Appeal No. 2019AP1918 **Cir. Ct. No. 2019CV790**

WISCONSIN COURT OF APPEALS
DISTRICT IV

CHEYNE MONROE,

PLAINTIFF-APPELLANT,

V.

CHAD CHASE,

DEFENDANT-RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Fitzpatrick, P.J., Kloppenburg, and Graham, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2017-18), this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

This appeal concerns the allegations necessary to state a claim for the common law tort of malicious prosecution.[1] The specific issue is whether the

[1] Malicious prosecution claims usually involve at least two separate proceedings, with the events of an earlier action forming the basis for a later action for malicious prosecution. Party designations can be confusing in any malicious prosecution case because the plaintiff in the malicious prosecution action was usually the defendant in the prior action. Likewise, the defendant in the malicious prosecution action was usually either the plaintiff in a prior civil action, or a complainant whose allegations led a prosecutor to file criminal charges. For the sake of clarity and consistency, we use the terms "malicious prosecution plaintiff" and "malicious prosecution defendant" throughout this certification, even when referring to a party's actions in the prior proceeding that gave rise to the malicious prosecution claim.

malicious prosecution defendant's unilateral voluntary dismissal of a prior proceeding can ever satisfy the third element of a malicious prosecution claim—that the prior proceeding terminated in the malicious prosecution plaintiff's favor. Precedent from the Wisconsin Supreme Court extending as far back as 1940 suggests that the answer to this question may be "yes." However, one of our decisions contains language that arguably points in the opposite direction, and suggests that a prior proceeding that was terminated in a unilateral voluntary dismissal can never be the basis for a malicious prosecution claim.

We certify this appeal to the Wisconsin Supreme Court because its resolution may require the court to resolve a conflict between Wisconsin precedents, and because it presents an opportunity to clarify and develop the common law.

BACKGROUND

This is a review of an order dismissing Cheyne Monroe's malicious prosecution claim against Chad Chase for failure to state a claim upon which relief can be granted. Monroe and Chase are the divorced parents of a minor child, and they have been parties to three separate court proceedings that are relevant here: the family court case in which they were divorced, a separate action to terminate Monroe's parental rights that Chase initiated and then voluntarily dismissed, and the instant action for malicious prosecution. We discuss each case briefly, with all facts taken from Monroe's complaint and assumed to be true for purposes of this appeal.

In the family court case, the parties stipulated that Chase would be granted primary placement of their minor child, C.C., and that Monroe would be granted periods of non-primary placement to be determined by agreement of the

parties. When Monroe contacted Chase to establish a regular placement schedule, Chase would not agree to any terms. Monroe then filed a motion asking the family court to establish a placement schedule.

Around the same time Monroe's motion for placement was pending, Chase commenced a separate action in which he sought to terminate Monroe's parental rights on the grounds that Monroe had abandoned C.C. and had never had a substantial parental relationship with her. *See* WIS. STAT. § 48.415(1), (6) (2017-18). This action, which we refer to as the TPR action, is the basis for the malicious prosecution claim that is the subject of this appeal.

According to Monroe, Chase took contradictory positions in these two actions. In the TPR action, Chase averred that there had been no contact between Monroe and C.C. for approximately three years. Yet, in the family court action, he acknowledged that there had been recent contact between Monroe and C.C.

After Chase filed the TPR action, the family court stayed all proceedings on Monroe's motion for placement pending the resolution of the TPR action. Nine months later, just before a hearing in the TPR action, Chase unilaterally withdrew his complaint and the TPR action was dismissed.[2] The dismissal was not the result of any settlement or stipulation. As a result of the TPR action and dismissal, Monroe incurred damages including the loss of months

[2] It is not clear from the complaint—or from anything else in the record before us—whether the circuit court entered an order dismissing the TPR action, and if so, the contents of that order.

of time with C.C., significant litigation costs to defend against the TPR action, and emotional distress.

Monroe then brought this malicious prosecution action, alleging that Chase had initiated the TPR action with malice and on false grounds. Chase moved to dismiss Monroe's complaint for failure to state a claim for relief. Among other things, he argued that Monroe must show that the prior proceeding terminated in her favor and that, as a matter of law, his voluntary dismissal of the TPR action cannot satisfy that requirement. The circuit court agreed, citing ***Pronger v. O'Dell***, 127 Wis. 2d 292, 379 N.W.2d 330 (Ct. App. 1985) as a basis for its decision.

DISCUSSION

There are six elements in a malicious prosecution claim: (1) there was a prior legal proceeding against the malicious prosecution plaintiff, (2) the prior proceeding was brought by the malicious prosecution defendant, (3) the prior proceeding terminated in favor of the malicious prosecution plaintiff, (4) the malicious prosecution defendant initiated the prior proceeding with malice, (5) there was a lack of probable cause to initiate the prior proceeding, and (6) the prior proceeding harmed the malicious prosecution plaintiff. ***Wisconsin Pub. Serv. Corp. v. Andrews***, 2009 WI App 30, ¶23, 316 Wis. 2d 734, 766 N.W.2d 232.

At issue in this appeal is the third element, which requires that the prior proceeding terminated in the malicious prosecution plaintiff's favor. For our purposes, the key Wisconsin decisions regarding this element are ***Lechner v. Ebenreiter***, 235 Wis. 244, 292 N.W. 913 (1940), ***Tower Special Facilities, Inc. v. Investment Club, Inc.***, 104 Wis. 2d 221, 228, 311 N.W.2d 225 (Ct. App. 1981), and ***Pronger***, 127 Wis. 2d 292.

Lechner is the seminal Wisconsin decision on this issue. In that case, Lechner was the malicious prosecution plaintiff, and he had been accused of larceny by Ebenreiter, the malicious prosecution defendant. ***Lechner***, 235 Wis. at 247. As a result of Ebenreiter's allegations, the district attorney filed a criminal complaint against Lechner and then ultimately moved to dismiss those charges. ***Id.*** at 252-53. During the hearing on the district attorney's motion, Lechner agreed to turn over the property that had been the subject of the larceny charge to a third party. ***Id.*** at 253. In the subsequent action for malicious prosecution, Ebenreiter argued that Lechner could not show that the criminal case had terminated in Lechner's favor. ***Id.*** at 252.

In discussing what it means for a prior proceeding to have terminated in Lechner's favor, the supreme court explained that a prosecutor's decision to dismiss a criminal case[3] is normally "sufficient termination of the action to support an action for malicious prosecution." ***Id.*** But it also explained that there could be no claim for malicious prosecution where the prior 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." ***Id.*** As the court explained, the reason for this rule is that an agreement or settlement is "an admission that there was probable cause," and that a malicious prosecution plaintiff "cannot afterwards retract [that admission] and try the question, which by settling he waived." ***Id.*** Applying this

[3] The ***Lechner*** court referred to the district attorney's dismissal as a "nolle prosequi." ***Lechner v. Ebenreiter***, 235 Wis. 244, 252, 292 N.W. 913 (1940). *See also* ***State v. Kenyon***, 85 Wis. 2d 36, 43, 270 N.W.2d 160 (1978) (using the same term to refer to a prosecutor's motion to dismiss a criminal case).

rule, the court declined to determine as a matter of law whether any "agreement" Lechner made about the property during the dismissal hearing was "an admission of probable cause." ***Id.*** at 254. Instead, it determined that whether the prior criminal case had terminated in Lechner's favor was a question of fact for the jury. ***Id.*** at 254.

In sum, ***Lechner*** set forth at least two principles that appear relevant to this appeal. First, a prosecutor's decision to dismiss criminal charges, which forecloses any court decision on the merits, can be a termination in favor of the malicious prosecution plaintiff sufficient to support a malicious prosecution claim. Second, a termination of a case "without regard to its merits or propriety by agreement or settlement" cannot support such a claim. ***Lechner*** has been cited favorably in subsequent cases.[4] It has never been overruled by the Wisconsin Supreme Court, and it appears to be a leading Wisconsin decision on the issue of what malicious prosecution plaintiffs must show to satisfy the requirement that the prior proceeding terminated in their favor.

One of the decisions that applies these principles from ***Lechner*** is ***Tower Special Facilities***, 104 Wis. 2d 221. In that case, Tower was the malicious

[4] *See, e.g.*, ***Bristol v. Eckhardt***, 254 Wis. 297, 300, 36 N.W.2d 56 (1949) (citing ***Lechner*** and explaining that the malicious prosecution plaintiff's release from jail was "at his procurement" as part of an agreement with the district attorney "amounting to a compromise or settlement," 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"); ***Elmer v. Chicago & N.W. Ry. Co.***, 257 Wis. 228, 234, 43 N.W.2d 244 (1950) (citing ***Lechner*** and explaining that "[t]he discharge by an examining magistrate, or a nolle prosequi by the district attorney except under circumstances as above stated (relating to compromises), is a sufficient termination of the action to support an action for malicious prosecution"); ***Thompson v. Beecham***, 72 Wis. 2d 356, 360, 241 N.W.2d 163 (1976) (citing ***Lechner*** for the proposition that "[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"); ***Tower Special Facilities, Inc. v. Investment Club, Inc.***, 104 Wis. 2d 221, 228, 311 N.W.2d 225 (Ct. App. 1981).

prosecution plaintiff, and it had entered into a settlement resulting in the dismissal of the prior action that formed the basis of its malicious prosecution claim. ***Id.*** at 227. We determined that the complaint failed to state a claim. ***Id.*** at 227-28. Citing ***Lechner***, we explained that there had been "no termination of the original proceeding in favor of Tower" because "the dismissal was ordered pursuant to stipulation [between Tower and the defendants], without regard to the merits or propriety of the proceeding." ***Id.*** at 228.

The final decision that is important to this appeal is ***Pronger***, 127 Wis. 2d 292. In that case, O'Dell was the party alleging malicious prosecution, and Pronger was the party defending against the claim. ***Id.*** at 294. The "prior proceeding" upon which the claim was based was Pronger's civil lawsuit, initially filed in state court, which claimed that O'Dell had sexually harassed her. ***Id.*** O'Dell denied the allegations and, in the same state court action, he counterclaimed for malicious prosecution. ***Id.*** at 296. Pronger later voluntarily dismissed her state court complaint so that she could file an identical suit in federal court. ***Id.*** at 294. The dismissal of Pronger's sexual assault claim left only the counterclaim pending in the original state court action. ***Id.***

The circuit court dismissed O'Dell's counterclaim for malicious prosecution, and we affirmed. We first concluded that "[a] claim for malicious prosecution cannot be interposed into the very proceedings that form the basis for the claim," and that O'Dell's counterclaim "was premature since it was instituted prior to a favorable termination of the proceedings upon which it was based." ***Id.*** at 296. Then, in a footnote, we added the following: "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. In support of this proposition, we cited

Tower Special Facilities, which, as discussed above, involved a dismissal pursuant to a settlement. We also cited ***Savage v. Seed***, 81 Ill. App. 3d 744, 750, 401 N.E.2d 984 (1980), a decision of the Illinois Court of Appeals that was subsequently overruled by the Illinois Supreme Court. *See* ***Cult Awareness Network v. Church of Scientology Int'l***, 177 Ill. 2d 267, 273, 275, 277, 685 N.E.2d 1347 (1997) (expressly overruling ***Savage*** in holding that a voluntary dismissal can support a malicious prosecution claim).

Here, the circuit court expressly relied on ***Pronger***'s footnote 2 in dismissing Monroe's complaint, and the parties dispute the meaning of this footnote. Monroe argues that it is an incomplete statement of Wisconsin law because it does not distinguish between voluntary dismissals that result from compromise and settlement between the parties, and those that do not. According to Monroe, if the footnote in ***Pronger*** meant that no proceeding that terminates by voluntary dismissal can ever be the basis for a malicious prosecution claim, ***Pronger*** would conflict with the Wisconsin Supreme Court's decision in ***Lechner***. Chase contends that ***Lechner***'s rule extends to any proceeding that terminates "without regard to its merits," that ***Pronger***'s footnote 2 accurately states Wisconsin law, and that it binds us to conclude that his unilateral voluntary dismissal of the TPR action cannot satisfy the third element of malicious prosecution. For the reasons that follow, we believe the parties raise issues that our supreme court is best suited to answer.

We are to certify cases that present a conflict between Wisconsin precedents, *see* ***Marks v. Houston Cas. Co.***, 2016 WI 53, ¶80, 369 Wis. 2d 547, 881 N.W.2d 309, and ***Pronger***'s footnote 2 could be taken to conflict with ***Lechner*** in at least two ways. First, ***Pronger***'s language could be read to bar any malicious prosecution claim where the prior proceeding terminated in a dismissal

that does not "adjudicate the merits of the claim," and indeed that is the interpretation Chase advances. But such a rule could conflict with ***Lechner***'s rule that a dismissal by a prosecutor *can* support a malicious prosecution claim.[5] Second, ***Lechner***'s rule was grounded on its conclusion that, by settling, the opposing party admits there was "probable cause" for the prior action.[6] But at least some voluntary dismissals are unilateral, and therefore do not necessarily constitute any statement by the opposing party, much less an admission that the proceeding had merit.

Additionally, the law regarding the tort of malicious prosecution should be clarified and developed, and the Wisconsin Supreme Court is best suited to that role. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶49, 326 Wis. 2d 729, 786 N.W.2d 78. The parties cite, and we have found, no Wisconsin precedent that provides a considered analysis of whether a civil case that terminates in a unilateral voluntary dismissal can support a malicious prosecution

[5] A prosecutor's dismissal does not necessarily "adjudicate the merits" of the dismissed charge. Wisconsin prosecutors have great discretion "as to the way in which [they] exercise[] power to prosecute complaints," ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶30, 271 Wis. 2d 633, 681 N.W.2d 110, and to dismiss a case after the filing of the complaint, they need only show that it is in the "public interest" to do so, ***State v. Dums***, 149 Wis. 2d 314, 322, 440 N.W.2d 814 (Ct. App. 1989).

[6] "[I]n the context of a malicious prosecution suit," probable cause means "that quantum of evidence which would lead a reasonable layman ... to honestly suspect that another person had committed a crime." ***Pollock v. Vilter Mfg. Corp.***, 23 Wis. 2d 29, 42, 126 N.W.2d 602 (1964). Other jurisdictions have articulated standards that expressly address what "probable cause" means when the prior suit is civil, not criminal. *See, e.g.*, ***Shannahan v. Gigray***, 131 Idaho 664, 668, 962 P.2d 1048 (1998) (when the prior proceeding in a malicious prosecution case is civil, that proceeding needs to be supported by "less [probable cause] than that required in a criminal action"). We are unaware of any Wisconsin authority that clearly addresses this issue.

claim,[7] and this may be a question of first impression in Wisconsin.[8] The parties also point to competing policy rationales to support their respective positions. Monroe argues that unless claims such as hers can go forward, there is no meaningful way to prevent a parent from misusing the judicial system by maliciously filing termination of parental rights proceedings on false grounds. Chase argues that the law of malicious prosecution should be drawn narrowly, because a permissive rule could prevent parties from filing meritorious actions out of fear of retaliation. This appeal presents the opportunity to develop the common law in light of these weighty considerations.

For all these reasons, we certify this appeal to the supreme court.

[7] ***Pronger v. O'Dell***, 127 Wis. 2d 292, 379 N.W.2d 330 (Ct. App. 1985) is the closest fit, but as discussed above, the voluntary dismissal in that case did not "terminate" the proceeding because it was only dismissed so that it could be re-filed in federal court.

[8] Other jurisdictions have addressed this question, and they have almost universally held that a malicious prosecution defendant's voluntary dismissal of a prior civil action can support a malicious prosecution claim. *See* Vitauts M. Gulbis, *Nature of Termination of Civil Action Required To Satisfy Element of Favorable Termination To Support Action for Malicious Prosecution*, 30 A.L.R. 4th 572 § 2[a] (2020) (noting that "the authorities are evidently agreed that a voluntary dismissal entered by the plaintiff in the underlying proceedings constitutes a favorable termination"); *see also* ***id.*** § 15 (collecting cases).