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 REPLY BRIEF

AUERBACH & PORTER, S.C.

Richard J. Auerbach
Attorney for Plaintiff/Appellant

Post Office Box 620205-0205
Middleton, WI 53562
Telephone: (608) 664-3800
Email: rauerbach@auerbach-porter.com
State Bar #1008842

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INTRODUCTION

Both parties agree that to prevail in a malicious prosecution action, the plaintiff must show that she was successful in defending against the initial lawsuit where she was the defendant. Moreover, both parties accept that "*where the original proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties,*" that original action cannot form the basis of a subsequent malicious prosecution lawsuit. Finally, both parties agree that actions that are dismissed "*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*" also cannot support a malicious prosecution action as well. [*Lechner v. Ebenreiter*, 235 Wis. 244, 252, 292 N.W. 913 (1940)]

The narrow issue on appeal is whether "*where the original proceeding has been terminated without regard to its merits or propriety* ***NOT*** *by agreement or settlement of the parties, but by voluntary dismissal by the tort defendant*" can a malicious prosecution action be pursued. Chad has largely abandoned a primary argument raised in the lower courts, and while still relying on the *Pronger* footnote (*Pronger v. O'Dell*, 127 Wis. 2d 292, 297, 379 N.W.2d 330 (Ct. App. 1985)), argues that his

unilateral dismissal of the original termination of parental rights action is an *"act ... preventing action and consideration by the court"* that precludes a subsequent malicious prosecution action as a matter of law. His arguments are unsound

I. CHAD ABANDONED A PRIMARY CLAIM HE ADVANCED IN THE LOWER COURTS.

In trial court proceedings [R13; 14], and in his Court of Appeals Brief, Chad argued that *Lechner, supra,*[1] created **four** types of outcomes in the initial lawsuit that barred a subsequent action for malicious prosecution. In the trial court, he claimed [underlining added]:

> ***Lechner*, Wisconsin Supreme Court gives you four exceptions to the favorable resolution. One is terminated without respect to its merits. This was not terminated with respect to its merits. Two, terminated by agreement or stipulation....**

This was echoed in Chad's Court of Appeals Brief, which reads at Pages 8-9 [underlining added]:

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[1] *Lechner*, quoting *18 R.C.L. p. 25, § 13, with approval, stated: as follows:*

> ***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.***

> **[T]here are <u>four</u> types of termination that generally preclude a finding of favorable resolution of the prior proceeding: (1) the original proceeding has been terminated without regard to its merits; (2) the original proceeding has been terminated without regard to the case's propriety by agreement or settlement of the parties; ....**

Cheyne addressed this contention in her Supreme Court Initial Brief, explaining that Chad's treatment of (1) and (2) as separate phrases was a warped construction of the *Lechner* language: the clause *"by agreement or settlement of the parties"* modifies the clause "*where the original proceeding has been terminated without regard to its merits or propriety"* such that there is but a single phrase: "***where the original proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties***." The language necessarily implies that where there is a termination without regard to the merits of the initial action **not** arising out of an agreement or settlement, the dismissed action **can** be the basis of a malicious prosecution action.

In his Supreme Court Brief, it appears that Chad has abandoned the argument that *Lechner* describes four outcomes that preclude subsequent malicious prosecution actions. Yet, despite belatedly recognizing that *Lechner* spells out only three such circumstances, Chad claims that the *Pronger* footnote – which failed to include the "by agreement or

settlement" modifier - merely enunciated existing law and is consistent with *Lechner* and its progeny. It is not.

II. *PRONGER* IS AN INCOMPLETE STATEMENT OF THE LAW.

If *Pronger* completely stated the law, the *"by agreement or settlement"* language in *Lechner* is rendered entirely without meaning or effect. As argued in Cheyne's Initial Brief, if *Pronger* is correct, the language might as well have been *"where the original proceeding has been terminated without regard to its merits or propriety* ***by agreement or settlement of the parties*** *and/or* ***not by agreement or settlement of the parties.***"[2] This covers the universe of dismissals not on the merits.

Second, if having covered the universe of dismissals not on the merits, why address dismissals resulting from acts, tricks or devices? They

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[2] Similarly, in *Tower Special Facilities, Inc. v. Inv. Club, Inc.*, 104 Wis. 2d 221, 227-28, 311 N.W.2d 225 (Ct. App. 1981), 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 ...* ***the dismissal was ordered pursuant to stipulation,*** *without regard to the merits or propriety of the proceeding.*

If all dismissals not on the merits are fatal to a subsequent malicious prosecution action, the *Tower* court could simply have said so, as it would be entirely irrelevant that there was a stipulation. *Pronger* would render the emphasized language in *Tower* as superfluous as the language in *Lechner*.

would already be excluded because they are part of the universe of dismissals not on the merits.

Third, the underlying action in *Lechner* action was dismissed when the defendant therein (tort plaintiff) agreed to turn over certain property to a third party. There was no exonerating verdict, nor was it clear that the state conceded a lack of evidence. There was no dismissal on the merits; instead, there was an agreement between the defendant therein and the district attorney that resulted in the dismissal. If *Pronger* correctly stated the law, the malicious prosecution action would not lie. However, the *Lechner* malicious prosecution action was deemed viable because the agreement was one not impliedly admitting probable cause. Since a diametrically opposite result is obtained by applying *Pronger* to *Lechner*'s facts, the claim that the cases are consistent is untenable.

Fourth, *Lechner* quoted various authorities for the proposition that settlements admit (at least implicitly) the existence of probable cause.[3] There is no such admission, explicitly or implicitly, when a plaintiff unilaterally withdraws his complaint. If *Pronger* is correct, why bother

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[3] ***"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."*** *Lechner, supra* at 252.

explaining why a settlement disqualifies the action from acting as the basis for a malicious prosecution action?

In sum, the *Pronger* footnote is contradicted by this Court's holding in *Lechner*. Perhaps recognizing that the dismissal of his termination of parental rights action was not *"by agreement or settlement of the parties,"* Chad now argues that the voluntary dismissal was terminated as a result of *"some act, trick, or device preventing action and consideration by the court."* This argument, too, must fail.

III. CHAD MISCONSTRUES *LECHNER'S* "SOME ACT, TRICK, OR DEVICE PREVENTING ACTION AND CONSIDERATION BY THE COURT."

Chad asserts that his unilateral withdrawal of the termination of parental rights petition was an "act" that prevented the trial court from considering the TPR action on the merits so as to fit within the language of *Lechner*.[4] He cites the trial judge's comment in support [R.13; 28, Chad's Brief, at 14] [emphasis added]:

> **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.**

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

However, in order for an act (or trick or device) to preclude a finding of an successful outcome for the defendant (the plaintiff in the malicious prosecution action), the act, trick or device must have been something performed **by the defendant** in the initial action, not the plaintiff in the initial action, for multiple reasons:

1. If a plaintiff commences an action without probable cause and with malice towards the defendant, it defies all logic to allow that plaintiff to avoid being sued for malicious prosecution action by ***his own act, trickery, or device.*** Conversely, if the defendant in the initial action escapes a decision on the merits by some act, trick or device, it makes perfect sense to bar a subsequent claim for malicious prosecution. This is simple logic: when the plaintiff in the initial action escapes an adjudication on the merits by employing some act, trick or device, one can infer that the action lacked merit. In contrast, when the defendant escapes an adjudication on the merits, it in no way suggests that the cause of action lacked merit.

2. The foregoing approach is consistent with other situations where courts look to whether a dismissal suggests a lack of merit. For example, when a case is dismissed due to the statute of limitations, it is not a dismissal that implies anything about the underlying merits, and a malicious prosecution action will not lie. Conversely, if a case is dismissed for lack of prosecution or for a failure to comply with discovery, it permits the inference that the case was meritless (why else would a plaintiff fail to move forward), and a subsequent malicious prosecution action will lie.[5] *See:* Vitauts M. Gulbis, *Nature of Termination of Civil Action*

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[5] Allowing a malicious prosecution action to be pursued does not mean that all such dismissals will be enough. A failure to prosecute could indicate a lack of funds or ill health on the plaintiff's part. It simply presents a triable question of fact on whether the outcome was or was not successful.

Required to Satisfy Element of Favorable Termination to Support Action for Malicious Prosecution, 30 A.L.R. 4th 572, §2[a] (2020). *See also: Selby v. O'Dea*, 156 N.E.3d 1212, ¶105 (Ill. App. 2020), quoting *Frey v. Stoneman*, 722 P.2d 274, 278 (Ariz. 1986) (en banc) [internal citations omitted]:

> **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.**

3. Cases from other jurisdictions support this approach. For example, in a New York case [*Halberstadt v. New York Life Ins. Co.*, 86 N.E. 801, 804, (Ct. App. NY, 1909)], the plaintiff had (while a defendant in the initial action) escaped from the country and eluded the jurisdiction of the court until after the passage of the statute of limitations. This was viewed as an action inconsistent with the kind of success required for the tort of malicious prosecution (an act, trick or device by the defendant in the initial action). Similarly, when a man acting on advice of counsel stayed out of the charging state until he could no longer be prosecuted, that was enough for the South Dakota courts to dismiss his subsequent action for malicious prosecution (again, an act, trick or device by the defendant in the initial action). As the latter state's high court wrote (quoting the New York case with approval) in *Stauffacher v. Brother*, 292 N.W. 432, 434 (S.D. 1940):

> **As we view this record, element three as above stated is lacking. Element three requires the bona fide determination of the**

original proceeding in favor of the present plaintiff. This court in the case of Baumgarten v. Mathieu, 39 S.D. 584, 165 N.W. 989, cited with approval the case of Halberstadt v. New York Life Ins. Co., 194 N.Y. 1, 86 N.E. 801, 804, 21 L. R. A., N. S., 293, 16 Ann. Cas. 1102. This New York case specifically held that "where the 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 the 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 such an action." Speaking with reference to the original proceeding upon which the action for malicious prosecution was based, the court said: "That proceeding came to a dismissal and end, not because of any judicial action in favor of the accused for lack of merits or because of a withdrawal or abandonment of it by the prosecuting party, but simply because the defendant therein succeeded in escaping from the country and eluding the jurisdiction of the court and thereby preventing a prosecution. He by his flight, as in other cases the accused had done by agreement, settlement, or trick, prevented a consideration of the merits, and he ought not now to be allowed to claim that there were no merits."

In the case before us the appellant deliberately and upon the advice of counsel refrained from going into the state of Iowa and submitting to the jurisdiction of the Iowa court. We think it clear that appellant

> **by his acts has brought himself within the rule announced in Halberstadt case, which rule has the approval of this court.**

4. Finally, if a plaintiff can perform any "act" that results in no adjudication on the merits, why would there be so much analysis in the case law. Entering into a stipulation for dismissal is an "act" by the plaintiff; a voluntary dismissal is an "act" by the plaintiff; failing to prosecute is an "act" (by omission) by the plaintiff ... and yet the law is not blind to the illogic of letting a malicious plaintiff who brought an action without probable cause escape the consequences by some trick or device or act.

Cheyne has discovered no case where the plaintiff in the initial action exercised acts, trickery or devices to escape a decision in the case he himself filed and used that escape artistry to further escape a malicious prosecution action. This Court should not credit his argument on that score.

IV. PUBLIC POLICY FAVORS CHEYNE'S POSITION.

Chad argues that this Court should give effect to the *Pronger* footnote lest there be a chilling effect that would *"deter litigants with potentially valid claims from filing those claims for fear of facing a retaliatory malicious prosecution action deter litigants from dismissing their claims when appropriate,"* Chad's Brief at 29, citing *Himmelfarb v. Alain*, 380 S.W.3d 35 (Tenn. 2012). This is mostly a red herring.

Himmelfarb is driven by the specifics of the Tennessee civil code: §41.01, T.R.C.P. liberally provides for voluntary dismissals. As *Himmelfarb* observed at 380 S.W.3d 40:

> **Rule 41 of the Tennessee Rules of Civil Procedure permits liberal use of voluntary nonsuits at any time prior to "final submission" to the trial court for decision in a bench trial or in a jury trial before the jury retires to deliberate [citations omitted].**

In contrast, in Wisconsin a party only has the right to unilaterally dismiss a civil action prior to the filing of a responsive pleading, §805.04(1). When an action is dismissed prior to the filing of a responsive pleading, the answering party ordinarily has incurred very little in the way of litigation expense. Moreover, only one such voluntary dismissal is permitted: the dismissal of a second action requires that it be with prejudice or by stipulation.

What this means is that in most civil cases, a voluntary dismissal will not trigger a malicious prosecution action because it can only occur before a responsive pleading. Thereafter, it must be by stipulation (which precludes a subsequent malicious prosecution action), or by court order upon such conditions as the court determines to be just, which may include payment of attorney's fees, §805.04(2).

But TPRs differ from standard civil actions in that a TPR action is

initiated by the filing of a petition under §48.417 with no responsive pleading involved. Instead, admissions and denials are orally entered at a plea hearing under §48.422(1). Thus, a petitioner's right to unilaterally dismiss the action seemingly never ends (because §805.04(1) ties the right to the filing of a responsive pleading) and, as here, could occur after months and months of pending litigation with attendant legal expenses and other consequences and without leave of court. Of course, no responsive pleading is involved in criminal cases as well.

Thus, most voluntary dismissals that follow lengthy and potentially expensive litigation will be confined to TPR and criminal cases, where fundamental liberty interests are at stake. Is there a public policy reason to protect those who **maliciously and without probable cause** bring TPR or trigger criminal actions against an innocent party? Of course not. On the contrary, if the possibility of facing a malicious prosecution action serves to deter someone whose malice towards another tempts him to falsify a claim that would otherwise lack even probable cause, the public interest is truly served.

CONCLUSION

This Court should correct the incomplete statement of law found in the *Pronger* footnote, and continue to adhere to the majority view found in

the Restatement (Second) of Torts, reversing the trial court and permitting Cheyne to seek redress for the serious harm she suffered when Chad maliciously filed a TPR action based on knowingly falsified allegations.

Dated this 17th day of December, 2020.

AUERBACH & PORTER, s.c.

BY: _____

Richard J. Auerbach
Attorney for Plaintiff/Appellant

Post Office Box 620205-0205
Middleton, Wisconsin 53562
Telephone Number: (608) 664-3800
State Bar Number: 01008842

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 17th day of December, 2020.

AUERBACH & PORTER, s.c.

BY: _____

Richard J. Auerbach
Attorney for Plaintiff/Appellant

Post Office Box 620205-0205
Middleton, Wisconsin 53562
Telephone Number: (608) 664-3800
State Bar Number: 01008842

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 17th day of December, 2020.

AUERBACH & PORTER, s.c.

BY: _____

Richard J. Auerbach
Attorney for Plaintiff/Appellant

Post Office Box 620205-0205
Middleton, Wisconsin 53562
Telephone Number: (608) 664-3800
State Bar Number: 01008842