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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1477
LT Case No.: 4D14-1855

RICHARD DEBRINCAT and,
JASON DEBRINCAT,

Petitioners

v.

STEPHEN FISCHER,

Respondent

RESPONDENT'S ANSWER TO PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

Petitioners, Richard and Jason DeBrincat are referred to as "Petitioners".

Respondent, Stephen Fischer, will be referred to as "Respondent".

Citations to the appendix are referred to page as "A.__," followed by a reference to the pleading and when necessary the paragraph number.

STATEMENT OF THE CASE AND FACTS

Petitioners Richard and Jason DeBrincat seek review of *Fischer v. DeBrincat*, 169 So.3d 1204 (Fla. 4th DCA 2015) wherein the final summary judgment entered by the trial court in their favor on Fischer's claim for malicious prosecution was reversed. In its opinion, the Fourth District certified conflict with *Wolfe v. Foreman*, 120 So.3d 67 (Fla. 3rd DCA 2013). The Third District in *Wolfe* determined that the litigation privilege as set forth by this Court in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Insurance Company*, 639 So.2d 606 (Fla. 1994) and *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380 (Fla. 2007) barred a malicious prosecution claim that had as one of its elements the filing of a civil lawsuit.

The trial court in *Fischer* was obligated to follow *Wolfe* and entered summary judgment against Fischer's claim for malicious prosecution which also had as one of its elements the filing of a civil lawsuit.[1] The Fourth District reversed the trial court on appeal holding that the litigation privilege does not bar a claim for malicious prosecution when the elements of that claim are met.

A. The *Wolfe v. Foreman* Opinion.

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[1]Fischer was actually added as a party defendant after the initial lawsuit was filed.

Richard Ferrell and Harold Wolfe were partners in a limited liability company. They were involved in litigation in Monroe County that ultimately settled. Ferrell then sued his partners in the United States District Court for the Southern District of Florida. Ferrell's New York attorney hired two Miami attorneys and their law firm (referred to by the Third District as the "Miami Lawyers") to serve as local counsel. The Miami Lawyers filed suit but received documents soon after from Wolfe establishing that the issues in the federal case were previously raised and settled in the Monroe County lawsuit. The Miami Lawyers thereafter withdrew as counsel. Ferrell's complaint was subsequently dismissed and final judgment was entered against him.

Wolfe then sued the Miami Lawyers for abuse of process and malicious prosecution. The trial court entered judgment on the pleadings in favor of the Miami Lawyers finding that the alleged wrongful actions were taken in the course and related to litigation and were thus absolutely privileged under Florida law.

The Third District cited this Court's decisions in *Myers v. Hodges*, 53 Fla. 197, 44 So. 357 (1907), *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Insurance Company*, 639 So.2d 606 (Fla. 1994), and *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380 (Fla. 2007) in holding that the litigation privilege barred Wolfe's claim for malicious prosecution.

The Third Districy stated:

> In answering the question as to whether the litigation privilege applies to a cause of action for malicious prosecution, we are 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.

The crux of the Third District's decision was stated by the Court as follows:

> 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. The filing of a complaint, which initiates the judicial proceedings, obviously 'occurs during the course of a judicial proceeding' and 'relates to the proceeding.'

To justify its decision, the Third District once again quoted this Court's *Levin* opinion:

> [t]his 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. *Levin*, 639 So.2d at 608-609.

B. The *Fischer v. DeBrincat* Opinion.

The DeBrincats brought suit against several defendants and later added Fischer as a party defendant. Fischer was sued for defamation, defamation per se, tortious interference and conspiracy. Subsequently, the DeBrincats dropped Fischer as a defendant in the underlying proceeding. Fischer then sued the DeBrincats for malicious prosecution alleging the DeBrincats maliciously filed the underlying proceedings against him without probable cause.

The DeBrincats raised the litigation privilege as an affirmative defense and then moved for summary judgment, claiming that the litigation privilege gave them immunity for their actions in the underlying proceeding, citing *Wolfe*. The trial court agreed and ultimately entered a final judgment in the DeBrincats favor. Fischer thereafter appealed.

As did the Third District, the Fourth District began its opinion summarizing this Court's decisions in *Myers, Levin*, and *Echevarria*. However, the Fourth District disagreed with the Third District's application of the litigation privilege, finding that *Wolfe* went too far in its application of the privilege, stating:

> Because the commencement or continuation of an original criminal or civil judicial proceeding is an act 'occurring during the course of a judicial proceeding' and having 'some relation to the proceeding,' 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. If the litigation privilege could apply to bar a malicious prosecution action, this would mean that the tort of malicious prosecution would be effectively abolished in Florida – or, at the very least, eviscerated beyond recognition.

The Fourth District acknowledged that *Echevarria* contains very broad language holding that the litigation privilege applies to all claims, whether common law torts or statutory violations. Nevertheless, the Fourth District held that the language could not have been intended "to sweep so broadly" as to provide absolute immunity from liability for a malicious prosecution claim, citing *DelMonico v. Traynor*, 116 So.3d 1205, 1208 (Fla.2013) where this Court held that the privilege could not "sweep so broadly" as to provide absolute immunity for an attorney's alleged defamatory statements made during ex-parte, out-of-court questioning of a potential, nonparty witness. The Fourth District concluded that it would be difficult to envision how a malicious prosecution claim could ever be successfully brought when a civil lawsuit was the original proceeding.

Finally, citing *Puryear v. State*, 810 So.2d 901, 905 (Fla. 2002), the Fourth District invoked this Court's declaration that it "does not intentionally overrule itself sub silentio." The Fourth District stated further:

> Commencement or continuation of an original judicial proceeding is an element of malicious prosecution, a longstanding tort with ancient roots. It is unfathomable that the Florida Supreme Court

> intended to cloak the commencement or continuation of a judicial proceeding with absolute immunity when such conduct occurs as an element of the tort of malicious prosecution.

SUMMARY OF ARGUMENT

As noted by the Fourth District, malicious prosecution is *sui generis* because "the essence of the tort of malicious prosecution is the misuse of legal machinery for an improper purpose." Citing *Rushing v. Bosse*, 652 So.2d 869, 874 (Fla. 4th DCA 1995). The tort of malicious prosecution requires the commencement of a judicial proceeding *without probable cause and with malice.* When all of the elements of a malicious prosecution claim are present, then the immunity of the absolute litigation privilege should not apply.

Properly analyzed, a claim for malicious prosecution is not an exception to the litigation privilege. Rather, the litigation privilege simply does not apply to a claim for malicious prosecution. The litigation privilege provides immunity to acts 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. However, the litigation privilege does not afford absolute immunity to the commencement of a *judicial proceeding* when that proceeding is initiated maliciously, and without probable cause.

No doubt, the filing of a civil or criminal complaint is an act during the course

of a judicial proceeding, yet the filing of a complaint, especially in a civil judicial proceeding, is the only method by which a judicial proceeding can be commenced under the Florida Rules of Civil Procedure. Though the filing of the complaint is an act within a judicial proceeding, this act in and of itself is not the wrong to be remedied in a claim for malicious prosecution. Rather, it is the commencement of the judicial proceeding as a whole – the misuse of the legal machinery for an improper purpose – that is the essence of the tort, *Rushing v. Bosse*, 652 So.2d 869, 874 (Fla. 4th DCA 1995).

Provided that a plaintiff in an original proceeding commences that proceeding either with probable cause or without malice, that plaintiff will be protected by the absolute litigation privilege for defamatory statements or other torts occurring during the course of the proceeding, so long as the statements or acts have some relation to the proceeding. *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ice Company*, 639 So.2d 606 (Fla. 1994). However, a plaintiff in an original proceeding should not be afforded the protection of the litigation privilege if that plaintiff abuses the legal system by filing a complaint without probable cause and with malice. Such a plaintiff is hardly worthy of protection.

Moreover, sanctions imposed by a trial judge, by the Florida Bar, or pursuant to Florida Statute 57.105 cannot adequately compensation a victim of malicious

prosecution. If *Wolfe* were affirmed, the balance would shift in favor of litigants who misuse the legal machinery to inflict harm on others. The litigation privilege should not become a shield to protect bad actors in the legal system. The Fourth District was correct in stating that the Third District in *Wolfe* went too far in its application of the litigation privilege.

ARGUMENT

I. THE DECISION OF THE FOURTH DISTRICT IN *FISCHER* FINDING THAT A CLAIM FOR MALICIOUS PROSECUTION IS NOT BARRED BY THE LITIGATION PRIVILEGE IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS IN *LEVIN, ECHEVARRIA*, AND *DELMONICO*, AND THE DECISION OF THE THIRD DISTRICT IN *WOLFE* FINDING OTHERWISE SHOULD BE QUASHED.

The tort of malicious prosecution is a "very ancient" cause of action that was derived from English common law. *Tatum Bros. Real Estate & Investment Co. v. Watsom,* 92 Fla. 278, 288 (Fla. 1926). When Florida expressly adopted the common laws of England, the action of malicious prosecution became part of Florida jurisprudence. Fla. Stat. 2.01. The elements of malicious prosecution were first introduced in *Tatum Bros. Real Estate & Investment Co. v. Watsom*, 92 Fla. 278, 288 (Fla. 1926):

> An action for maliciously putting the law in motion lies in all cases where there is a concurrence of the following elements: (1) The commencement or continuance of an original criminal or civil judicial

> proceeding. (2) Its legal causation by the present defendant against plaintiff who was defendant in the original proceeding. (3) Its bona fide termination in favor of the present plaintiff. (4) The absence of probable cause for such proceeding. (5) The presence of malice therein. (6) Damage conforming to legal standards resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action.

Since *Tatum*, a well-established legal precedent for malicious has taken shape representing years of litigation. The aforementioned elements required to demonstrate a proper showing of malicious prosecution remain intact today. *Cohen v. Corwin*, 980 So.2d 1153, 1155 (Fla. 4th DCA 2008).

The purpose of the claim for malicious prosecution is to provide the plaintiff an avenue for redress when he has been improperly subjected to the legal process. *S. H. Kress & Co. v. Powell*, 132 Fla. 471, 482 (Fla. 1938). It is intended to be a safeguard for those facing unsubstantiated litigation or unwarranted prosecution. *Burns v. GCC Beverages*, Inc., 502 So. 2d 1217 (Fla. 1986). The heart of a malicious prosecution action is a lawsuit brought without probable cause. *Korman v. Kent*, 821 So.2d 408, 410 (Fla. 4th DCA 2002). The action is complete the instant that the person has been summoned to court where the maliciously brought or maintained action was pending. *Id*.

The litigation privilege was first analyzed by this Court in *Myers v. Hodge*s, 53 Fla. 197 (Fla. 1907). In *Myers*, Hodges filed a lawsuit against William B. Myers,

the president of a naval store, and within the bill of complaint declared Myers to be a "tricky, dishonorable, unscrupulous, and conscienceless man." *Myers*, 53 Fla. at 200. Although the defamatory language was stricken out of the bill for being irrelevant and scandalous, Myers brought a claim for libel against Hodges for the slanderous remarks made in the complaint following the conclusion of the lawsuit. *Id*. at 199. Hodges invoked the defense of absolute privilege from English common law, and created a case of first impression for the Florida Supreme Court. *Id.* at 205. The Court rejected the absolute privilege of the English common law given to all statements made within a proceeding and instead adopted a qualified privilege that would protect any statements made that were relevant or connected to the proceeding. *Id*. at 221-22 Should the statements be found to be irrelevant, a plaintiff would have the burden of demonstrating that the publisher's libelous statements were made with malice. *Id*. at 222.

In *Levin, Middlebrooks, Mabie, Thomas, Maybes & Mitchell, P.A., v. United States Fire Insurance Company*, 639 So.2d 606 (Fla. 1994), an excess insurance carrier brought a lawsuit against an insurance company for failing to settle a personal injury action within its policy limits. The excess insurance carrier retained the same law firm, the Levin firm, that represented the plaintiff in the personal injury action. *Id*. at 607. The insurance company certified that it would be calling one of the firm's

attorneys as a witness at trial, resulting in the disqualification of the Levin firm as counsel for the plaintiff. *Id*. The insurance company never called the attorney as a witness at trial. *Id*. After the conclusion of the proceeding, the Levin firm sued the insurance company for intentional interference with a business relationship for issuing the subpoena and obtaining disqualification of the law firm. *Id.* The court held 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." *Id*. at 608. Although, *Levin* indicated that the litigation privilege was now an absolute privilege, the holding of *Levin* never truly disturbed the opinion in *Myers*- which was that any act occurring during a legal proceeding would be afforded immunity so long as it was relevant to the proceeding.

The scope of the litigation privilege went under further review in *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380, 384 (Fla. 2007), where this Court extended the privilege's reach to include all causes of action, whether they be common law torts or statutory violations.

The most recent analysis of the litigation privilege by this Court came in *Delmonico v. Traynor*, 116 So.3d 1205 (Fla. 2013) where the Court declined to

extend the litigation privilege to statements made by an attorney during ex-parte, out of court questioning of a nonparty witness.

For years, the litigation privilege and malicious prosecution have existed together without discord. In *Fisher v. Payne*, 93 Fla. 1085, 1087 (Fla.1927), three physicians were appointed as witnesses in a lunacy action to determine the mental health of plaintiff. Each found her to be a danger to herself and society and adjudicated her insane. One year following the adjudication, plaintiff was determined to be of sound mind. *Id*. at 1088. She filed a lawsuit against the physicians for libel, false imprisonment, and malicious prosecution. *Id*. at 1092. Regarding the libel allegations, defendants successfully raised the litigation privilege because their statements were made within judicial proceedings and relevant to the lawsuit. *Id.* However, when the Court analyzed plaintiff's malicious prosecution claim, the litigation privilege was not applied; instead the Court found that plaintiff was unable to satisfy all six elements required for a prima facie case of malicious prosecution. *Id*. at 1094. The crucial take away from *Fisher* is that there is a precedent that this Court has elected not to apply the litigation privilege to bar a claim of malicious prosecution.

Other courts in Florida have held the same. In *Wright v. Yurko*, 446 So.2d 1162 (Fla. 5th DCA 1984) the court reviewed a dismissal of claims of libel, slander,

defamation, and malicious prosecution in a medical malpractice suit. The plaintiff alleged that defendants brought a malpractice claim against him without probable cause and with malice, and further, that plaintiff gave false testimony damaging his reputation. *Id*. at 1164. The libel, slander, and defamation claims were upheld and protected by the litigation privilege because the acts occurred during the proceeding. *Id*. at 1164-65. The court, however, did find an actionable claim for malicious prosecution and that all elements were satisfied. *Id*. at 1165. Similarly, in *Johnson v. Sackett*, 793 So.2d 20, 24 (Fla. 2nd DCA 2001) a social worker that filed a dependency action against a mother was not entitled to immunity from a claim of malicious prosecution for her actions in filing the petition of dependency.

Other jurisdictions overwhelmingly hold that the litigation privilege cannot protect a party from a claim for malicious prosecution. *Indus. Power & Lighting Corp. v. Western Modular Corp.*, 623 P.2d 291, 298 (Alaska 1981)*; Flatley v. Mauro* (2006) 39 Cal.4th 299, 322 (Flatley)*; Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.,* 774 A.2d 332, 346 (D.C. 2001); *Estate of Mayer v. Lax, Inc.,* 998 N.E.2d 238, 250 (Ind. App.2013)*; Keys v. Chrysler Credit Corp.,* 303 Md. 397, 406 (MD 1985)*; McKinney v. Okoye*, 282 Neb. 880, 889 (Neb. 2011); *Rainier's Dairies v. Raritan Val. Farms*, 19 N.J. 552, 563-64 (1995); *Crowell v. Herring*, 301 S.C. 424, 432 (Ct. App. 1990); *Clark v. Druckman*, 218 W.Va. 427, 435

(2005).

The tort of malicious prosecution and the defense of litigation privilege were able to coexist until the Third District Court of Appeals caused a schism in Florida law that effectively dismantled the claim of malicious prosecution. Prior to *Wolfe*, the litigation privilege was never successfully used as a means to prevent a plaintiff from bringing a claim for malicious prosecution. Florida's appellate courts, the Florida Supreme Court, and the vast majority of other jurisdictions have all rendered opinions that can attest to this. Yet the *Wolfe* court inexplicably found itsself to be "restrained by the broad language and application of the privilege" in *Levin* and *Echevarria*. *Wolfe*, 128 So.3d at 70.

Wolfe first noted that pursuant to *Levin*, "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding." *Id. Wolfe* concluded that the filing of the complaint "obviously occurs during the course of a judicial proceeding" and is therefore within the parameters of the litigation privilege. *Id.* However, until *Wolfe*, the litigation privilege in *Levin* and *Echevarria* had never stretched far enough to reach the filing of the complaint itself. A claim for malicious prosecution is not based upon actions taken during the judicial proceeding. The claim for malicious prosecution is based upon the unfounded judicial proceeding. This is what *Wolfe* completely overlooked– that the litigation privilege is only intended to

apply to a parties' conduct during the proceeding; it has never been applied to the proceeding itself. The decision in *Wolfe* essentially creates a legal paradox where the litigation privilege is extended to the filing of the complaint itself, but since a legal proceeding cannot be commenced without the filing of a complaint, under *Wolfe*, there can be no claim for malicious prosecution. Equally bewildering is that *Levin*, the very opinion that shaped *Wolfe's* reasoning to discard malicious prosecution, cited approval with *Wright v. Yuruko,* an actionable malicious prosecution case. *Levin*, 639 So.2d at 608, 609.To create further confusion, the Third DCA had previously acknowledged that they believed malicious prosecution endured after the *Levin* opinion in *SCI Funeral Services of Florida, Inc. v. Henry,* 839 So.2d 702 (Fla. 3rd DCA 2002 n.4), stating that "presumably the cause of action for malicious prosecution continues to exist and would not be barred by the litigation privilege."

Wolfe and Petitioners further rationalize the decision to extend the privilege to a legal proceeding itself by quoting *Levin* in emphasizing that parties must be able to engage in unhindered communication so that they may 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." *Wolfe,* 128 So.3d at 70. The irony, however, is that the decision of *Wolfe* encourages parties to *not* use their best

judgment because it effectively allows ill-intentioned litigants to file malicious lawsuits with impunity.

Next *Wolfe* quotes *Levin* once more, to illustrate that despite the apparent dissolution of malicious prosecution, victims of a parties' misconduct within court proceedings would still have remedies in the form of discipline of the courts, the bar association, and the state; but *Wolfe's* reasoning misses the point. *Id*. at 71. It ignores the fact that *Levin* never actually obviated malicious prosecution claims. Moreover, each form of punishment quoted by *Levin* are used to primarily discipline attorneys– there would be no effective remedy available to the actual victims of a malicious lawsuit that was filed against them.

Wolfe should have been limited to the facts of the case, which involved attorneys being sued for malicious prosecution. In *Wolfe*, the actual plaintiff in the original proceeding was not sued for malicious prosecution. Rather, his attorneys, the Miami lawyers, were. The Miami lawyers were unaware of the original proceeding, and once they did become aware, they immediately withdrew. *Wolfe* was never a malicious prosecution case to begin with because two essential elements were missing– malice and probable cause. Instead of narrowing the scope of the opinion to the unique facts of the case, *Wolfe* overturned an ancient cause of action. The concurring judge in Wolfe was correct when he wrote "the only remarkable thing

about this case is its existence." *Wolfe*, 128 So.3d at 71.

Should the decision in *Wolfe* stand, Florida's courts will give litigious individuals permission to file baseless lawsuits with impunity. The repercussions of such a decision will undoubtably affect those without the financial resources to protect themselves. A litigant wishing harm on a business competitor could file a groundless lawsuit against the competitor with the sole intention to weaken their competition; and watch as their opponent expends all of their resources to fight a shameless lawsuit. The defendant could lose his or her's employment, as well as family and friends, long before a lawsuit is dismissed or sanctions imposed. A defendant's entire livelihood could be destroyed by a plaintiff with enough resources and ill-will.

Wolfe eroded generations of legal precedent in Florida. *Wolfe* is overwhelmingly inconsistent with other jurisdictions. *Levin* and *Echevarria* may give the litigation privilege broad powers; but the Fourth District was correct in determining that *Wolfe* too far. Properly applied, as in *Fischer,* the litigation privilege adequately protects litigants and their attorneys for their acts and words in a legal proceeding. There was no necessity, and no rational basis to eviscerate the claim of malicious prosecution by an unwarranted expansion of the litigation privilege.

Conclusion

Based upon the foregoing, the Respondent respectfully requests that the Court approve *Fischer* and quash *Wolfe*.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by e-mail on January __, 2016 to: Paul Morris, Esquire, Law Offices of Paul Morris, P.A., Attorneys for Petitioners, 9350 S. Dixie Highway, Suite 1450, Miami, FL 33156 (paulappeal@gmail.com; paul@paulmorrislaw.com).

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CERTIFICATE OF FONT COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2); 9.100(1), the undersigned counsel hereby certifies that the pleading is in compliance with the font requirements and attests that this document is in TIMES NEW ROMAN 14 POINT.

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