

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1477

RICHARD DEBRINCAT and JASON DEBRINCAT,

Petitioners,

v.

STEPHEN FISCHER,

Respondent.

**ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT**

INITIAL BRIEF OF PETITIONERS ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The petitioners, Richard and Jason Debrincat, appellees in the Fourth District and defendants in the trial court, seek review of *Fischer v. Debrincat*, 169 So. 3d 1204 (Fla. 4th DCA 2015) in which the Fourth District certified conflict with *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013). The respondent, Stephen Fischer, was the appellant in the Fourth District and the plaintiff in the trial court.

In *Wolfe*, the Third District held that the absolute litigation privilege barred a cause of action for malicious prosecution that was premised solely upon the filing of a lawsuit. The Third District stated that it was “guided and restrained by the broad language and application of the privilege” articulated by this Court in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606 (Fla.1994)¹ and *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380, 384 (Fla.2007)², both of which held that the privilege applies to *all* causes of action. *Wolfe*, 128 So. 3d at 70.

In *Fischer*, the trial court followed *Wolfe* and entered summary judgment against the respondent’s cause of action for malicious prosecution that was also based solely upon the filing of a lawsuit. On appeal, the Fourth District reversed, holding

¹ Referred to herein as “*Levin*.”

² Referred to herein as “*Echevarria*.”

that the litigation privilege does not apply.

For the reasons presented in this brief, the petitioners request that this Court quash *Fischer* and approve *Wolfe*.

The Decision of the Third District in *Wolfe*

The operative facts in *Wolfe* as recounted by the Third District are as follows:

Richard Ferrell and Harold Wolfe, who are partners in a limited liability company (“The Boatslip”), were involved in litigation in Monroe County over control of The Boatslip. The Monroe County litigation ultimately was settled.

Ferrell, who was dissatisfied with the outcome, sued his partners in the United States District Court for the Southern District of Florida (“the Federal case”). Ferrell’s New York counsel retained the appellees, two Miami attorneys and their law firm (the “Miami Lawyers”), to serve as local counsel. The Miami Lawyers filed a complaint on January 6, 2007. On March 6, 2007, when the Miami Lawyers received documents from Wolfe demonstrating that the issues raised in the Federal case were raised and settled in the Monroe County suit, the Miami Lawyers immediately notified Ferrell that they could not ethically pursue his claims and must withdraw. The Miami Lawyers withdrew from the Federal case on March 13, 2007, after seeking and receiving permission from the Federal court to do so, as required under applicable rules. On September 13, 2007, six months after the Miami Lawyers withdrew, Ferrell’s complaint was dismissed and final judgment was entered. The United States Circuit Court affirmed the dismissal.

Wolfe, Harold E. Wolfe, Jr., P.A., and Harold E. Wolfe, Jr., Revocable Trust (collectively, “Wolfe”) the appellants here, sued the Miami Lawyers for abuse of process and malicious prosecution. The trial court granted the Miami Lawyers’ motion for judgment on the pleadings, finding that the pleadings demonstrated that the alleged wrongful actions were taken in the course of and related to litigation and were

thus absolutely privileged under Florida law.

Wolfe, 128 So. 3d at 68. On appeal by *Wolfe*, the Third District affirmed.

The Third District commenced its analysis with an examination of the history of the litigation privilege in Florida as follows:

The litigation privilege was first recognized in Florida in 1907 to provide legal immunity for actions that occur in judicial proceedings. *Myers v. Hodges*, 53 Fla. 197, 44 So. 357 (1907). In *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla.1994), the Florida Supreme Court extended the litigation privilege, already applicable to defamatory statements (slander and libel) and perjury, to all other torts so long as the act complained of occurs during and has some relation to the proceedings, stating:

[W]e find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding.... [P]articipants [must] be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

The *Levin* plaintiff alleged that the defendant law firm tortiously interfered with the plaintiff's relationship with its attorneys by listing the attorneys as witnesses in a separate case in order to prevent them from serving as attorneys in that case. *Id.* at 607. The *Levin* court held the attorneys' conduct was shielded against the plaintiff's suit by Florida's litigation privilege. *Id.*

Thirteen years after *Levin*, the Florida Supreme Court clarified that "[t]he litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a

statute, or of some other origin,” *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380, 384 (Fla.2007), and reaffirmed that “[a]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding ... so long as the act has some relation to the proceeding.” *Echevarria*, 950 So.2d at 384 (quoting *Levin*, 639 So. 2d at 608), *see also DelMonico v. Traynor*, 116 So.3d 1205 (Fla.2013) (clarifying that, although not all statements made outside of the formal judicial process are protected by the litigation privilege, an absolute privilege applies to conduct occurring during the course of the proceedings).

Wolfe, 128 So. 3d at 68-9.

In addressing the abuse of process claim in *Wolfe*, the Third District noted that it was undisputed that the acts relating to that claim occurred after the complaint was filed and were related to the judicial proceedings. The Third District held that the trial court correctly applied the litigation privilege to the cause of action for abuse of process, citing *LatAm Invs., LLC v. Holland & Knight, LLP.*, 88 So. 3d 240 (Fla. 3d DCA 2011) (holding that the litigation privilege applies to abuse of process claims where the conduct occurred during and was related to the judicial proceedings, and concluding that the application of the litigation privilege to a cause of action for abuse of process does not eliminate that cause of action because the privilege only applies to acts taken during and related to the judicial proceedings), and *Am. Nat’l Title & Escrow of Fla. v. Guarantee Title & Trust Co.*, 748 So. 2d 1054, 1055 (Fla. 4th DCA 1999) (*Am. Nat’l Title & Escrow I*) (affirming the trial court’s order

granting summary judgment in favor of the law firm in an action for abuse of process on the basis of absolute immunity applied to that cause of action and *Levin*).

Turning to the malicious prosecution claim in *Wolfe*, the Third District found itself

guided and restrained by the broad language and application of the privilege articulated by the Florida Supreme Court in *Levin* and *Echevarria*. In *Levin*, the Florida Supreme Court held that “absolute immunity must be afforded to any act occurring during the course of a judicial proceeding ... so long as the act has some relation to the proceeding.” *Levin*, 639 So.2d at 608. In *Echevarria*, the Court reiterated its broad application of privilege “applies in all causes of action, statutory as well as common law.” *Echevarria*, 950 So.2d at 380–81.

Wolfe, 128 So. 3d at 70. The Third District reasoned that “[i]t is difficult to imagine any act that would fit more firmly within the parameters of *Levin* and *Echevarria* than the actual filing of a complaint.” *Id.*

The Third District found that application of the litigation privilege to the prosecution of a lawsuit was consistent with the policy reasons underlying the privilege. The Third District stated:

The Florida Supreme Court explained that, “Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be **free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.**” *Echevarria*, 950 So. 2d at 384 (quoting *Levin*, 639 So. 2d at 608) (emphasis added). “It is the perceived necessity for candid and

unrestrained communication in those proceedings, free of the threat of legal actions predicated upon those communications, that is the heart of the rule. The nature of the underlying dispute simply does not matter.” *Echevarria*, 950 So. 2d at 384.

Because the Florida Supreme Court has clearly and unambiguously stated, not once, but twice, that the litigation privilege applies to all causes of actions, and specifically articulated that its rationale for applying the privilege so broadly was to permit the participants to be “free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct,” we are obligated to conclude that the act complained of here – the filing of the complaint – is protected by the litigation privilege. Thus, the trial court properly granted a judgment on the pleadings for Wolfe’s cause of action against the Miami Lawyers for malicious prosecution.

Wolfe, 128 So. 3d at 70.

Wolfe argued in the Third District that the application of the privilege to malicious prosecution claims would eliminate that tort as a cause of action. The Third District found no merit to this argument, observing that by definition, application of the absolute litigation privilege was limited to conduct that occurred during and related to judicial proceedings. Accordingly, the Third District explained, a malicious prosecution cause of action premised upon acts committed outside the judicial process would not necessarily be barred by the privilege:

We are unpersuaded by the argument that, unlike other torts, the application of the litigation privilege to the tort of malicious prosecution would effectively eliminate malicious prosecution as a cause of action altogether. In the instant case, the acts complained of were the actual

filing of the complaint and the brief prosecution of the [underlying] case.... These acts indisputably occurred during and were related to the judicial proceedings, and are therefore protected by the litigation privilege. Acts committed prior to the filing of the complaint may not, in some cases, enjoy the broad protection of the privilege.

Wolfe, 128 So. 3d at 71. The Third District cited *Olson v. Johnson*, 961 So. 2d 356 (Fla. 2d DCA 2007) and *American Nat'l Title and Escrow*, 810 So. 2d 996 (Fla. 4th DCA 2002) (*Am. Nat'l Title & Escrow II*) as examples where the malicious prosecutions claims would not be barred by application of the absolute privilege.³

The Decision of the Fourth District in *Fischer*

Fischer brought a malicious prosecution action against the Debrincats. (R. 1-86). The pertinent facts are quoted from *Fischer*⁴ as follows:

In appellant's [Fischer's] malicious prosecution action below, the trial court granted appellees' motion for summary judgment⁵ and later entered final judgment against appellant.⁶ We reverse and hold that the litigation privilege cannot be applied to bar the filing of a claim for malicious prosecution where the elements of that tort are satisfied.

³ In *Olson*, the act complained of in the malicious prosecution action was a police report falsely accusing Olson of stalking. In *Am. Nat'l Title & Escrow II*, a claim of absolute privilege was rejected upon a finding that the defendants would enjoy at most a qualified privilege for allegedly providing law enforcement with false information with the intent to injure the plaintiffs.

⁴ *Fischer*, 169 So. 3d at 1205 (footnotes to record references added).

⁵ (R. 192).

⁶ (R. 207-08).

Appellees [Debrincats] commenced a civil lawsuit against various defendants and later added appellant as a party defendant.⁷ In the underlying proceeding, appellees sued appellant for defamation, defamation *per se*, tortious interference, and conspiracy.⁸ Appellees later dropped appellant from the underlying proceeding.

Appellant then brought the instant action for malicious prosecution against appellees, claiming that appellees acted with malice towards him in pursuing the underlying proceeding against him without probable cause.⁹ Appellees raised the litigation privilege as an affirmative defense in their operative answer.¹⁰

Appellees eventually moved for summary judgment, arguing that the litigation privilege afforded them immunity for their conduct of joining appellant as a defendant in the underlying lawsuit.¹¹ Appellees relied upon *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013), a case holding that the litigation privilege applies to a cause of action for malicious prosecution. The trial court granted appellees' motion for summary judgment¹² and later entered a final judgment in their favor.¹³

The Fourth District reversed the trial court's order based upon the following holding:

“We reverse and hold that the litigation privilege cannot be applied to bar the filing

⁷ (R. 4-50).

⁸ *Id.*

⁹ (R. 1-3)

¹⁰ (R. 175-77).

¹¹ (R. 178-80)

¹² *See* n.3.

¹³ *See* n.4.

of a claim for malicious prosecution where the elements of that tort are satisfied.”
169 So. 3d at 1205.

The Fourth District opined that “... *Wolfe* went too far in its application of the litigation privilege.” *Id.* at 1207. According to the Fourth District, “malicious prosecution could never be established if causing the commencement or continuation of an original proceeding against the plaintiff were afforded absolute immunity under the litigation privilege.” *Id.* at 1207. With regard to this Court’s holding in *Echevarria* that the litigation privilege applies in all causes of action, the Fourth District reasoned that this Court did not intend to provide absolute immunity from liability for malicious prosecution. *Id.* at 1208. The Fourth District went on to cite with approval the law of California wherein the litigation privilege does not apply to the tort of malicious prosecution. *Id.* at 1209. The Fourth District reversed the summary judgment, remanded for further proceedings, and certified conflict with *Wolfe*. *Id.*

SUMMARY OF THE ARGUMENTS

In *Levin*, this Court balanced competing policy considerations and concluded that “absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior, so long as the act has some relation to the proceeding.” 639

So. 2d at 608 (emphasis added). This Court reasoned that participants in litigation “must be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.” *Id.* (emphasis added). Thereafter in *Echevarria*, this Court held that this litigation “immunity” or “privilege” applies to “all causes of action,” “across the board,” whether initiated “pursuant to common law, statute, or some other origin.” 950 So. 2d at 380-384.

More recently in *DelMonico*, this Court explained that the absolute privilege applies to acts “made either in front of a judicial officer or in pleadings or documents filed with the court or quasi-judicial body.” 116 So. 3d at 1217. In these formalized judicial settings, such acts are “memorialized before a judicial officer, minimizing concerns of factual dispute” where “the potential harm that may result can be mitigated by ... notice and hearing, the comprehensive control exercised by the trial judge whose action is reviewable on appeal, and the availability of retarding influences such as false swearing and perjury prosecutions.” *Id.* By contrast, a qualified privilege would apply to an act committed outside but related to a formal judicial proceeding where “these safeguards are either unavailable or far less effective” and no privilege would apply at all where the act was neither committed within a formal judicial proceeding nor related to a formal judicial proceeding. *Id.* at

1218-19.

In *Wolfe*, the Third District, following *DelMonico*, *Levin* and *Echevarria*, correctly applied the absolute litigation privilege to a cause of action for malicious prosecution because it was based solely upon the filing of a lawsuit (*i.e.*, pleadings filed with the court), an act clearly taking place in a formalized judicial setting, subject to the supervision and remedies of the trial judge, and occurring during the course of and related to the judicial proceeding. *Wolfe* is also consistent with one of the key rationales for the litigation privilege recognized by this Court in *Levin*, namely, allowing “participants in litigation ... to be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.” *Levin*, 639 So. 2d at 608.

As noted in *DelMonico* and *Levin*, where a claim is barred by the absolute litigation privilege, the claimant can still seek redress by invoking any of the remedies available in a judicial proceeding. The Third District in *Wolfe* correctly noted that the same is true where a malicious prosecution claim based upon the filing of a lawsuit is barred by the absolute litigation privilege. That claimant can avail himself of any of the judicial remedies applicable to litigation misconduct.

Wolfe properly observes that application of the absolute litigation privilege to a malicious prosecution action does not abolish that tort because by definition, the

application of the absolute privilege is limited to an act taken during and related to a judicial proceeding, which in *Wolfe*, was the filing of a lawsuit. Consequently, malicious prosecution claims based upon acts occurring outside the judicial process remain viable and are not “abolished” by the absolute privilege.

In *Fischer*, a malicious prosecution cause of action was filed by Fischer against the Debrincats. The malicious prosecution claim was based solely upon the Debrincats’ addition of Fischer as a party to an ongoing lawsuit. The trial court granted summary judgment against Fischer based upon *Wolfe* and he appealed to the Fourth District. Disagreeing with *Wolfe*, the Fourth District reversed. The court in *Fischer* carved out an exception to this Court’s broad mandate that the litigation privilege applies across the board to all actions in Florida, holding instead that the absolute litigation privilege does not apply to any malicious prosecution action “where the elements of that tort are satisfied.” *Fischer*’s oddly-phrased exception should be disapproved for several reasons. *Fischer* conflicts with this Court’s holdings in *DelMonico*, *Echevarria* and *Levin* that the litigation privilege applies to all torts that are based upon acts occurring in formalized judicial proceedings under the supervision of a judicial officer. *Fischer* also conflicts with the essential policies underlying the privilege, and is based upon the flawed assumption, correctly rejected in *Wolfe*, that application of the privilege would abolish the tort of malicious

prosecution. *Fischer* is also irreconcilable with the law governing affirmative defenses. By contrast, *Wolfe* fully examines relevant policy and correctly applies the holdings of this Court to properly subject a claim of malicious prosecution, when based upon the filing of a lawsuit, to the absolute immunity afforded by the litigation privilege. The petitioners request that this Court quash *Fischer* and approve *Wolfe*.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT IN *FISCHER*, EXEMPTING A MALICIOUS PROSECUTION CLAIM FROM APPLICATION OF THE ABSOLUTE LITIGATION PRIVILEGE, SHOULD BE QUASHED AS CONFLICTING WITH THIS COURT'S DECISIONS IN *DELMONICO*, *LEVIN* AND *ECHEVARRIA*, AND THE DECISION OF THE THIRD DISTRICT IN *WOLFE*, WHERE THE MALICIOUS PROSECUTION CLAIM IS BASED UPON AN ACT MADE DURING THE COURSE OF AND IN RELATION TO A JUDICIAL PROCEEDING.

The absolute litigation privilege applies to the tort of malicious prosecution where the act complained of is the filing of a lawsuit.

In *Levin*, the question before this Court as certified by the Eleventh Circuit Court of Appeals was whether Florida would extend the absolute immunity afforded by the litigation privilege to a cause of action for tortious interference with a business relationship that was based upon misconduct in a judicial proceeding. In addressing the certified question, this Court reviewed the origins of the immunity in pertinent part as follows:

[W]e first examine the origins of the immunity afforded to statements or

actions taken during a judicial proceeding. Traditionally, defamatory statements made in the course of judicial proceedings are absolutely privileged, no matter how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry. *Fridovich v. Fridovich*, 598 So.2d 65 (Fla.1992). Consequently, the torts of perjury, libel, slander, defamation, and similar proceedings that are based on statements made in connection with a judicial proceeding are not actionable. *Wright v. Yurko*, 446 So.2d 1162 (Fla. 5th DCA 1984). The immunity afforded to statements made during the course of a judicial proceeding extends not only to the parties in a proceeding but to judges, witnesses, and counsel as well. *Fridovich; Cox v. Klein*, 546 So.2d 120 (Fla. 1st DCA 1989); *Wright*.

Levin, 639 So. 2d at 607-08. This Court went on to answer the certified question in the affirmative and extended the scope of the immunity to other claims arising from alleged tortious conduct occurring during the course of litigation, reasoning as follows:

In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

This does not mean, however, that a remedy for a participant's misconduct is unavailable in Florida. On the contrary, just as "[r]emedies for perjury, slander, and the like committed during judicial

proceedings are left to the discipline of the courts, the bar association, and the state,” *Wright*, 446 So. 2d at 1164, other tortious conduct occurring during litigation is equally susceptible to that same discipline. Clearly, a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice. In particular, a trial court would have the ability to use its contempt powers to vindicate its authority and protect its integrity by imposing a compensatory fine as punishment for contempt.

Levin, 639 So. 2d at 608-609.

Thereafter in *Echevarria*, this Court reviewed a decision of the First District holding that the litigation privilege could not be invoked when a statutory claim was being litigated, which conflicted with *Boca Investors Group, Inc. v. Potash*, 835 So. 2d 273 (Fla. 3d DCA 2002) (applying the litigation privilege to a statutory anti-trust claim). In approving the decision of the Third District, the Court in *Echevarria* again looked to the history of the privilege in Florida, noting its 1907 decision in *Myers*, wherein “this Court recognized the principle of the litigation privilege in Florida, essentially providing legal immunity for actions that occur in judicial proceedings.” *Echevarria*, 950 So. 2d at 383 (citing *Myers*). The Court then turned to its application of the privilege in *Levin*, wherein “we extended the litigation privilege to all torts....” *Id.* (emphasis added). The Court reaffirmed *Levin*, observing as follows:

We concluded the opinion [in *Levin*] by noting that adequate remedies still exist for misconduct in a judicial proceeding, most notably the trial court’s contempt power, as well as the disciplinary measures of the state

court system and bar association. *Id.* at 608-09. Notably, our holding was without qualification as to the nature of the judicial proceedings, whether based on common law, statutory authority, or otherwise.

Levin plainly establishes that “[t]he rationale behind the immunity afforded to defamatory statements is equally applicable to *other misconduct* occurring during the course of a judicial proceeding.” 639 So.2d at 608 (emphasis supplied).

Id. at 384. This Court concluded: “Given the precedent established by *Levin*, we hold that the litigation privilege applies in all causes of action, whether for common-law torts or statutory violations.” *Id.* (emphasis added).

More recently in *DelMonico*, this Court addressed the relationship between a judicial proceeding and alleged tortious acts underlying a defamation claim for the purpose of determining whether the litigation privilege applied and if so, whether the privilege was absolute or qualified. The Court explained that an absolute privilege would apply where the tortious misconduct took place in front of a judicial officer, or in pleadings or documents filed with a court or quasi-judicial body. *Id.* at 1217. In such cases, the misconduct is “memorialized before a judicial officer” thereby “minimizing concerns of factual dispute.” *Id.* Any “potential harm” to the claimant can be “mitigated by ... formal requirements such as notice and hearing, the comprehensive control exercised by the judge whose action is reviewable on appeal, and the availability of retarding influences such as false swearing and perjury

prosecutions.” *Id.* (internal citations and quotations omitted).

Applying the foregoing to the alleged tortious acts in *DelMonico*, which were defamatory statements made by an attorney during ex-parte, out-of-court questioning of a potential, nonparty witness in the course of investigating a pending lawsuit, this Court held as follows:

In this narrow scenario, we conclude that a qualified privilege instead should apply to ex-parte, out-of-court statements, so long as the alleged defamatory statements bear some relation to or connection with the subject of inquiry in the underlying lawsuit. A qualified privilege requires the plaintiff to establish express malice. However, where the statements do not bear some relation to or connection with the subject of inquiry in the underlying lawsuit, the defendant is not entitled to the benefit of any privilege - either absolute or qualified.

DelMonico, 116 So. 3d at 1208.

This Court has now stated on three separate occasions and in unequivocal unambiguous language that the litigation privilege applies to *all torts*. See *DelMonico*, *Echevarria*, and *Levin*. Here, the tort at issue is malicious prosecution. As is the case with any tort where the litigation privilege is asserted, the question is whether the alleged underlying misconduct gives rise to an absolute privilege, a qualified privilege, or no privilege at all. In this case, that question is easily answered. The absolute privilege applies because the underlying misconduct alleged in the malicious prosecution claim, the filing of a civil lawsuit (*i.e.*, filing a pleading with

the court, more specifically in this case a pleading adding Fischer as a party to an ongoing lawsuit), is an act clearly taking place within a formalized judicial setting under judicial supervision, occurring during a judicial proceeding, and related to the judicial proceeding.¹⁴

Disregarding this Court's clear and unequivocal guidance in *DelMonico*, *Echevarria*, and *Levin*, the Fourth District held in this case that the litigation privilege did not apply to the tort of malicious prosecution. The petitioners respond below to the reasons offered by the Fourth District for its ruling.

The application of the litigation privilege to a cause of action for malicious prosecution based upon the filing of a lawsuit does not abolish the cause of action.

The Fourth District opined that if the litigation privilege applied to a malicious

¹⁴ See *Wolfe*, 128 So. 3d at 70 (“It is difficult to imagine any act that would fit more firmly within the parameters of *Levin* and *Echevarria* than the actual filing of a complaint.”); see also *Davidson v. Capital One, N.A.*, No. 14-20478-CIV, 2014 WL 3767677 at *5 (S.D. Fla. July 31, 2014) (applying Florida law regarding the litigation privilege and holding: “The filing and maintenance of a lawsuit is plainly protected by Florida’s litigation privilege....”); *Perez v. Bureaus Investment Group No. II, LLC*, No. 1:09-CV-20784, 2009 WL 1973476 at *3 (S.D. Fla. July 8, 2009) (same -- and holding that the filing of a lawsuit “... clearly relates to a judicial proceeding....”); *Gaisser v. Portfolio Recovery Assoc., LLC*, 571 F.Supp.2d 1273 (S.D. Fla. 2008) (same); *Pack v. Unifund CCR Partners*, No. 8:07-CV-1562-T-27EAJ, 2008 WL 686800 at *6 (M.D. Fla. March 13, 2008) (agreeing with contention that party’s filing of Florida lawsuit, “... necessarily occurred during a judicial proceeding and is related to such proceeding.”).

prosecution claim, then the tort of malicious prosecution would be “effectively abolished in Florida -- or, at the very least, eviscerated beyond recognition.” *Fischer*, 169 So. 3d at 1207. The Fourth District read this Court’s broadly worded language in *Echevarria* as abolishing the tort. Reasoning that this Court could not have intended such a result, the Fourth District stated:

To be sure, *Echevarria* contains broad language stating that the litigation privilege applies “in all causes of action, whether for common-law torts or statutory violations.” 950 So. 2d at 384. But this language could not have been intended “to sweep so broadly” as to provide absolute immunity from liability for malicious prosecution. *Cf. DelMonico v. Traynor*, 116 So.3d 1205, 1208 (Fla.2013) (“We hold that Florida’s absolute privilege, as this Court has developed the common law doctrine, was never intended to sweep so broadly as to provide absolute immunity from liability to an attorney for alleged defamatory statements the attorney makes during ex-parte, out-of-court questioning of a potential, nonparty witness in the course of investigating a pending lawsuit.”).

Fischer, 169 So. 3d at 1208. The Fourth District’s concern that application of *Echevarria* as written would result in absolute immunity in every malicious prosecution case, and the Fourth District’s reliance upon *DelMonico* as justification for carving out an exception to *Echevarria*, are not well taken. *Echevarria* and *DelMonico* concern two distinct aspects of the litigation privilege, and application of the broad language of *Echevarria* would not abolish the tort of malicious prosecution.

Echevarria rejected any distinction between common law and statutory causes of action for the purposes of applying the privilege. In so holding, this Court

reiterated that the litigation privilege applies to all torts, but reaffirmed that absolute immunity is only afforded to acts occurring during the course of a judicial proceeding. In *DelMonico*, this Court then focused upon the boundaries of an “act occurring during the course of a judicial proceeding” in order to determine whether the narrow factual scenario presented in that case called for application of a qualified privilege rather than an absolute privilege. In so doing, this Court established clear guidelines applicable to all causes of action to determine whether the complained of acts are subject to an absolute privilege, a qualified privilege, or none at all.

Far from supporting the Fourth District’s wholesale exemption of a malicious prosecution claim from the application of the litigation privilege, the guidelines provided by *DelMonico*, *Echevarria*, and *Levin* establish that: a malicious prosecution claim would be subject to an absolute privilege where the alleged litigation misconduct was made in front of a judicial officer or in pleadings or documents filed with the court, and related to the judicial proceeding; if the litigation misconduct occurred outside a judicial proceeding but was relevant to the subject of inquiry of an underlying suit, a qualified privilege would apply; and no privilege would apply where the misconduct took place outside a judicial proceeding and was not relevant to a judicial proceeding. The absolute litigation privilege applies here to the litigation misconduct alleged by Fischer, namely, the commencement by the Debrincats of a

civil cause of action against him, which took place in a formalized judicial setting, after notice and hearing, under the comprehensive control of a trial judge whose action is reviewable on appeal, and with all of the attendant judicial remedies available to Fischer to redress his grievances for the alleged litigation misconduct.

Fischer is not the first case where a Florida plaintiff invoked an unfounded fear that the tort alleged in his lawsuit would be effectively abolished if the litigation privilege applied. In *Latam*, the tort of abuse of process was at issue and the argument was advanced that application of the litigation privilege would eliminate that tort. The Third District rejected the argument as follows:

We conclude that the application of the litigation privilege to a cause of action for abuse of process does not eliminate that cause of action. The litigation privilege, by definition, is limited to actions taken during a judicial proceeding and which are related to the judicial proceeding. *Levin*, 639 So.2d at 608. Therefore, a claimant may still pursue a claim for an abuse of process when the claim is based on actions taken outside of a judicial proceeding or on actions that are taken during a judicial proceeding but which are unrelated to the judicial proceeding.

Latam, 88 So. 3d at 243.

The same reasoning applies to the tort of malicious prosecution. As the Third District concluded in *Wolfe*: “We are also unpersuaded by the argument that, unlike other torts, the application of the litigation privilege to the tort of malicious prosecution would effectively eliminate malicious prosecution as a cause of action all together.” *Wolfe*, 128 So. 3d at 70-71. “Acts committed prior to the filing of the

complaint may not, in some cases, enjoy the broad protection of the privilege.” *Id.* As examples, the Third District cited *Olson* (where the malicious prosecution claim was based upon accusatorial statements that led to the plaintiff’s arrest which were made before the charges against him were filed and were not made during the judicial proceeding), and *Am. Nat’l Title & Escrow II* (claim of absolute privilege rejected upon a finding that the defendants would enjoy at most a qualified privilege for allegedly providing law enforcement with false information with the intent to injure the plaintiffs). In sum, application of the litigation privilege to malicious prosecution will not signal the death knell of that tort.

The law of California, which the Fourth District cited with approval in *Fischer*, is based upon a policy determination rejected by this Court in *DelMonico* and *Levin*.

After deciding not to apply this Court’s broad language in *Echevarria*, the Fourth District in *Fischer* went on to align itself with the law of California, citing the decision of the California Supreme Court in *Silberg v. Anderson*, 50 Cal.3d 205, 266 Cal.Rptr. 638, 786 P.2d 365 (1990), which held that the litigation privilege does not apply to the tort of malicious prosecution. *See Fischer*, 169 So. 3d at 1209. Of course, the Fourth District should instead have followed this Court’s holdings in *DelMonico*,

Echevarria and *Levin* that the privilege applies to all torts.¹⁵ Regardless, California’s rationale for exempting malicious prosecution actions from the litigation privilege, which the Fourth District did not address, has already been rejected by this Court in *DelMonico* and *Levin*.

The rule in California exempting malicious prosecution from application of the litigation privilege is based upon a policy determination of the California Supreme Court that encouraging free access to the courts is outweighed by a policy of affording redress for malicious prosecution. *See Silberg*, 50 Cal. 3d at 215, 786 P.2d at 371 (quoting *Albertson v. Raboff*, 46 Cal.2d 375, 295 P.2d 405 (1956)). This precise issue was addressed by this Court in both *DelMonico* and *Levin*. In *DelMonico*, this Court stated that:

Based on a review of the history of the absolute privilege in Florida and the purpose served by the doctrine, *Myers* and its progeny firmly establish a unifying concept: this Court’s recognition of the privilege derived from a balancing of two competing interests—the public interest in allowing litigants and counsel to freely and zealously advocate for

¹⁵ A district court of appeal is bound to follow the decisions of the Supreme Court of Florida. *See State v. Lott*, 286 So. 2d 565, 566 (Fla. 1973) (“[T]he District Courts of Appeal follow controlling precedents set by the Florida Supreme Court.”); *see also Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (“[A] District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida.”). Where a district court disagrees or questions supreme court precedent, the district court’s duty is to follow the precedent and certify the question to the supreme court. *See, e.g., Gilliam v. Stewart*, 291 So.2d 593 (Fla.1974).

their causes in court versus protecting the rights of individuals, including the right of an individual to maintain his or her reputation and not be subjected to slander or malicious conduct. Where this balance fell was often dependent upon the safeguards in place that served to provide real and immediate checks to abusive and overzealous practices—that is, how far removed those practices were from protections of the formalized judicial process that would serve to counteract the occurrence and consequences of defamatory statements or abuse.

DelMonico, 116 So. 3d at 1217 (emphasis added). Similarly in *Levin*, the Court stated: “Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.” *Levin*, 639 So. 2d at 608. As previously noted, the Court in *Levin* also answered the argument that application of the privilege would deny redress to the party claiming litigation misconduct:

This does not mean, however, that a remedy for a participant’s misconduct is unavailable in Florida. On the contrary, just as “[r]emedies for perjury, slander, and the like committed during judicial proceedings are left to the discipline of the courts, the bar association, and the state,” *Wright*, 446 So. 2d at 1164, other tortious conduct occurring during litigation is equally susceptible to that same discipline. Clearly, a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice. In particular, a trial court would have the ability to use its contempt powers to vindicate its authority and protect its integrity by imposing a compensatory fine as punishment for contempt.

Levin, 639 So. 2d at 608-609 (emphasis added); *see also Wolfe*, 128 So. 3d at 71

(applying the foregoing reasoning from *Levin* in rejecting the plaintiff’s argument that application of the litigation privilege to his malicious prosecution claim that was based solely upon the filing of a lawsuit left him without redress). There are now additional remedies for a participant’s litigation misconduct available through application of § 57.105(1), Florida Statutes (2013), which authorizes the trial court to “award reasonable attorney’s fees, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party’s attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party’s attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts.”

Similarly in *Latam*, the Third District, citing *Levin*, properly rejected the argument that if a claim for abuse of process were subjected to the litigation privilege, the claimant would be left without redress:

The Florida Supreme Court has also specifically noted that the inability to pursue a tort action due to the litigation privilege does not leave a party with no remedy. Viable alternative remedies for a participant’s misconduct during judicial proceedings include “the discipline of the courts, the bar association, and the state.” *Levin*, 639 So.2d at 608 (quoting *Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. 5th DCA 1984)).

Specifically, “a trial court would have the ability to use its contempt powers to vindicate its authority and protect its integrity by imposing a compensatory fine as punishment for contempt.” *Levin*, 639 So.2d at 609 (citing *S. Dade Farms, Inc. v. Peters*, 88 So.2d 891 (Fla.1956)). We therefore reject LatAm’s argument that application of the litigation privilege eliminates abuse of process as a cause of action.

Latam, 88 So. 3d at 243; *see also Fridovich*, 598 So. 2d at 69 (noting that “in formal judicial proceedings, ‘the potential harm which may result from the absolute privilege is somewhat mitigated by the formal requirements such as notice and hearing, the comprehensive control exercised by the trial judge whose action is reviewable on appeal, and the availability of retarding influences such as false swearing and perjury prosecutions.’ ”) (internal quotations and citations omitted).

The same reasoning applies to the tort of malicious prosecution. Where the malicious prosecution claim is based upon an act occurring within and related to a judicial proceeding, such as the filing of a lawsuit, application of the absolute litigation privilege does not deny the claimant redress. Rather, the claimant can invoke any of the above-noted judicial remedies.

It is neither necessary nor advisable for this Court to open the doors to rounds of retaliatory litigation in Florida in the name of redress for unjustified lawsuits where there are sufficient alternative remedies already in place.¹⁶ In fact, in *DelMonico*,

¹⁶ California is reportedly suffering a proliferation of malicious prosecution actions. *See* Wendy Gordon Carroll, *The New Assault Against Malicious*

while discussing the extension of the absolute privilege to quasi-judicial proceedings in *Myers*, this Court noted that the balance of competing considerations should be

Prosecution, Los Angeles County Bar Association, County Bar Update, October 2000, Vol. 20, No. 9:

Although malicious prosecution is generally considered to be a disfavored derivative tort, attorneys and their clients continue to be the target of malicious prosecution claims. In Los Angeles County and surrounding areas, malicious prosecution is becoming the leading claim asserted against attorneys. It seems that successful defendants are no longer satisfied with a civil verdict; they want to punish the perceived perpetrator for their time and money invested in defending the action. They feel they have nothing to lose by seeking vindication in a malicious prosecution case. The explosion of malicious prosecution actions is fueled by the growing trend of legal professionals willing to sue other attorneys without reservation. The proliferation of malicious prosecution cases is expensive for both carriers and insureds. Judicial reluctance to resolve cases by summary judgment drives up the cost of defending malicious prosecution cases.

available at <http://archive.lacba.org/showpage.cfm?pageid=2117>); see also Walter W. Heiser, *California Civil Procedure*, Third Edition 2012 (“In *Brennan v. Tremco, Inc.*, 25 Cal. 4th 310, 105 Cal. Rptr. 2d 790, 20 P. 3d 1086 (2001), the Supreme Court addressed the question of whether a person may sue for the malicious prosecution of an action that the parties resolved through contractual arbitration. Clearly concerned about the proliferation of malicious prosecution actions, the *Brennan* court concluded that whether the underlying action started in court or in arbitration, an action terminated in contractual arbitration will not support a malicious prosecution action against parties to the arbitration or their attorneys.”) (emphasis added) excerpt available at (https://books.google.com/books?id=Ds8ASKr-s30C&pg=PT52&lpg=PT52&dq=proliferation+malicious+prosecution+cases&source=bl&ots=bQAtDJ4c7j&sig=T-1UETRu7WuC8ZPq78Fr_kkgGB0&hl=en&sa=X&ved=0CD4Q6AEwBGoVChMIaL79J7RyAIVV9hjCh0m1gJK#v=onepage&q=proliferation%20malicious%20prosecution%20cases&f=false).

weighted in favor of applying the litigation privilege to avoid such unnecessary lawsuits:

Our recognition of the absolute privilege in this context was premised on two concerns: (1) that the initial trial would needlessly devolve into another trial; and (2) that the potential exposure to a subsequent lawsuit would have a chilling effect on litigants seeking to redress their injuries.

DelMonico, 116 So. 3d at 1214.

The holding in *Fischer* is not supported by *Wright*, *Olson* or *Am. Nat'l Title & Escrow II*.

In support of its ruling in *Fischer*, the Fourth District relied upon three district court of appeal decisions as follows:

Moreover, other cases have recognized that the litigation privilege does not bar a malicious prosecution action. For example, in *Wright v. Yurko*, 446 So. 2d 1162, 1164–65 (Fla. 5th DCA 1984), which was cited with approval in *Levin*, the Fifth District held that the litigation privilege did not bar a claim for malicious prosecution that was brought against the two underlying plaintiffs and their expert witness. While the Fifth District recognized that torts such as “perjury, libel, slander, defamation, and the like” were not actionable when committed in connection with judicial proceedings, the court explained that “[t]he *only* private remedy in this context allowed or recognized is the ancient cause of action of malicious prosecution.” *Id.* at 1164–65 (emphasis added).

Similarly, in a post-*Echevarria* case, the Second District held that a plaintiff’s claim for malicious prosecution was not barred by the litigation privilege where the defendants allegedly made a false criminal complaint against the plaintiff. *See Olson v. Johnson*, 961 So.2d 356 (Fla. 2d DCA 2007). In an opinion authored by then-Judge Canady, the Second District emphasized the unique nature of malicious prosecution actions:

In relying on *Fridovich*, Johnson confuses the law of defamation—with which *Fridovich* deals—with the law of malicious prosecution—which is at issue in the instant case.... *There is no equivalent privilege available to a complaining witness ... who is named as a defendant in a malicious prosecution action.* Such a defendant must defend against a malicious prosecution claim by disputing an element or elements of the cause of action alleged or by raising an applicable affirmative defense.

Id. at 360–61 (emphasis added); *see also Am. Nat'l Title & Escrow of Fla., Inc. v. Guarantee Title & Trust Co.*, 810 So.2d 996, 998 (Fla. 4th DCA 2002) (reversing trial court's dismissal of various claims, including malicious prosecution, where the plaintiffs alleged that the defendants conspired to maliciously give false information to law enforcement: "These allegations, if proved, would not be protected by the absolute litigation privilege which protected the law firm for doing things pursuant to court orders. They would enjoy at most a qualified privilege....").

Fischer, 169 So. 3d at 1207-08. For the reasons stated below, none of the three decisions supports the holding in *Fischer*. To the degree any one of those decisions might be viewed as supportive of *Fischer*, it should be disapproved as conflicting with *DelMonico*, *Echevarria*, and *Levin*.

Wright sheds no light on the issues presented in the case at bar. Indeed, *Wright* predates *DelMonico*, *Echevarria*, and *Levin*, so that at the time *Wright* was decided, under Florida law, the litigation privilege applied exclusively to defamation actions. Also, this Court's citation in *Levin* to *Wright* does not imply approval of *Wright*'s holding with respect to malicious prosecution. *Levin* was not a malicious prosecution

case and this Court was not citing to *Wright* for the proposition that malicious prosecution is exempt from application of the litigation privilege. Rather, *Wright* was referenced in *Levin* in the context of a discussion of the application of the litigation privilege to defamation, and cited for two principles that *support* the decision of the Third District in *Wolfe*. First, in justifying the expansion of the privilege to other torts, this Court cited with approval the policy rationale provided in *Wright* that “the chilling effect on free testimony would seriously hamper the adversary system if absolute immunity were not provided. *Wright*.” *Levin*, 639 So. 2d at 608. Second, *Levin* cites *Wright* for the proposition that simply because the litigation privilege applies does not mean that there are not sufficient alternative remedies available to the trial court, the bar, and the state. *Id.* at 608-09.

The facts in *Olson* support the holding in *Wolfe*. As noted, the Third District cited *Olson* in *Wolfe* as an example of a malicious prosecution claim that would not be subject to a litigation privilege challenge because in *Olson*, the malicious prosecution claim was based upon “acts committed prior to the filing of the complaint...” *Wolfe*, 128 So. 3d at 71. To the extent *Olson* may be read as holding that the litigation privilege can never apply to a malicious prosecution claim, that holding should be disapproved for the same reasons that *Fischer* was wrong in so holding.

Am Nat'l Title & Escrow II also supports the holding in *Wolfe* as yet another example of a malicious prosecution claim that would not be subject to application of an absolute litigation privilege. In that case, the claim of an absolute privilege was rejected upon a finding that the defendants would enjoy at most a qualified privilege for allegedly providing law enforcement with false information with the intent to injure the plaintiffs.

The rule announced in *Fischer* conflicts with the law governing affirmative defenses.

The Fourth District held in *Fischer* that “the litigation privilege cannot be applied to bar the filing of a claim for malicious prosecution where the elements of that tort are satisfied.” *Fischer*, 169 So. 3d at 1205 (emphasis added); *see also Watson v. Stewart Tilghman Fox & Bianchi, P.A.*, No. 4D14-957, 2015 WL 6738760 (Fla. 4th DCA Nov. 4, 2015) (quoting the above-quoted holding of *Fischer*); *Rivernider v. Meyer*, 174 So. 3d 602, 604 (Fla. 4th DCA 2015) (stating that in *Fischer* “...our Court held that the litigation privilege cannot be applied to bar an action for malicious prosecution where all of the elements of malicious prosecution are satisfied.” and that “the litigation privilege does not apply ... unless an element of malicious prosecution is lacking.”). The Fourth District’s oddly-phrased exception is irreconcilable with the law governing affirmative defenses.

The litigation privilege is recognized as an affirmative defense. *See R.H. Ciccone Prop. Inc. v. JP Morgan Chase Bank, N.A.*, 141 So. 3d 590, 590 (Fla. 4th DCA 2014); *Latam*, 88 So. 3d at 245; *Am. Nat. Title & Escrow II*, 810 So. 2d at 998; *see also Fischer*, 169 So. 3d at 1205 (“Appellees raised the litigation privilege as an affirmative defense in their operative answer.”). “ ‘An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability.’ ” *State Farm. Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014) (quoting *St. Paul Mercury Ins. Co. v. Coucher*, 837 So. 2d 483, 487 (Fla. 5th DCA 2002)).

It was illogical for the Fourth District to hold that the litigation privilege could not apply on the ground that the elements of the cause of action were satisfied, because for the purpose of invoking the affirmative defense of litigation privilege, the Debrincats admitted the elements of Fischer’s cause of action for malicious prosecution. The converse of the Fourth District’s holding -- that the affirmative defense of litigation privilege can only be applied to bar a malicious prosecution claim where the elements of that tort are not satisfied, which that court applied in *Rivernider* -- is equally illogical because where a plaintiff (such as Fischer) cannot satisfy one or more elements of his malicious prosecution claim, there is no need to reach the affirmative defense of litigation privilege; rather, the defense would be

entitled to judgment based upon the plaintiff's failure to state or prove a cause of action for malicious prosecution.

CONCLUSION

Based upon the foregoing, the petitioners respectfully request that the Court approve *Wolfe*, quash *Fischer*, and remand with directions to affirm the trial court's summary judgment.

Respectfully submitted,

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