



Malicious Prosecution and the Litigation Privilege

by Ted Babbitt

The litigation privilege is an absolute privilege which protects attorneys and litigants because of wrongful acts taken in the course of and relating to litigation in Florida. It was first recognized in Florida in 1907 in *Myers v Hodges*, 44 So. 357 (Fla. 1907). It was extended in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, v. U.S. Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994) beyond defamatory statements of slander or libel. In *Levin* at 608 the Supreme Court held:

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... Participants [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 Florida Supreme Court extended the privilege in *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007) when it declared at 384:

The 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.

In *Wolfe v Foreman*, 128 So. 3d 67 (Fla. 3rd DCA 2013) the issue was whether the litigation privilege applied to the filing of a cause of action based on a claim of malicious prosecution. In essence the question was whether the filing of the allegedly malicious complaint was itself protected by the litigation privilege. Since the basis of malicious prosecution is the malicious filing of a lawsuit without probable cause, a holding that such a filing was absolutely privileged would bar all causes of action for malicious prosecution in Florida. In *Wolfe, supra*, at 70, the Third District concluded that the malicious filing of a complaint was, indeed, protected by the litigation privilege even if that effectively barred all actions for malicious prosecution in Florida. The Court held:

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.

In *Fisher v. Debrincat*, 169 So. 3d 1204 (Fla. Fourth DCA 2015) the Fourth District Court of Appeals refused to follow *Wolfe, supra*, and held that a malicious prosecution action was not barred by the litigation privilege. At 1207, the Fourth District held:

In our view, *Wolfe* went too far in its application of the litigation privilege. 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 cited a similar case in the Fifth District, *Wright v Yurko*, 446 So. 2d 1162 (Fla. 5th DCA 1984) as well as the Second District holding in *Olson v. Johnson*, 961 So. 2d 356 (Fla. 2nd DCA 2007).

In refusing to follow the Third District's opinion in *Wolfe, supra*, the Fourth District in *Fisher, supra*, makes a compelling argument that the Supreme Court's broad language in *Levin, supra*, was not intended to essentially eliminate malicious prosecution cases in Florida. At 1208, the Fourth District holds:

As a practical matter, such a broad application of the litigation privilege would mean that a malicious prosecution would rarely, if ever, be actionable. Indeed, it is difficult to envision how a malicious prosecution claim would ever be actionable where the original proceeding was a civil lawsuit.

The Florida Supreme Court has declared that it "does not intentionally overrule itself sub silentio." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). If the litigation privilege could be applied to bar a malicious prosecution action, this would mean that the Florida Supreme Court silently eviscerated the longstanding common law tort of malicious prosecution. Had the Florida Supreme Court truly meant for the litigation privilege to immunize conduct that would otherwise constitute malicious prosecution under the common law, one would have expected the court to say so explicitly.

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.

The Fourth District in *Rivernider v. Meyer*, 174 So. 3d 602 (Fla. Fourth DCA 2015) and in *Edwards v Epstein and Rothstein*, 40 Fla. L. Weekly D2550 (Fla. 4th DCA Nov. 12, 2015) reaffirmed its holding in *Fischer, supra*, and has now three times certified conflict with *Wolfe* to the Florida Supreme Court.

Three out of the five District Courts have refused to follow the Third District's opinion in *Wolfe, supra*, which essentially eliminated the tort of malicious prosecution in Florida on the basis of the litigation privilege. While the ultimate decision rests with the Supreme Court, it is unlikely *Wolfe* will stand.