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CAREFUL: THE FLORIDA SUPREME COURT CLARIFIED THE EXISTENCE OF LIMITS TO THE LITIGATION PRIVILEGE DOCTRINE AND PROVIDED A CLEAR EXAMPLE OF WHY ONE SHOULD NOT READ TOO MUCH INTO COURT DECISIONS

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In *Debrincat v. Fischer*, 42 Fla. Weekly S141a (February 9, 2017), the Florida Supreme Court clarified limits to the litigation privilege doctrine, a doctrine often thought to provide absolute immunity for any actions taken in prior judicial proceedings by parties and other participants in those proceedings if related to those proceedings. The *Debrincat* decision also emphasizes the need to recognize the difference between *dicta* – what judges say to bolster their decisions -- from the essential holdings of those decisions.

The factual surroundings in *Fischer* are straightforward. In late 2007, the Debrincats brought an action against several defendants. They subsequently added Fischer as a defendant and then later dropped him from the lawsuit. In 2009, Fischer sued the Debrincats for malicious prosecution. The Debrincats moved for summary judgment arguing that the litigation privilege afforded them absolute immunity for joining Fischer as a defendant in the underlying lawsuit. In so arguing, the Debrincats relied on the Third District decision in *Wolfe v. Foreman*, 128 So.3d 67 (Fla. 3d DCA 2013), a case which itself relied on *dicta* found in two Florida Supreme Court decisions, *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell PA v. U.S. Fire Insur. Co.*, 639 So.2d 606 (Fla. 1994), and *Echevarria, McCalla, Raymer, Barrett & Frappier,* 950 So.2d 384 (Fla. 2007). The Third District in *Wolfe* read *Levin* and *Echavarria* to require it to find that the litigation privilege applies to a cause of action for malicious prosecution.

The problem is that the Dubrincats made the same mistake as the Third District in *Wolfe*: although the quoted *dicta* in *Levin* and in *Echevarria* made it appear that the Florida Supreme Court was intending or would extend the litigation privilege to shield more than what was at issue in those two cases, the Supreme Court had not gone that far and, in *Dubrincat,* the Supreme Court made it clear that it would not do so.

In *Levin*, the Supreme Court extended the reach of the litigation privilege from its traditional defamatory statement made in the course of judicial proceedings footing and applied the doctrine to a tortious interference claim. In doing so, it bolstered its opinion with the following *dicta* statement:

> "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 behavior at issue*, so long as the act has some relation to the proceeding." (Emphasis added)

The emphasized material was truly not needed to decide the case. All the Supreme Court was to decide was whether the absolute immunity of the litigation privilege applied to tortious interference claims, not "other tortious behavior."

In *Echevarria*, the Supreme Court was asked to determine whether the litigation privilege applied to statutory causes of action. The Court held that it did, but in doing so, it helped confuse the situation with its approving quote of its language in *Levin*, which was broader than necessary:

> "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. '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.' [Citing *Levin*]"

In *Debrincat*, the Supreme Court ignored its own prior *dicta* and ruled that "the litigation privilege does not bar the filing of a claim for malicious prosecution ….:" It emphasized that to extend the litigation privilege to malicious prosecution would effectively eviscerate that cause of action.

> "'[a]n action for malicious prosecution – which is based as a matter of law on causing the commencement or continuation of an original judicial proceeding – could never occur outside the context of litigation.'… Therefore, 'malicious prosecution could never be established if causing the commencement or continuation of an original proceeding against a plaintiff were afforded absolute immunity under the litigation privilege.'"

Notably, the Court went further and narrowed its ruling that the litigation privilege "does not bar the filing of a malicious prosecution claim *that was based on adding a party defendant to a civil action."* (Emphasis added) The Court was clearly sending a message that its opinions are about the matters before them, and we should all be aware of that reality.

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