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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

REPLY BRIEF OF PETITIONERS ON THE MERITS

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The Debrincats' Conduct is Within the Litigation Privilege

This Court's test for determining whether conduct is within the litigation privilege is straightforward: "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." *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co*., 639 So. 2d 606, 608 (Fla.1994); *see also Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007). Fischer argues that his malicious prosecution lawsuit, which is premised solely upon the Debrincats' prior filing of a cause of action against him is "not based upon actions taken during the judicial proceeding" but rather upon "the proceeding itself." Resp. Brf. at 14-15. Every reported decision applying Florida law reaches a contrary conclusion[1] and Fischer cites not a single authority in support of this odd assertion.

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[1] In applying the privilege to the retaliatory malicious prosecution lawsuit filed in *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013), the Third District reasoned: "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." *Id*. at 70; accord, *Davidson v. Capital One, N.A*., No. 14-20478-CIV, 2014 WL 3767677 at *5 (S.D. Fla. July 31, 2014) ("The filing and maintenance of a lawsuit is plainly protected by Florida's litigation privilege...."). Even prior to *Wolfe*, federal

Malicious prosecution is nothing more than a tort that prohibits a party from engaging in certain conduct that violates a duty. In this case, the duty is not to commence or maintain certain proceedings. While it is true that the nature of and the motivations for the proceedings define what proceedings may not be commenced or maintained, it is nevertheless the conduct of commencing or maintaining a proceeding that this tort seeks to redress. Thus, malicious prosecution seeks to punish not the proceeding itself, but its commencement and maintenance. Because that conduct, the commencement and maintenance of the lawsuit, occurs during the course of the judicial proceeding and relates to the proceeding, it undeniably is and should be protected by Florida's absolute litigation privilege.[2]

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decisions applying Florida litigation privilege law reached the same conclusion. *See Perez v. Bureaus Investment Group No. II*, LLC, No. 1:09-CV-20784, 2009 WL 1973476 at *3 (S.D. Fla. July 8, 2009) (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) (confirming that filing a Florida lawsuit, "... necessarily occurred during a judicial proceeding and is related to such proceeding."); *see also Myers v. Hodges*, 53 Fla. 197, 44 So. 357 (1907) (applying the privilege to allegations in the complaint which commenced the proceedings).

[2] Even the Fourth District in this case acknowledged that the filing of a complaint was an act that occurred during the judicial proceedings and had some relation to the proceeding. *See Fischer v. Debrincat*, 169 So. 3d 1204, 1207 (Fla. 4th DCA 2015).

The "Wrong Without a Remedy" Argument

Respondent and amicus American Federated Title Corporation (AFTC) argue that there will be no remedy for wrongful litigation if the absolute litigation privilege applies to the tort of malicious prosecution. AFTC Brf. at 15-16; Resp. Brf. at 15-16. Both are wrong. The litigation privilege's requirements that it be applied only to alleged misconduct occurring during the course of judicial proceedings and only if the misconduct relates to those proceedings ensures that a remedy will be available to those whose retaliatory lawsuits would be subject to the privilege's application. Where alleged misconduct occurs under those circumstances, there is accurate notice of the claimed misconduct, and an opportunity to respond and challenge it in the underlying litigation. From the time that litigation is commenced, the alleged misconduct is under the supervision of a judge who has the power to dismiss, adjudicate in favor of defendant, strike improper pleadings, and sanction, all of which serve to mitigate and remedy any harm allegedly incurred by the commencement of a flawed lawsuit. *See DelMonico v. Traynor*, 116 So. 3d 1205, 1217 (Fla. 2013); *Levin*, 639 So. 2d at 608-09; *Fridovich v. Fridovich*, 598 So. 2d 65, 69 n.5 (Fla. 1992).

Fischer and amicus Florida Justice Association (FJA) argue that the remedies available in the original judicial proceeding for litigation misconduct are inadequate.

But in *DelMonico*, this Court observed: "Importantly, the Court [in *Levin*] concluded by noting that *adequate* remedies would still exist for misconduct occurring during judicial proceedings, including the trial court's contempt power as well as the disciplinary measures of the state court system and the bar association." *DelMonico*, 116 So. 3d at 1216 (emphasis supplied). Section § 57.105, Florida Statutes (2013) provides yet another remedy by authorizing 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.

The trial judge's authority to assess fees against the losing party under § 57.105, as well as against that party's counsel, refutes the argument of FJA that the alternative remedies "have no application to non-lawyers who engage in malicious prosecution...." FJA Brf. at 16.

AFTC is correct that certain consequential monetary damages arising out of tortious conduct occurring during litigation would not be awarded by a presiding judge in the underlying litigation. However, in order to avoid the chilling effect of retaliatory lawsuits upon good-faith litigants, redress for litigation misconduct must be sought in the underlying proceedings rather than through large cash payouts in duplicative retaliatory lawsuits. The possibility that a party may not recover full financial compensation for his consequential damages has never before justified excluding tortious conduct from application of the litigation privilege, nor does it now.

The absolute litigation privilege has historically barred an action for consequential damages resulting from defamation, particularly where the alleged defamation is based on statements made during the course of litigation. The broad public policy reason for immunity outweighs an individual's entitlement to damages: "Although the immunity afforded to defamatory statements may indeed bar recovery for bona fide injuries, the chilling effect on free testimony would seriously hamper the adversary system if absolute immunity were not provided." *Levin*, 639 So. 2d at 608. Courts applying Florida's litigation privilege have also denied monetary damage recovery for a variety of tort claims premised upon litigation misconduct. *See*, *e.g*., *Green Leaf Nursery v. E.I. DuPont De Nemours & Co*., 341 F.3d 1292, 1302-03 (11th Cir. 2003) (civil perjury, concealment of evidence, and falsification of discovery); *Perl v. Omni Int'l of Miami, Ltd*., 439 So. 2d 316 (Fla. 3d DCA 1983) (civil fraud, perjury, forgery, and slander in underlying proceeding); *Donner v. Appalachian Ins. Co*., 580 So. 2d 797, 798 (Fla. 3d DCA 1991) (fraudulent misrepresentations in discovery); *Ponzoli & Wassenberg, P.A. v. Zuckerman*, 545 So. 2d 309 (Fla. 3d DCA 1989) (extortion). In *DelMonico*, this Court applied a qualified privilege to multi-million dollar tort claims for misconduct that did not even occur during judicial proceedings merely because the claims related to judicial proceedings.

The Tort of Malicious Prosecution Does Not Carry a Uniquely Onerous Burden for the Plaintiff

AFTC argues that malicious prosecution "intentionally carries a heavy burden of proof." AFTC Brf. at 8. The implicit suggestion is that the tort's elements of requiring proof of the absence of probable cause and the presence of malice will deter endless retaliatory lawsuits and protect good faith litigants. While imposition of these elements may limit the number of retaliatory plaintiffs whose secondary lawsuits ultimately succeed, these elements do little, if anything at all, to protect the far greater number of good-faith litigants from the full course of discovery, motion practice, and trial they must endure before the retaliatory lawsuits against them will be adjudicated in their favor. *See*, *e.g*., *Fee, Parker & Lloyd, P.A. v. Sullivan*, 379 So. 2d 412 (Fla. 4th DCA 1980) (where a complete trial and appeal were required to vindicate the defendant in a retaliatory lawsuit).

Proving the absence of probable cause is fact specific and therefore unlikely to be resolved prior to trial in a summary judgment proceeding. *Jenkins v. State*, 978

So. 2d 116 (Fla. 2008) (" '[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules.' ") (internal quotations omitted); *D.H. v. State*, 121 So. 3d 76, 81 (Fla. 3d DCA 2013) ('Whether or not probable cause exists in a particular case is fact-specific, and there is no bright line for when it will be found."). Even where proof of this element is lacking in the retaliatory malicious prosecution, the good faith plaintiff in the original action will likely face the ordeal of trial in the secondary litigation. *See*, *e.g.*, *Sullivan* (where the clear existence of probable cause was no deterrent to filing the retaliatory suit, did not even prevent the retaliatory claimant from prevailing at trial, and did not vindicate the good faith litigants until the judgment against them was reversed on appeal).[3] Nor is the element of malice a deterrent as it is unnecessary to prove actual malice in a malicious prosecution action. Legal malice, which may be inferred from a lack of probable cause, is sufficient to satisfy the claimant's burden. *Alamo Rent-A-Car, Inc.*, 632 So. 3d 1352, 1357 (Fla. 1994).

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[3] A malicious prosecution action places far more of a financial burden on the defendant than it does on the plaintiff. As a commonly recognized practice, plaintiffs' cases are often taken on contingency, while defendants must pay the hourly fees of their attorneys and for all disbursements as they are incurred. Consequently, the chilling effect of even the threat of a retaliatory lawsuit cannot be overstated.

Moreover, the imposition of malice as an element does nothing to distinguish the malicious prosecution claim from a claim for defamation (to which it is undisputed that the litigation privilege applies). To the contrary, the element highlights the fundamental similarity between these causes of action, as malice must be proven, for example, to prevail in a defamation claim against a public figure, or to overcome a qualified privilege to a defamation claim where applicable. As far back as *Myers*, this Court has consistently held that qualified privileges are not applicable and malice is irrelevant where the complained of misconduct both occurs during judicial proceedings and relates to the judicial proceedings. Where, as in this case, the absolute privilege applies, the argument for an exception from the litigation privilege because of a retaliatory lawsuit's "built-in qualified privilege", FJA Brf. at 10-11, should be summarily rejected.

AFTC cites Wade, John H., *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 Hofstra L.Rev. 433, 451 (1986) for the inventive proposition that "some scholars" believe that the tort of malicious prosecution "with its extremely high burden of proof" was developed to address the problem of frivolous lawsuits while recognizing that an aggrieved person should be entitled to seek judicial relief without having to guarantee he is correct. AFTC Brf. at 6-7. But in that same article, Wade observed that the use of the tort of malicious prosecution as a response to frivolous litigation had been "rather spotted and its effectiveness quite doubtful", *id*. at 1, and so concluded that "the way to attain simplicity and consistency is to make use of a rule of court similar to the current Rule 11 of the Federal Rules" whereby the "trial judge has control of the proceedings" and can "require either party or his attorney to pay" fees and costs. *Id*. at 22. Wade's recommendation makes just as much sense today as it did thirty years ago, particularly here, where Florida's equivalent of rule 11, § 57.105, is available to redress litigation misconduct such as that alleged by Fischer.

The Tort of Malicious Prosecution is Disfavored and at War with the Litigation Privilege's Underlying Policies

Fischer and amici note that the tort of malicious prosecution is "very ancient", Resp. Brf. at 8, has coexisted with the litigation privilege for "hundreds of years", FJA Brf. at 2, and was "meant to peacefully coexist" with the litigation privilege. AFTC Brf. at 5.[4] To the contrary, actions for malicious prosecution are "not generally favored." *Central Fla. Machinery Co., Inc. v. Williams*, 424 So. 2d 201, 202 (Fla. 2d DCA 1983).[5] Courts view malicious prosecution as a disfavored tort precisely

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[4] AFTC takes it a step further and contends that "malicious prosecution has always been sacrosanct." AFTC Brf. at 7. The petitioners have not located a single authority to support AFTC's proposition.

[5] *Accord*, *Stolinski v. Pennypacker*, 772 F.Supp.2d 626, 640 (D. N.J. 2011); *Flynn v. Okafor*, No. 03AP-1232, 2004 WL 1607024 *3 (Ct. App. Ohio 2004);

because it chills the prosecution of legitimate claims. *See*, *e.g.*, *Stolinski*, 772 F.Supp. at 639.

Fischer and amici urge this Court to exempt retaliatory lawsuits from the litigation privilege's carefully crafted, time-tested balance of free access to the courts and redress for litigation misconduct, arguing that the retaliatory lawsuit's balance of the same issues is preferable because it punishes the filing of a complaint without probable cause and with malice, and that one who so abuses the legal system is unworthy of protection. Although this argument might bear some consideration were it possible to summarily determine a lack of probable cause and malice at the outset of a case, so as to limit its impact and thus deterrence on good-faith litigants, as explained above, the adjudication of this element is unlikely to be made before completion of a trial. Thus, Fischer's and amici's arguments assume the bad faith of the plaintiff at the outset of the case, at the expense of good faith litigants. However,

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Brough v. Foley, 572 A.2d 63, 66 (R.I.1990); *Young v. First State Bank, Watonga*, 628 P.2d 707, 709 (Okla. 1981); *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981); *Berlin v. Nathan*, 64 Ill. App. 3d 940, 946, 21 Ill. Dec. 682, 686, 381 N.E.2d 1367, 1371 (1978); *Lind v. Schmid*, 67 N.J. 255, 262, 337 A.2d 365, 368 (1975); *Allen v. State Dep't of Health and Human Resources*, 456 So. 2d 679, 682 (5th Cir. La. 1984); *Wiggs v. Farmer*, 205 Va. 149, 151-52, 135 S.E.2d 829, 831 (1964); *Glenn v. Hoerner Boxes, Inc*., 211 F.Supp. 9, 16 (W.D. Ark. 1962); *Daniels v. Finney*, 262 S.W.2d 431, 433 (Tex. Civ. App. Galveston 1953); *Perry v. Washington National Ins. Co*., 14 Cal.App.2d 609, 619, 58 P.2d 701, 706 (1936); *Watts v. Gerking*, 111 Or. 641, 656, 228 P. 135, 137 (1924).

in 1907, when this Court adopted the requirements of the litigation privilege to balance free access and redress, it specifically rejected that assumption and would only inquire about malice if the alleged litigation misconduct were not relevant to the underlying proceedings:

> "For it would be extremely inconsistent, and I might say absurd, for the law to presume that judicial proceedings of any kind are resorted to for the mere purpose of enabling parties to indulge their malice and utter slanders, and not in good faith, to attain some legitimate end, or to perform some lawful act or duty, which is useful and beneficial to themselves or others. On the contrary, the presumption is very strong that persons so situated are using legal proceedings for proper purposes, and that what is said or done proceeds from sufficient cause and right motives; when that which thus transpires may constitute the basis of an action at all, it is only upon the ground that there is proof of express malice, and that the person complained of has availed himself of his position to gratify his malevolence by defamatory expressions against the parties or others, which have no connection with or bearing upon the subject under investigation."

*Myer*s, 53 Fla. at 213, 44 So. at 362 (quoting with approval *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738 (1860)). In favor of its own cynical view, the retaliatory lawsuit rejects the assumptions and well-considered policy balance adopted by this Court. The absolute litigation privilege and retaliatory lawsuit are not meant to co-exist peacefully, but rather are at odds with each other. Exempting the retaliatory lawsuit from the absolute litigation privilege does violence to long standing broad public policies that, despite Fischer's and amici's arguments to the contrary, are not effectively addressed by a retaliatory lawsuit.

The Lesson to be Learned from California

Fisher and amici urge this Court to abandon its sound policies and logical reasoning because other jurisdictions addressing this issue have withheld application of the litigation privilege to retaliatory lawsuits. However, the applicable laws in Florida and such other jurisdictions are not identical and do not lend themselves to a meaningful comparison. For example, a number of jurisdictions require special damages as an element of a retaliatory lawsuit, *see* Wade at n. 30, which is not required in Florida. The fewer number of retaliatory lawsuits and the nature of the special damages that must be incurred for a suit to succeed in a particular jurisdiction may be such as to justify a different policy balance than that which was conducted by this Court.

The status of retaliatory lawsuits in California provides yet another example of why comparisons between Florida and other jurisdictions should be avoided. California exempts retaliatory malicious prosecution lawsuits from the litigation privilege and is reported to be suffering a proliferation of retaliatory malicious prosecution lawsuits. *See* Pet. Brf. at 26, n.16.[6] FJA questions whether that is the

[6] *See also* Ben-Zvi, Daniel, *How Real is "The Threat"? What Mediators Should Know about Malicious Prosecution* ("Malicious prosecution cases are being filed in ever-increasing record numbers. Attorneys and their former clients are being reunited as defendants in lawsuits. The risk of claims against an attorney by third parties (people who the attorney does not represent) is at an all-time high.

case, noting that California has not receded from its position. FJA Brf. at 18. But the courts in California are taking action in an apparent attempt to curb retaliatory lawsuit abuses. For example, one California appellate court drew a new line after malicious prosecution claims found their way into California family law cases. *See Bidna v. Rosen*, 19 Cal. App. 4th 27, 23 Cal. Rptr.2d 251 (Cal. 4th Dist. 1993) (barring malicious prosecution actions for any family law motion or order to show cause).[7] By way of another example, the California Supreme Court construed that state's anti-SLAPP statute[8] broadly to apply to the tort of malicious prosecution. *See Jarrow*

The biggest peril of litigation facing a lawyer practicing in Los Angeles now is no longer a legal malpractice claim by his or her client - it is a malicious prosecution action by the disgruntled opposing litigant who was named as a party in that client's unsuccessful prior lawsuit.").
http://www.mediate.com/mobile/article.cfm?id=1378

[7] The *Bidna* court's four reasons why malicious prosecution actions should be so barred in family law actions apply to all tort litigation in Florida: (1) there is much bitterness in family law cases it is difficult to distinguish malicious actions from ordinary ones; (2) family law courts in California have the ability to control litigation misconduct by imposing attorney's fees as sanctions; (3) allowing malicious prosecution actions might improperly deter a party in a family law case from filing something meritorious; (4) the availability of malicious prosecution actions would raise malpractice insurance premiums for family law attorneys. 19 Cal.App.4th at 35-6, 23 Cal. Rptr. 2d at 256-57.

[8] Cal. Civ. Proc. Code § 425.16. "SLAPP" stands for "strategic lawsuits against public participation. The California statute provides for a summary proceeding to dismiss certain lawsuits, such as the malicious prosecution lawsuit in *Jarrow*, within the first 60 days of the proceedings. Rather than holding a defendant in a retaliatory lawsuit hostage until the existence of probable cause is

Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 74 P.2d 737, 3 Cal. Rptr. 3d 636 (2003). By contrast, these problems are prevented before they even take root in Florida thanks to this Court's all-inclusive approach for application of the litigation privilege.

CONCLUSION

This Court has repeatedly explained that where there is litigation misconduct in an original proceeding, the litigation privilege encourages redress in the original proceeding and prohibits secondary, redundant, and costly retaliatory lawsuits, the mere threat of which is far more menacing to good-faith litigants than any determinations by the presiding judge in an original proceeding. For the highest court in Florida to hold that the retaliatory lawsuit is immune from application of the litigation privilege would encourage every single defendant who is fortunate enough to overcome the uncertain outcome of a judicial proceeding to press his good fortune and seek a monetary windfall in the duplicative retaliatory lawsuit. Such a holding would discourage innovative applications of the law and chill those of meager means from pursuing complex claims against deep pocket or multiple defendants for fear

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proven at trial, California's anti-SLAPP procedure empowers the defendant to shift the burden to plaintiff to justify the continuation of the litigation and establish a "reasonable probability" of success on the merits, failing which the litigation is dismissed with an award to the defendant.

they might get it wrong and face a costly legal battle to demonstrate their propriety. Litigants who might voluntarily dismiss an action that is proving to be less successful than anticipated will hold fast, wasting limited judicial resources by pushing discovery and motion practice to the fullest in the hopes of finding something to preserve their failing case and staving off a retaliatory onslaught. Retaliatory lawsuits against adverse party counsel, which are already on the rise, will only further increase, and with them an ever increasing potential for conflicts of interest and diminished honest communication between lawyer and client to the overall detriment of the attorney client relationship. The careful balance of the policies underlying the privilege must not be supplanted by base financial motives underlying malicious prosecution, particularly where the elements of that tort (cited as a significant check against the tort's chilling effect) have proven so ineffective at achieving their stated purpose. Yet that is precisely what Fischer and amici ask of this Court. Their request should be denied, the decision of the Fourth District Court of Appeal should be quashed, and the absolute privilege should be applied to the commencement and maintenance of a retaliatory civil lawsuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this reply brief was emailed to the following counsel this 24th day of March, 2016:

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