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STATE OF WISCONSIN
COURT OF APPEALS
District IV
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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Cases

Wisconsin Statutes

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 unnecessary, as the issue presented is readily determined based on briefs.

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 commenced a civil action for the tort of malicious prosecution by filing a Summons and Complaint [R:1] on March 22, 2019. The Complaint alleged that Defendant/Respondent committed the tort of malicious prosecution by filing a termination of parental rights action. The third element of the tort of malicious prosecution requires a showing that the former proceedings (the termination of parental rights action) must have terminated in favor of the plaintiff in the malicious prosecution action; to meet this requirement, the Complaint alleged that Defendant/Respondent *"withdrew the petition for termination of parental rights"* and *that the withdrawal "was not the result of any settlement or stipulation."*

Defendant/Respondent 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 the tort plaintiff'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 Defendant/ Respondent's voluntary withdrawal of the termination of parental rights action was not a termination of favor of Plaintiff/Appellant.

Plaintiff/Appellant timely filed a Notice of Appeal on October 8, 2019 [R:12].

STATEMENT OF FACTS

This trial court granted Defendant/Respondent'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[1] 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 Wisconsin after the Minnesota divorce was granted) and filed an action against Cheyne in Dane County Circuit Court. A copy of the pleadings 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 grounds. [Footnote omitted.]

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[1] From here on, this Brief identifies Plaintiff/Appellant as "Cheyne" and Defendant/Respondent as "Chad."

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 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.

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.[2] 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 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 use the pendency of the TPR action as a reason to deny placement to Cheyne in

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

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 filing by the Dane County Juvenile Court, also violated §48.396(2)(a), *Stats.*, which provides in relevant 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

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), the Wisconsin Supreme 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. THE PLAINTIFF IN A MALICIOUS PROSECUTION ACTION MUST SHOW THAT THE PRIOR ACTION TERMINATED IN HER FAVOR.

Cheyne's action against Chad alleges that he, knowing that she was seeking a specific placement schedule for their minor child in their Minnesota divorce action, filed a Wisconsin termination of parental rights action premised on knowingly false factual representations.[3] There are six elements that must be proven to establish the tort of malicious prosecution, *Schier v. Denny,* 9 Wis. 2d 340, 342, 101 N.W.2d 35 (1960),[4] with one deemed dispositive in this case. Specifically, the circuit court held that the Complaint failed to establish the third such element, that the termination of parental rights action initiated by Chad terminated in Cheyne's favor. This ruling was erroneous.

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[3] 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.

[4] 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.

A. A Party Cannot Settle The Prior Action And Then Base A Malicious Prosecution Claim On That Settled Action.

Case law is clear that a defendant in a particular action cannot settle the case and thereafter bring an action for malicious prosecution based on that settled action. Nearly 80 years ago, the Wisconsin Supreme 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.]

The *Lechner* court further explained the rule in its decision, *Lechner, 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 (without admitting 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 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 until 1981, the law appeared well settled in Wisconsin that when the original action is terminated by ***"agreement," "compromise," "stipulation" or "settlement"*** (all of these words having been used in the above-cited cases), a subsequent claim of malicious prosecution cannot be brought.[5] 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.

B. In 1985, A Court Of Appeal's Footnote Could Have Suddenly Changed The Law By Omitting The *"Compromise Or Settlement"* Language From *Lechner's* Holding.

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:

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[5] Under *Lechner, supra* at 252, there are three circumstances in which a dismissed prior action cannot form the basis for a malicious prosecution action: 1) when it is dismissed *"by agreement or settlement of the parties,"* 2) when it is dismissed *"solely by the procurement of the accused as a matter of favor,"* and 3) when it is dismissed *"as a result of some act, trick, or device preventing action and consideration by the court."* In the present case, Chad dismissed the termination of parental rights 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.*

> *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. [Citations omitted.] A claim for malicious prosecution cannot be interposed into the very proceedings that form the basis for the claim. [Citations omitted.] 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).* [Bolding added.]

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. If taken literally, it would apply to *all* voluntary dismissals of the prior action, seemingly no matter how the dismissal occurred. The trial court in Cheyne's action against Chad concluded that this footnote was binding and, accordingly, dismissed the case. [R:13; 25]

C. The *Pronger* Footnote Must Not Be Construed As Changing *Lechner's* Requirement That A Dismissal Barring A Subsequent Malicious Prosecution Action Be By Agreement.

Cheyne asserts that the footnote in *Pronger* should not be interpreted as a modification of the general rule, first laid out in Wisconsin in *Lechner, supra.* Instead, its failure to include the phrase "by agreement or settlement," or similar words, was inadvertent.[6] We offer six arguments for this position.

1. The *Pronger* footnote is mere 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 remained 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.

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[6] To be clear, Cheyne does not ask this Court to overrule or modify *Pronger.* Rather, she asks that this Court find that the discussion in the *Pronger* footnote was incomplete. *See, e.g., State v. Jahnke,* 316 Wis. 2d 324, 762 N.W.2d 696 (Ct. App. 2009): *"it is an incomplete definition"* and *"we did not attempt to provide a full and complete definition ."*

2. 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.

3. 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 any elimination of the "by stipulation or agreement" language in *Lechner* and its progeny. That the *Pronger* court would cite *Tower* in the footnote

supports the conclusion that it was not seeking to substantively affect long-standing case law.

4. 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:

> *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.*

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.* [Citations omitted, emphasis added]

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

It seems rather improbable that the authors of the *Pronger* decision intended to both change existing law after 80 years AND intended to do so only via a footnote. 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 all previous cases was inadvertent.

5. Cases should not be interpreted in a manner that renders language often used in prior cases entirely surplusage.

Finally, if every dismissal without an adjudication on the merits was insufficient to support a malicious prosecution action, the references in *Elmer, Thompson* and *Tower* to agreements, stipulations, voluntary compromises, and settlements would be mere surplusage. For example, the *Thompson* court stated (*supra*):

> *A **voluntary compromise and settlement** of the prior suit is not a favorable termination.*

This, if *Pronger* is interpreted literally, could be changed to:

> *A **voluntary compromise and settlement** of the prior suit or **an involuntary compromise and settlement** of the prior suit, or **any other way that the prior suit gets dismissed,** is not a favorable termination.*

This is clearly not what the prior cases intended – the *Pronger* footnote, if a correct statement of law, would render "voluntary" and "compromise and settlement" meaningless.

6. The Court of Appeals cannot overrule a Wisconsin Supreme Court decision.

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.

> *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 changing what has been the law in this State for at least 80 years: 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.

III. PUBLIC POLICY SUPPORTS CHEYNE'S RIGHT TO ASSERT HER CLAIM.

In a typical civil action, a party may seek at least a partial remedy for an unjustifiable filing within the civil proceedings themselves. For example, an aggrieved defendant may seek actual attorney's fees and costs by serving notice that the action is unsupported by fact or law and, if the action is not withdrawn, seeking a finding of what used to be labeled frivolousness. *See:* §802.05(3). In addition, §805.04(2) provides in relevant part: *"Except as provided in sub. (1), an action shall not be dismissed at the plaintiff's instance save upon order of court and upon such terms and conditions as the court deems proper."* Thus, a defendant in a civil action

is guaranteed the opportunity to request costs and, if appropriate, attorney's fees. Thus, such a defendant has at least *some* remedies irrespective of a right to bring an action for malicious prosecution.

However, the litigation that forms the basis for Cheyne's malicious prosecution claim was a juvenile court action seeking to terminate Cheyne's parental rights to her daughter. Juvenile court proceedings are generally not governed by the rules of civil procedure (different notice provisions, no responsive pleading, different substitution of judge procedure, time limits, etc.). When the juvenile code uses civil procedures, it expressly says so – for example, §48.293(4) provides: *"In addition to the discovery procedures permitted under subs. (1) to (3), the discovery procedures permitted under ch. 804 shall apply in all proceedings under this chapter."*

Thus, in a juvenile court case, no costs are available under Chapter 814, the frivolous lawsuit provisions in §802.05(3) do not apply, and the quoted provisions in §805.04(2) requiring notice before dismissal are inapplicable (a petitioner may unilaterally withdraw the petition, as happened here). In fact, there are ***no*** remedies for an abusive filing within the termination of parental rights proceedings.

Because terminations of parental rights implicate fundamental liberty interests

protected by both the Wisconsin and Federal constitutions,[7] 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

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[7] *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):

> *Terminations of parental rights affect some of parents' most fundamental human rights. T.M.F. v. Children's Serv. Soc'y, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983). At stake for a parent is his or her "interest in the companionship, care, custody, and management of his or her child." Id. Further, the permanency of termination orders "works a unique kind of deprivation. In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome authority of the State to destroy permanently all legal recognition of the parental relationship." M.L.B. v. S.L.J., 519 U.S. 102, 127-28, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (citations and quotations omitted). For these reasons, "parental termination decrees are among the most severe forms of state action." Id.*

attempted to use that action to block her efforts, first in Minnesota and then in Wisconsin, only withdrawing the action at the last moment before a hearing was scheduled.

If the trial court's decision is upheld, what disincentive exists for individuals like Chad? Persons in his position are already free from the possibility of an award of costs, free from an award of attorney's fees, and free from any other legal sanctions. 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 on the family court process) of his knowing (and 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 withdrew the termination of parental rights action with no involvement by Cheyne. 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 clarified so as to include the *Lechner* language "by agreement or stipulation." This Court should therefore reverse the dismissal of the action by the circuit court and remand the matter for further proceedings.

Dated this 10 day of February, 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):

☐ Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.

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Dated this 10 day of February, 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 10 day of February, 2020.

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

CHEYNE MONROE,

Plaintiff-Appellant

- v. -

CHAD CHASE,

Defendant/Respondent

PLAINTIFF/APPELLANT'S APPENDIX

Appendix Certification

Appendix A: Trial Court Order [R:11]

Appendix B: Complaint [R:1]

Appendix C: Relevant portions of Transcript of Oral Ruling [R:13] (Cover page plus pages 25-27)

APPENDIX CERTIFICATION

I, Richard J. Auerbach, Attorney for Plaintiff/Appellant, hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that this appeal is not taken from a circuit court order or judgment entered in a judicial review of an administrative decision.

I further certify that no portion of the appellate record is required by law to be confidential.

Dated this 10 day of February, 2020.

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