supreme Court on August 13, 2020, pursuant to Wis. Stat. § (Rule) 809.61.

By Order dated October 21, 2020, the Supreme Court accepted the certification of this appeal.

ARGUMENT

I. STANDARD OF REVIEW

At question, for purposes of this appeal, is only one of the six elements of a malicious prosecution claim. On Chad's motion to dismiss, the circuit court correctly ruled that Cheyne failed to satisfy the third element of a malicious prosecution claim, namely, that the prior action must have been terminated in her favor.

Because the facts alleged in the Complaint must be taken as true in deciding a motion to dismiss, those are the facts that are applied and those are the facts that must show that the party is entitled to relief. In short, "it is the sufficiency of the facts alleged that control the determination of whether a claim for relief is properly plead." *Strid v. Converse*, 111 Wis. 2d 418, 422–23, 331 N.W.2d 350 (1983). In *Strid*, the

Wisconsin Supreme Court held that "[a]n examination of the complaint leads to the conclusion that it fails to allege the third element of a claim for malicious prosecution—that the complained of proceedings terminated in favor of the defendant, who then became the plaintiff in the subsequent malicious prosecution action." *Strid*, 111 Wis. 2d at 424.

The issue presently 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, this Court reviews the determination of the circuit court *de novo*, owing no deference to the circuit court. See, e.g., *Towne Realty v. Zurich Insurance Co.*, 201 Wis. 2d 260, 270, 548 N.W.2d 64 (1996); *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). Here, the former proceeding did not terminate in favor of the plaintiff. Nor does Cheyne specifically allege in her Complaint that it was terminated in her favor, instead simply stating that the dismissal satisfied the third element and 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: 4 (¶ 18).

For the reasons set forth below, voluntary dismissal does not constitute a favorable termination under Wisconsin law. Cheyne has failed to allege facts supporting the third

element of a malicious prosecution claim and, therefore, the circuit court acted correctly in dismissing her Complaint.

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 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,[2] *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).

[2] For example, in support of her argument 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," (Plaintiff/Appellant's Supreme Court Brief at pp. 20-21), Cheyne states that *Pronger* (unlike *Lechner*) never mentioned the concepts of waiver or admission of probable cause "inherent to agreements or stipulations that resolve the predicate action" and concluded: "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." (*Id.* at p. 26.) However, as noted below, in Section II. B., *infra*, *Pronger* did not change the rule of law in Wisconsin.

In this matter, Cheyne admits in her Complaint that the prior action was concluded by dismissal of the petition. R. 1:4 (¶18). Under Wis. Stat. § 805.04(2) a dismissal is not on the merits unless the court orders that it is. Cheyne does not allege that underlying proceeding was dismissed with prejudice. Nor can she.

The underlying action was terminated without regard to its merits and, therefore, 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 "clearly *dicta*." (Plaintiff/Appellant Initial Brief And Appendix filed with State of Wisconsin Supreme Court ("Plaintiff-Appellant's Supreme Court Brief"), p. 21). Chad disagrees.

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 Supreme Court Brief at pp. 22-24.) 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 "we note that…" indicates that the footnoted language is *dicta*. (Plaintiff-Appellant's Supreme Court Brief at p. 21.) 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, the Complaint does not allege that the prior action in this matter was resolved by settlement or stipulation. As such, this proposition is not at issue in this 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*, 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 a number of types of termination that generally preclude a finding of favorable resolution of the prior proceeding. Id. *See also Bristol v. Eckhardt*, 254 Wis. 297, 300, 36 N.W.2d 56 (1949).

Thus, although the *Lechner* court cites various types of terminations that would not constitute "favorable resolution," 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 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.

Cheyne has previously argued that the term "act" must refer to something "shady or inappropriate" because it is used in the same phrase as "trick" and "device." (*See* Plaintiff-

Appellant's Reply Brief before the Court of Appeals, at pp. 12-13.) However, the term "device" need not be "shady or inappropriate." A "device" has been defined to include a "plan, procedure, technique." *See* Webster's Collegiate Dictionary, 316 (10th ed. 2001).

Thus, the argument that "act" must have a negative connotation because it is used with the words "trick or device" is without merit. Moreover, assigning the terms "act" and "device" the same meaning as "trick" would render those words mere surplusage. If "act" means some kind of a "trick," why use the term "act" at all?

A dismissal of the underlying proceeding was an act preventing consideration by that court. The circuit court in the instant action correctly agreed, holding "I think that clearly there was a result of some action 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*.

Cheyne cites to *Elmer v. Chicago & N.W. Ry. Co.*, 257 Wis. 228, 43 N.W.2d 244 (1950), as a case in which a dismissal did constitute a "favorable resolution." (Plaintiff-Appellant's Supreme Court Brief at pp. 14-15.) 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.

III. OTHER JURISDICTIONS HAVE HELD THAT A VOLUNTARY DISMISSAL IS NOT A FAVORABLE TERMINATION FOR PURPOSES OF A MALICIOUS PROSECUTION CLAIM.

In its certification, the court of appeals states that it has found no Wisconsin precedent "that provides a considered analysis of which a civil case that terminates in a unilateral voluntary dismissal can support a malicious prosecution claim, and that this may be a question of first impression in Wisconsin." Certification by Wisconsin Court of Appeals, pp. 9-10 (footnotes omitted). Although Chad and Cheyne have addressed Wisconsin precedent in support of their respective positions, Chad now addresses cases from other jurisdictions.

Cheyne quotes from the Restatement (Second) of Torts, § 674, Comment j (1977). (Plaintiff/Appellant Initial Brief And Appendix filed with State of Wisconsin Supreme Court ("Plaintiff-Appellant's Supreme Court Brief, pp. 29-30). At the outset, we note that this authority does not support

Cheyne's argument that a voluntary dismissal not arising as a result of a settlement is a favorable outcome as a matter of law. *See*, *e.g.*, Cheyne's argument that "a dismissal without a settlement, compromise or agreement is indeed an outcome favorable to the plaintiff in a malicious prosecution case." (*Id.*, p. 28.) Instead of providing a blanket rule that, as a matter of law, the lack of a settlement constitutes a favorable outcome, Comment j to Restatement (Second) of Torts, § 674 provides that "[w]hether 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."

Although a number of jurisdictions cite Restatement (Second) of Torts, § 674, Comment j, in support of a holding that a court must consider the circumstances under which the proceedings were withdrawn, other jurisdictions have found that the voluntary dismissal or nonsuit of an action does not

constitute a favorable termination for purposes of a malicious prosecution claim.

For example, under Tennessee law, a voluntary nonsuit without prejudice does not constitute a favorable termination for purposes of a malicious prosecution claim.[3] *Himmelfarb v. Allain*, 380 S.W.3d 35 (Tenn. 2012). In *Himmelfarb*, the issue was whether a voluntary nonsuit dismissing the underlying proceeding constituted a "favorable termination" for purposes of a malicious prosecution action. *Himmelfarb*, 380 Wis. 2d at 38. As in the case before this Court, the *Himmelfarb* trial court had neither addressed the merits of the plaintiff's claims nor the defendant's liability. *Id.* at 41.

The *Himmelfarb* court held that the plaintiff's voluntary dismissal of his claims against the defendant in the underlying proceeding was not a dismissal on the merits, and that neither

[3] The elements of malicious prosecution in Tennessee are (1) the defendant brought a lawsuit against the plaintiff without probable cause; (2) the defendant brought the lawsuit with malice; and (3) the lawsuit terminated in favor of the plaintiff. *Parrish v. Marquis*, 172 S.W.3d 526, 530 (Tenn. 2005), overruled on other grounds by *Himmelfarb v. Allain*, 380 S.W.3d 35 (Tenn. 2012). Thus, the third element is that same under Tennessee law as it is under Wisconsin law.

party ended up as the "prevailing party." *Id.* In doing so, it considered the approach recommended by Comment j to section 674 of the Restatement (Second) of Torts and cited several cases following that approach. *Id.* at 38-39.

However, the Supreme Court then turned its discussion to jurisdictions holding otherwise:

> Contrary to the Restatement (Second) approach, a minority of jurisdictions have held that a voluntary nonsuit cannot serve as a favorable termination in a malicious prosecution case. *See e.g.*, *Hewitt v. Rice*, 154 P.3d 408, 416 (Colo. 2007) (declining to examine the underlying circumstances of a voluntary nonsuit because it "would lower the burden of proof in a malicious prosecution case and deter the settlement of cases"); *Miller v. Unger*, 192 Ohio App.3d 707, 2011–Ohio–990, 950 N.E.2d 241 (Ct. App.), at ¶ 21 (stating that a voluntary dismissal of a complaint is not a favorable termination for purposes of malicious prosecution); *KT Bolt Mfg. Co. v. Tex. Elec. Coops., Inc.*, 837 S.W.2d 273, 275 (Tex. Ct. App. 1992).

Id. at 39.

The Supreme Court of Tennessee also considered the reasoning that the above courts applied when deciding differently than those jurisdictions

applying comment j to section 674 of the Restatement (Second) of Torts:

> These courts reason that a voluntary nonsuit is not an adjudication of the merits of the case but is merely a procedural option available to plaintiffs as a matter of right. See, e.g., *KT Bolt Mfg.*, 837 S.W.2d at 275 (finding that a voluntary nonsuit cannot be a favorable termination because it neither adjudicates rights nor litigates issues but merely places the parties in the position in which they were prior to the filing of the claim).

Id.

The *Himmelfarb* court ultimately concluded: "After reviewing the rationales employed in various jurisdictions, we decline to follow those jurisdictions that have adopted comment j to the Restatement (Second) of Torts section 674 and that examine the circumstances under which a voluntary nonsuit is taken." *Id.* at 39-40. The court held that a voluntary nonsuit without prejudice was not a favorable termination for purposes of a malicious prosecution claim and explained that this result was consistent with Tennessee law. *Id.* at 40-41.

The Supreme Court also discussed important policy reasons supporting its conclusion:

> Malicious prosecution actions have the potential to create a chilling effect on the right to access the courts. Cf. *Kauffman v. A.H. Robins Co.*, 223 Tenn. 515, 448 S.W.2d 400, 404 (1969) ("The freedom to use the courts and other tribunals having some quasi-judicial functions should not be impeded."). The threat of a malicious prosecution action may reduce the public's willingness to resort to the court system for settlement of disputes. *Hewitt*, 154 P.3d at 416. We decline to adopt a rule that would deter litigants with potentially valid claims from filing those claims because they are fearful of a subsequent malicious prosecution action. Nor do we wish to deter parties from dismissing their claims when a dismissal is the appropriate course of action.

Id. at 41.

Under Ohio law, the voluntary dismissal of a complaint is not a termination in favor of a party who later asserts a malicious prosecution claim. *See*, *e.g.*, *Rogers v. Olt*, 2018-Ohio-2110, ¶ 25, 112 N.E.3d 407, 415. In that case, the defendant in a malicious prosecution claim, Timothy J. Olt ("Olt") voluntarily dismissed a second petition for protective

order against Richard Rogers ("Roger").[4] The Ohio appellate court held:

> Voluntary dismissal of a complaint is not a termination of the proceedings in a party's favor for purposes of a malicious prosecution claim. *Jones v. Nichols*, 12th Dist. Warren No. CA2012-02-009, 2012-Ohio-4344, 2012 WL 4351313, ¶ 12, citing *Miller v. Unger*, 192 Ohio App.3d 707, 950 N.E.2d 241, 2011-Ohio-990, ¶ 16 (12th Dist.). In this case, after receiving the second *ex parte* protection order, Olt voluntary dismissed the petition against Rogers. Olt never received a permanent [civil stalking protective order] because he dismissed the case before it went forward. For this reason, we find that Rogers has failed to show the prior proceedings were terminated in his favor, and he therefore cannot prevail on the claim of malicious prosecution.

Rogers v. Olt, 2018-Ohio-2110, ¶ 25, 112 N.E.3d 407, 415.

This court should adopt the approach set forth in the jurisdictions that find that a voluntary dismissal does not constitute a termination in favor of the malicious-prosecution plaintiff and affirm the circuit court's decision in this case.

[4] The first petition had been dismissed by stipulation. *Rogers*, ¶22, 112 N.E.3d at 414.

IV. PUBLIC POLICY SUPPORTS THE CONCLUSION THAT VOLUNTARY DISMISSAL OF THE PRIOR CASE DOES NOT CONSTITUTE THE FAVORABLE RESOLUTION REQUIRED FOR A MALICIOUS PROSECUTION ACTION TO PROCEED.

Public and judicial policy favor a rigid threshold for the institution of malicious prosecution claims, for reasons which are set forth below.

Cheyne argues that Wisconsin "disfavors denial of relief to victims when relief is available," quoting § 9 of the *Wisconsin Constitution*. (Plaintiff-Appellant's Supreme Court Brief, p. 37.) 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 i**t.
>
> 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 (bold-faced 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 did anything other than simply acquiesce to a dismissal of the former proceeding.

Cheyne also contends that a malicious prosecution action "will only lie when the initial lawsuit was brought without probable cause and with malice." (Plaintiff-Appellant's Brief at p. 41). Apparently, Cheyne's position is that those two elements are already difficult to satisfy, so the courts should not allow "a last minute abandonment of the action [to] insulate the plaintiff who brought the wrongful lawsuit from possible liability." (*Id.* at p. 42.) Cheyne also

asks "[i]f the trial court's decision is upheld, what disincentive exists for individuals like Chad?" (*Id.* at p. 43.)

But what about the disincentive that would result from Cheyne's policy position? Litigants dismiss cases for many different reasons, including, but not limited to, a lack of resources or a change of heart. If dismissing a case could result in a malicious prosecution case, litigants would be discouraged from dismissing their case short of trial – for fear of having the defendant in that litigation use the fact of that dismissal against them in a subsequently lawsuit against them. *See*, *e.g.*, *Himmelfarb*, *supra*, 380 S.W.3d at 41 ("Nor do we wish to deter parties from dismissing their claims when a dismissal is the appropriate course of action").

If the circuit court's decision were reversed, the policy ramifications would be significant. Adopting the rule that Cheyne advocates would, as noted by the Supreme Court of Tennessee, "deter litigants with potentially valid claims from filing those claims because they are fearful of a subsequent malicious prosecution action." *Id.*

Pursing a malicious prosecution action is not intended to be easy. 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). The plaintiff in a malicious-prosecution action bears the burden of establish all six elements, including the one at issue before this Court, and if the plaintiff fails to establish any one of those elements, the plaintiff cannot prevail. *Yelk v. Seefeldt*, 35 Wis. 2d 271, 277, 151 N.W.2d 4,7 (1967).

In the context of addressing the damages element of a claim for malicious prosecution, the Wisconsin Supreme Court acknowledged that its position – namely, that a complaint must allege distracting of, or interference with, the plaintiff's person or property as a result of the underlying proceeding – was the minority rule, the Supreme Court noted that it "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, 454, 455, 464 N.W.2d 647, 651 (1991). The Supreme Court further explained:

> It is apparent that the choice was consciously and conscientiously made by this court almost fifty years ago. The rule was adopted because the court concluded that there would be freer access to the courts if prospective litigants were not easily subject to malicious prosecution suits were their actions to fail. Thus, as a matter of judicial policy, the Wisconsin court preferred the additional special damage-seizure requirements to make more difficult the bringing of malicious prosecution actions that would discourage persons from having access to the courts. The policy factors weighed and balanced then are no different than they are now. The rule has worked well for fifty years. While mere antiquity does not justify a rule, its successful and just operation for a long period of time does.

Johnson v. Calado, 159 Wis. 2d 446, 459–60, 464 N.W.2d 647 (1991).

In *Himmelfarb*, *supra*, the Supreme Court of Tennessee expressed similar concerns, reasoning:

> Malicious prosecution actions have the potential to create a chilling effect on the right to access the courts. Cf. *Kauffman v. A.H. Robins Co.*, 223 Tenn. 515, 448 S.W.2d 400, 404 (1969) ("The freedom to use the courts and other tribunals having some quasi-judicial functions should not be impeded."). The threat of a malicious prosecution action may reduce the public's

> willingness to resort to the court system for settlement of disputes. *Hewitt*, 154 P.3d at 416.

Himmelfarb v. Allain, 380 S.W.3d at 41. The *Himmelfarb* court therefore declined to adopt the rule set forth in Restatement (Second) of Torts, § 674, comment j, which would not only deter litigants with potentially valid claims from filing those claims for fear of facing a retaliatory malicious prosecution action, but would also deter litigants from dismissing their claims when appropriate. *Id.*

The same is true here. Cheyne argues that affirming the circuit court rules would provide individuals with an incentive to file claims and then withdraw them. (Plaintiff-Appellant's Supreme Court Brief, p. 43.) However, it is more likely that adopting Cheyne's position would "deter parties from dismissing their claims" when they wish to do so and keep them in court when dismissal would have been an appropriate way of proceeding.

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.

December 3, 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 5,476 words.

Dated: December 3, 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.

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