IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

KENNETH J. MYNATT,	§	
	§	
Plaintiff-Appellant,	§	
	§	
v.	§	Case: M2020-01285-COA-R3-CV
	§	
NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 39, *et al.*	§	Rutherford County Circuit Court Case No.: 75CC1-2020-CV-77158
	§	
	§	
Defendants-Appellees.	§	

PRINCIPAL BRIEF OF APPELLANT KENNETH J. MYNATT

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ORAL ARGUMENT REQUESTED

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Hurd, 972 F.3d 1278, 1289 (11th Cir. 2020).

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IV. STATEMENT REGARDING RECORD CITATIONS

Mr. Mynatt's brief uses the following designations:

1. Citations to the Technical Record are abbreviated as "R. at [page number]."

2. Citations to August 7, 2020 Transcript of Proceedings are abbreviated as "Tr. at [page number] [line number]."

Record citations are footnoted throughout Mr. Mynatt's brief unless including a citation in the body of the brief improves clarity.

V. APPLICABLE STANDARDS OF REVIEW

1. "A trial court's decision to grant a Rule 12.02(6) motion to dismiss is a question of law that [appellate courts] review de novo with no presumption of correctness." *Khan v. Regions Bank*, 572 S.W.3d 189, 194 (Tenn. Ct. App. 2018). Thus, this Court reviews the trial court's "adjudication of [the Defendants'] motion to dismiss for failure to state a claim de novo without a presumption of correctness." *Moore v. State*, 436 S.W.3d 775, 782–83 (Tenn. Ct. App. 2014). *See also Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) ("We review the trial court's legal conclusions regarding the adequacy of the complaint de novo.") (citations omitted).

2. "In considering a motion to dismiss, courts must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id.* (cleaned up).

VI. STATEMENT OF THE CASE

This is an appeal from the Rutherford County Circuit Court's final order granting the Defendants' Rule 12.02(6) motion to dismiss Plaintiff Kenneth Mynatt's Complaint for failure to state a claim upon which relief can be granted.[1] Mr. Mynatt's Complaint asserted only two claims for relief against all Defendants: (1) a claim for malicious prosecution, and (2) a claim for civil conspiracy.[2]

Following a hearing on the Defendants' Motion to Dismiss Mr. Mynatt's Complaint, the trial court agreed that Mr. Mynatt had alleged "every element in the malicious prosecution," but the court indicated that it was "stuck on" whether the favorable termination element of that tort could be established as a matter of law.[3] The trial court's confusion arose from the fact that before being dismissed and terminating in Mr. Mynatt's favor, Mr. Mynatt's criminal proceedings had been retired on an interim basis.

The Defendants asserted that the interim retirement of Mr. Mynatt's criminal charges represented "the lynchpin of this malicious prosecution claim, and it's where this case starts and ends, defendants would submit."[4] Specifically, the Defendants maintained, the interim retirement of Mr. Mynatt's criminal case categorically precluded Mr. Mynatt's malicious prosecution claim as a matter of law, because it

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[1] *See* R. at 83–87.
[2] R. at 25.
[3] Tr. at 12, lines 20–23 ("You got enough here about all those elements, every element in the malicious prosecution. But the one I'm stuck on is terminating in your client's favor on the merits.").
[4] Tr. at 4, lines 20–23.

necessarily meant that his case had been resolved via a settlement akin to diversion.[5]

Mr. Mynatt disagreed, both as a case-specific factual matter and regarding the Defendants' theory of retirement generally.[6] At least at this juncture, three essential facts of Mr. Mynatt's Complaint also controlled the matter and should have precluded dismissal at this early stage in proceedings. Those facts—which must be taken as true and are subject to reasonable inferences favoring Mr. Mynatt—are as follows:

First, the final disposition of Mr. Mynatt's criminal proceedings was not "retired," as the Defendants repeatedly contended. Instead, as Mr. Mynatt's Complaint reflects, the final disposition of his criminal case was "dismissed." *See* R. at 23, ¶ 102 ("On November 28, 2016 all charges against Plaintiff were formally dismissed."). Accordingly, because the appropriate inquiry is whether "the prior action was *finally* terminated in plaintiff's favor," *Roberts v. Fed. Express Corp.*, 842 S.W.2d 246, 248 (Tenn. 1992) (emphasis added; citations omitted), only the *final* disposition of Mr. Mynatt's criminal case—its dismissal—was even relevant to whether the "final termination" element of Mr. Mynatt's malicious prosecution claim had been established.

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[5] Tr. at 4, line 24–5, line 6.

[6] R. at 77–78 ("The Defendants also attempt to equate the retirement of the Plaintiff's case to a pre-trial diversion, which are two distinct criminal dispositions under Tennessee law. . . . [T]he Plaintiff maintained his innocence throughout the entire duration of his criminal case and the disposition did relate to the merits of the charges and reflect on his innocence. Furthermore, the Plaintiffs complaint alleges that the disposition of his case was favorable and reflected upon his innocence.").

Second, Mr. Mynatt's Complaint specifically alleged that he "repeatedly refused all 'deals[,]'" *see* R. at 23, ¶ 100, precluding any finding at this stage that his case was dismissed as part of an agreement as the Defendants claimed. Thus, regardless of whether or not *other* litigants' dismissals are achieved following an agreed resolution with the State, in *this* case, Mr. Mynatt secured a favorable, final termination of his criminal proceedings after "repeatedly refus[ing] all 'deals[.]'" *Id.*

Third, Mr. Mynatt's Complaint alleged without ambiguity that "[t]he criminal prosecution terminated in the favor of the Plaintiff." R. at 25, ¶ 110. Critically, "the circumstances under which the prior action terminated remains a question of fact." *Collins v. Carter*, No. E2018-01365-COA-R3-CV, 2020 WL 1814905, at *5 (Tenn. Ct. App. Apr. 9, 2020), *app. denied* (Tenn. Oct. 22, 2020) (citation omitted). Thus, because Mr. Mynatt was entitled to have all factual allegations in his Complaint taken as true and to have all reasonable inferences regarding those allegations drawn in his favor, at this juncture, Mr. Mynatt's allegation that "[t]he criminal prosecution terminated in the favor of the Plaintiff"[7] controls.

Notwithstanding these pleaded facts, though, the trial court held—as a matter of law—that "there's no set of facts that [Mr. Mynatt] could prove" that would enable him to establish the favorable termination element of his malicious prosecution claim.[8] As grounds, the court explained that "I don't think a retirement is a termination on the

[7] R. at 25, ¶ 110.
[8] Tr. at 14, lines 8–10.

merits."[9] In its written order, the court held further that in *other* cases, "[r]etirements are entered all the time for various reasons, and it is hardly ever stated in the order of retirement why they are done, but the defendant and the State agree to retire their case."[10] Adopting the Defendants' argument on the matter, the court additionally held that, for purposes of a malicious prosecution claim, "[a] retirement of charges is similar to" the "diversion of a charge"[11] before trial under Tennessee law—even though: (1) retirement is fundamentally different from any form of diversion under Tennessee law, and (2) in any event, the disposition of Mr. Mynatt's charges was neither retired nor diverted; instead, the disposition of Mr. Mynatt's criminal case was "dismissed."[12]

Nonetheless, based on the above analysis, Mr. Mynatt's malicious prosecution claim was dismissed for failure to state a claim upon which relief could be granted. In particular, the trial court held that "[a] retirement does not reflect consideration by the Court or by a jury of any of the facts or evidence giving rise to the charge. . . . Accordingly, there is no set of facts that Mr. Mynatt could prove that would make the retirement of the criminal charges against him a determination on the merits, which is a necessary element of a malicious prosecution claim."[13] And because Mr. Mynatt's malicious prosecution claim was dismissed, Mr. Mynatt's civil conspiracy claim was dismissed along with it, because

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[9] Tr. at 13, lines 21–22.
[10] R. at 85.
[11] *Id.*
[12] *See* R. at 23, ¶ 102 ("On November 28, 2016 all charges against Plaintiff were formally dismissed.").
[13] R. at 85–86.

"[a] claim of conspiracy is only actionable where the underlying tort is actionable."[14] Consequently, the trial court having: (1) misapprehended the correct disposition of Mr. Mynatt's criminal case, which was "dismissed" rather than retired; (2) erroneously concluded that the intermediate retirement of a criminal case categorically precludes a malicious prosecution claim in all circumstances; (3) erroneously held that for purposes of a malicious prosecution claim, retirement is akin to diversion under Tennessee law; and (4) deviated from the actual facts alleged in Mr. Mynatt's Complaint and dismissed it, instead, based on what the trial court surmised occurs "all the time for various reasons" in *other* cases,[15] this appeal followed.

VII. STATEMENT OF FACTS

Presuming all of the factual allegations in Mr. Mynatt's Complaint "to be true and giving the plaintiff the benefit of all reasonable inferences" regarding them, *see Webb*, 346 S.W.3d at 426 (cleaned up), Mr. Mynatt's Complaint is premised upon the following facts:

Kenneth Mynatt "has been a full-time bargaining unit employee of the U.S. Department of Treasury, Internal Revenue Service ('IRS') since January 1991."[16] After becoming an IRS employee, Mr. Mynatt joined the National Treasury Employees Union (NTEU), "a national union which currently has the right to represent all bargaining unit employees of the IRS."[17]

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[14] R. at 86.
[15] R. at 85.
[16] R. at 3, ¶ 10.
[17] *Id.*

In 2013, the Defendants began "a politically motivated conspiracy" that was designed "to retaliate against [Mr. Mynatt] for exposing governmental waste."[18] Critically, Mr. Mynatt "was innocent of any wrongdoing."[19] The Defendants' retaliatory actions were specifically prompted by spillover from union political disputes and because Mr. Mynatt had, among other things:

(1) "published several articles in [a union] chapter newsletter which were critical of IRS's management at both the national and local level";[20]

(2) "expos[ed] $60,000 of government waste spending on a 'Star Trek' video by then IRS executive Chris Wagner[,]" which "became the subject of heavily publicized congressional hearings and embarrassed IRS executives";[21]

(3) engaged in "criticism of Agency management";[22]

(4) described IRS executives as "weasels";[23] and

(5) exposed malfeasance related to Defendant Colleen Kelley's unapproved sale of the "NTEU's building in Washington, D.C., at a deep discount in order to prevent a large change in NTEU's cash reserves from being shown on NTEU's financial statements" following a failed campaign to recruit TSA members to the NTEU, in which Defendant

[18] R. at 20, ¶ 84.
[19] *Id.*
[20] R. at 5, ¶ 23.
[21] R. at 6, ¶ 24.
[22] *Id.* at ¶ 25.
[23] *Id.* at ¶ 28.

Kelley had squandered approximately "ten million dollars"[24]—exposure that attracted national publicity in the *Washington Post* and elsewhere.[25]

Upset with Mr. Mynatt's criticism of them, the Defendants and federal employees of both the Treasury Inspector General for Tax Administration and the IRS "jointly tried to get the Plaintiff indicted by the Federal government."[26] They were not successful.[27] Upon review of their claims, federal prosecution was "refused by the United States Attorney's Office for the Middle District of Tennessee[.]"[28] In particular, the "criminal referral against the Plaintiff was rejected for prosecution, due to the lack of any evidence a crime was committed and the overwhelming exculpatory evidence submitted by the Plaintiff, which showed the case was politically motivated by representatives from NTEU39 and NTEU National."[29]

Undeterred, however, the Defendants "continued their conspiracy by pressuring the U.S. Department of Labor to have the Plaintiff indicted by a State grand jury for theft of union funds which they knew was false and politically motivated."[30] Thus, the Defendants undertook

> to conspire with IRS management officials to eventually bring false criminal charges against the Plaintiff in order to retaliate against him for publicly embarrassing the IRS for misuse of government funds, and for embarrassing [Defendant Kelley] by giving interviews with the Washington

[24] R. at 7, ¶ 30.
[25] R. at 7, ¶ 30–8, ¶ 33.
[26] R. at 13, ¶ 61.
[27] R. at 13–14, ¶ 61.
[28] *Id.*
[29] R. at 20–21, ¶ 88.
[30] R. at 13–14, ¶ 61.

> Post and other national publications detailing her abuse of power and failure to follow union laws and regulations.[31]

More specifically, after the Defendants' failed attempt to have Mr. Mynatt prosecuted federally, Defendant Kelley "suggested a local prosecution be tried as they had used that tactic before to deal with their adversaries."[32] Accordingly, the Defendants arranged for a meeting with the District Attorney General for the 20th Judicial District of Tennessee [] in early January 2014."[33]

"During this meeting, false testimony and forged documents generated by Defendant [Van Atta] were given to the ADA."[34] Agents in the meeting also "admitted to the ADA they were being pressured by their respective management structures to have the Plaintiff indicted regardless of the facts."[35] Those agents—working at the Defendants' behest—specifically "admitted to the ADA that the charges were political in nature and not based on provable facts, but they insisted Plaintiff would have little or no representation and would likely plead guilty if the ADA assisted them in overcharging the Plaintiff."[36] Although the ADA involved "initially declined" the agents' requests to charge Mr. Mynatt, the ADA "finally relented to and agreed to let [Defendants' agent] testify to a state grand jury as long as [the agent] agreed to sign any indictment

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[31] R. at 14, ¶ 62.
[32] R. at 21, ¶ 89.
[33] *Id.*
[34] *Id.* at ¶ 90.
[35] *Id.*
[36] *Id.*

issued as a result of the false testimony and evidence."[37]

"On March 10, 2014, the ADA permitted [the Defendants' agent] . . . to testify before a State grand jury and successfully had Plaintiff indicted for two State felonies."[38] As previously agreed, the Defendants' agent—rather than the ADA—signed Mr. Mynatt's indictment.[39] "The only reason the Plaintiff was indicted and later arrested was because the Defendants[,] . . . and employees of NTEU National created a false narrative, manufactured phony evidence, and tampered with witnesses as part of a conspiracy."[40]

Although Mr. Mynatt's indictment was sealed, the Defendants knew about it before Mr. Mynatt did.[41] "Checkmate," one of them remarked to Mr. Mynatt before his indictment was public.[42] Notably, the indictment at issue had been "sealed at the behest of" the Defendants,[43] who

> hope[d] to arrest Plaintiff at the Estes Kefauver Federal building in Nashville, TN to humiliate and embarrass Plaintiff in the presence of his co-workers, and to send a message to other whistle blowers who might have a desire to expose wasteful Government spending and corrupt union practices.[44]

Mr. Mynatt was ultimately arrested on the indicted charges after

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[37] *Id.*
[38] *Id.* at ¶ 91.
[39] *Id.*
[40] R. at 22, ¶ 92.
[41] *Id.* at ¶ 95.
[42] *Id.*
[43] *Id.* at ¶ 94.
[44] *Id.*

being pulled over for a minor traffic violation.[45] "He subsequently spent the night in the Davidson County, TN detention center where he was threatened and harassed by other inmates for almost ten hours."[46]

Following Mr. Mynatt's arrest and detention, Mr. Mynatt's Complaint details the timeline of his criminal proceedings as follows:

> 97. Plaintiff's first court appearance was in April 2014 and shortly thereafter a comprehensive discovery request was filed by FROGGE.
>
> 98. From March 2014 until November 2015, the Plaintiff's attorney FROGGE filed multiple "Brady" requests for all documents in the possession of OLMS agent KEMP to no avail. After extensive delays, Plaintiff's attorney contacted the ADA's supervisor Jim Milam ("MILAM"). FROGGE informed MILAM of the political nature of the charges, and the prior unsuccessful efforts of agents KEMP and MAYES to dupe the U.S. Attorney's Office into indicting the Plaintiff for false charges based on manufactured evidence. MILAM confronted the ADA with these allegations and personally took over the prosecution of the Plaintiff's case.
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> 99. Once MILAM took over the prosecution of the case, he proceeded to begin offering the Plaintiff a series of "deals" to plead guilty to ever decreasing misdemeanor crimes.
>
> 100. **Plaintiff repeatedly refused all "deals"** and in a seemingly last bite at the apple, MILAM on or about September 15, 2015 offered to drop all charges against Plaintiff if he agreed to resign his position with the Federal government. **The Plaintiff again refused based on the fact he was innocent.** Upon knowledge and belief, during this time period the Defendants were in frequent contact with the local prosecutor MILAM directing the political prosecution of Plaintiff or were using KEMP and MAYES as

[45] *Id*. at ¶ 96.
[46] *Id*.

their intermediaries.

> 101. After Plaintiff's **repeated claims of innocence, refusal to plead guilty or resign**, and his continued demand for documents under the previously filed discovery request, MILAM, on November 24, 2015, filed a motion in State court with Judge Seth Norman to 'retire' all charges against Plaintiff for a one (1) year period.
>
> 102. **On November 28, 2016 all charges against Plaintiff were formally dismissed.**

R. at 23, ¶¶ 97–102 (emphases added).

Consequently—and specifically *not* due to a settled resolution or any "'deal[,]'" which Mr. Mynatt repeatedly refused, *see id.* at ¶ 100—the final disposition of Mr. Mynatt's criminal case was that "all charges against [him] were formally **dismissed**." *Id.* at ¶ 102 (emphasis added). Thus, the "the criminal prosecution terminated in the favor of [Mr. Mynatt]," *see* R. at 25, ¶ 110, and this action followed.

VIII. ARGUMENT

A. TAKING AS TRUE THE ALLEGATIONS IN MR. MYNATT'S COMPLAINT, AND DRAWING ALL REASONABLE INFERENCES IN MR. MYNATT'S FAVOR, THE TRIAL COURT ERRED IN DETERMINING THAT "NO SET OF FACTS" WOULD ENABLE MR. MYNATT TO PROVE THAT HIS CRIMINAL PROCEEDINGS TERMINATED IN HIS FAVOR.

1. Elements of the Plaintiff's Malicious Prosecution Claim

The elements of Mr. Mynatt's malicious prosecution claim appear to have been misapprehended by the trial court.[47] However,

> [i]t is settled law in this jurisdiction that there are four

[47] *See* R. at 84–85 (referencing the materially different elements of malicious prosecution claims arising from terminated *civil* proceedings).

> essential elements in a malicious prosecution case arising from an arrest for an alleged criminal act. These elements are (1) the defendant instituted a criminal prosecution against the plaintiff; (2) the criminal prosecution was terminated in favor of the plaintiff; (3) the defendants lacked probable cause to institute the proceeding, and (4) the defendant acted maliciously or for some reason other than to bring the plaintiff to justice.

Cannon v. Peninsula Hosp., No. E2003-00200-COA-R3-CV, 2003 WL 22335087, at *1 (Tenn. Ct. App. Sept. 25, 2003) (citations omitted), *app. denied* (Tenn. Mar. 22, 2004). *See also Sewell v. Par Cable, Inc.*, No. 87-266-II, 1988 WL 112915, at *2 (Tenn. Ct. App. Oct. 26, 1988), *no app. filed*; *Davis v. Beckham, No. 2*, 1989 WL 67197, at *1 (Tenn. Ct. App. June 19, 1989), *app. denied* (Tenn. Sept. 11, 1989).

Here, because the trial court held that all other elements of Mr. Mynatt's malicious prosecution claim had been established,[48] this appeal concerns only the second element above: whether Mr. Mynatt's criminal prosecution terminated in his favor.

2. "Favorable Termination" in Criminal Contexts

With respect to malicious prosecution claims that arise from criminal proceedings, "Tennessee courts have never fully determined what type of disposition satisfies the favorable termination requirement." *Sewell*, 1988 WL 112915, at *2. This Court has, however, determined the boundaries of such claims. For example, this Court has made clear that certain criminal dispositions—such as those attributable to settlement, misconduct, or an exercise of mercy—will preclude a malicious prosecution claim. *See, e.g.*, *id.* at *3. This Court has similarly made clear that certain criminal dispositions will *permit* a malicious

[48] Tr. at 12, lines 20–22.

prosecution claim. *See, e.g.*, *Collins*, 2020 WL 1814905, at *5 (noting that in criminal cases, "[o]ur courts have accepted a prosecutor's entry of a nolle prosequi and a grand jury's refusal to indict as favorable terminations." (citing *Scheibler v. Steinburg*, 167 S.W. 866, 866–67 (Tenn. 1914); *Perry v. Sharber*, 803 S.W.2d 223, 225 (Tenn. Ct. App. 1990))). *See also Sewell*, 1988 WL 112915, at *2 (collecting cases and noting that "Tennessee courts have also found several dispositions short of an acquittal to be sufficient.") (citations omitted). Thus, this Court has explained, "[w]hile an acquittal is clearly a favorable outcome, something less will support a malicious prosecution action." *See Collins*, 2020 WL 1814905, at *5 (citation omitted).

Whatever the precise limitations of malicious prosecution claims that arise from concluded criminal proceedings, based on this Court's established precedent, Mr. Mynatt's claim clears them. As noted, "[o]ur courts have accepted a prosecutor's entry of a nolle prosequi" as a favorable determination for malicious prosecution purposes. *Id.* (citing *Scheibler*, 167 S.W. at 866–67). Here, Mr. Mynatt's disposition—outright dismissal—was at least as favorable as a nolle prosequi disposition. *See* R. at 23, ¶ 102 ("On November 28, 2016 all charges against Plaintiff were formally dismissed."). Further, reasonable inferences support the conclusion that Mr. Mynatt's disposition was even *more* favorable. Specifically, whereas a nolle prosequi "is not a bar to a subsequent prosecution" before a jury is empaneled, *see Scheibler*, 167 S.W. at 866, "[a] dismissal pursuant to Rule 48(b) can be with or without prejudice[,]" *State v. Benn*, 713 S.W.2d 308, 310 (Tenn. 1986) (citations omitted). *Cf. Joyner v. Clower*, No. 03A01-9203CV118, 1992 WL 204468,

at *1 (Tenn. Ct. App. Aug. 25, 1992) ("We question whether a prosecution may be reinstated after such a dismissal."), *no app. filed*.

Given this body of precedent, malicious prosecution claims based on dismissed or abandoned criminal charges have been permitted to go forward on many occasions. *See, e.g.*, *Scheibler*,167 S.W. at 866–67 ("We are of opinion, therefore, that the entry of a nolle prosequi, without the procurement of the defendant, is such a termination of the criminal prosecution in defendant's favor as is contemplated by the rule requiring that the original suit be terminated in favor of the plaintiff before he can commence his suit for malicious prosecution."); *Williams v. Norwood*, 10 Tenn. 329, 336 (1829) (permitting malicious prosecution claim following magistrate's dismissal of a warrant); *Miller v. Martin*, 10 Tenn. App. 149, 152 (1929) (permitting malicious prosecution claim following district attorney general's decision to "terminate[] the prosecution"). *Cf. Christian v. Lapidus*, 833 S.W.2d 71, 74 (Tenn. 1992) ("[W]e are persuaded, and now hold, that abandonment or withdrawal of an allegedly malicious prosecution is sufficient to establish a final and favorable termination so long as such abandonment or withdrawal was not accompanied by a compromise or settlement, or accomplished in order to refile the action in another forum."). Of course, all criminal cases that result in dismissal are not dismissed for the same reason. Thus, although it would be wrong to suggest that *every* post-retirement dismissal of a criminal case will satisfy the favorable termination element of a malicious prosecution claim, it would also be wrong to hold—as the trial court did—that none will.

Instead, a fact-specific inquiry into the circumstances that gave rise

to dismissal—an inquiry that the Defendants are free to conduct through discovery upon remand—is required. *See, e.g.*, *Parrish v. Marquis*, 172 S.W.3d 526, 531 (Tenn. 2005) ("In determining whether a specific result was a favorable termination, a court must examine the circumstances of the underlying proceeding.") (cleaned up), *overruled on other grounds by Himmelfarb v. Allain*, 380 S.W.3d 35 (Tenn. 2012); *Sewell*, 1988 WL 112915, at *2 ("the circumstances under which the underlying proceeding were terminated are questions of fact for the jury"); *Collins*, 2020 WL 1814905, at *5 ("the circumstances under which the prior action terminated [is] a question of fact") (citation omitted). Central to this inquiry will be the specific reason why Mr. Mynatt's criminal charges were dismissed. *See, e.g.*, *Sewell*, 1988 WL 112915, at *3 (holding that a plaintiff's case "must stand or fall on his proof that the charges against him were dismissed because of his innocence and not for some other reason"). *Cf. Bowman v. Breeden*, No. CA 1206, 1988 WL 136640, at *2 (Tenn. Ct. App. Dec. 20, 1988) (affirming dismissal of a malicious prosecution claim where there was "no indication the charges were dismissed either because they were unfounded or because victory for the prosecution was otherwise dubious"), *no app. filed*. In particular, upon remand, Mr. Mynatt's malicious prosecution claim will turn on whether his criminal case was dismissed due to his innocence, as Mr. Mynatt's Complaint alleges, *see, e.g.*, R. at 20, ¶ 84, or due, instead, to a deal with the State—something the Defendants repeatedly asserted to the trial court below, *see supra*, at pp. 13–14, but which Mr. Mynatt's Complaint expressly denies, *see* R. at 23, ¶ 100 (alleging that "Plaintiff repeatedly refused all 'deals'"); *id.* at ¶ 101 (emphasizing "Plaintiff's repeated claims

of innocence" and "refusal to plead guilty or resign").

Thus, a case-specific, factual inquiry into the reason why Mr. Mynatt's criminal case was dismissed is essential. "In order to make this determination, the court must examine the circumstances of the underlying proceeding. If the circumstances surrounding dismissal are ambiguous on this point, the determination should be left for trial." *Anderson v. Wal-Mart Stores, Inc.*, No. 1:07-00024, 2008 WL 1994822, at *4 (M.D. Tenn. May 2, 2008) (cleaned up). Thus, following discovery, if the circumstances surrounding dismissal remain unclear, the issue will be one for the jury. *See Lane v. Becker*, 334 S.W.3d 756, 762 (Tenn. Ct. App. 2010) ("If the circumstances surrounding dismissal are ambiguous on this point, the determination should be left for trial.") (cleaned up). *See also Stone v. City of Grand Junction*, 765 F. Supp. 2d 1060, 1078 (W.D. Tenn. 2011) (holding, in case where the parties disputed whether a dismissal had been achieved due to settlement, that: "Considering all the circumstances of the underlying proceeding, the Court is of the opinion that there is sufficient ambiguity to render it appropriate to leave a determination on the favorable termination element in the hands of the jury.") (citation omitted).

To be sure, discovery will usually resolve any ambiguity on the matter. For example, if post-remand discovery were to reveal that Mr. Mynatt's criminal charges were dismissed based on his agreement to pay costs, that fact would preclude his malicious prosecution claim. *See, e.g.*, *Cannon*, 2003 WL 22335087, at *2 ("[T]he disposition of the criminal charge against the Plaintiff on the basis of: 'The charge would be dismissed upon payment of costs by the Defendant' is consistent only

with a dismissal by consent or agreement of the accused because an innocent criminal defendant cannot be taxed with costs. Tenn. Code Ann. § 40-25-101, et seq. The judgment disposing of the underlying criminal charge, we repeat, reflects a basis for dismissal which is not consistent with a finding of innocence but is only consistent with agreement or consent of the accused."). Post-remand discovery evidencing that Mr. Mynatt's criminal charges were dismissed due to double jeopardy would similarly preclude his malicious prosecution claim. *See, e.g.*, *Foshee v. Southern Fin. & Thrift Corp.*, 967 S.W.2d 817, 820 (Tenn. Ct. App. 1997) (finding that the dismissal of an underlying criminal case on double jeopardy grounds was not a favorable termination and thus did not support employee's subsequent suit for malicious prosecution). By contrast, post-remand evidence that Mr. Mynatt's criminal charges were dismissed outright because the district attorney determined that he was innocent—as Mr. Mynatt's Complaint alleges—would vindicate Mr. Mynatt's claim. *See Sewell*, 1988 WL 112915, at *3 (holding that a plaintiff's case "must stand or fall on his proof that the charges against him were dismissed because of his innocence and not for some other reason"); *id.,* at *5 ("The prosecutor's reasons for not proceeding with a criminal prosecution are relevant to the favorable termination issue.").

Ultimately, though, the circumstances surrounding the dismissal of Mr. Mynatt's criminal case present a question of fact that—at this stage in proceedings—Mr. Mynatt has established through the allegations in his Complaint. *See Collins*, 2020 WL 1814905, at *5 ("[T]he circumstances under which the prior action terminated [is] a question of fact.") (citation omitted). And because the allegations in Mr. Mynatt's

Complaint control at this juncture, reversing the trial court's final order and remanding this case for further proceedings and discovery is appropriate.

3. Factual Allegations Supporting Mr. Mynatt's Claim of "Favorable Termination"

On the present factual record, which consists of the allegations in Mr. Mynatt's Complaint alone, the facts are that Mr. Mynatt's criminal case was dismissed outright—and not due to a deal with the State, but, instead, because "the Plaintiff was innocent of any wrongdoing and that this was a politically motivated conspiracy to retaliate against the Plaintiff for exposing governmental waste." *See* R. at 20, ¶ 84. Thus, at this early stage in proceedings, the following three allegations from the Plaintiff's Complaint control the proper outcome of this appeal:

(1) "On November 28, 2016 all charges against Plaintiff were formally dismissed[,]" R. at 23, ¶ 102;

(2) Mr. Mynatt "repeatedly refused all 'deals[,]'" *see id.* at ¶ 100; and

(3) "[t]he criminal prosecution terminated in the favor of the Plaintiff[,]" *id.* at 25, ¶ 110.

This Court must take the above factual allegations as true at this stage in the proceedings. *See Webb*, 346 S.W.3d at 426. As the non-moving party, Mr. Mynatt is also entitled to the benefit of all reasonable inferences regarding his allegations. *See id.* By contrast, what the trial court did—drawing untested and disputed factual inferences in *the Defendants'* favor due to circumstances that the Defendants believed

implied "some sort of conditional agreement"[49] and based on what the trial court surmised, *sua sponte*, occurs "all the time for various reasons" in *other* cases[50]—was reversible error. That error is also particularly glaring given that the Defendants themselves argued only about what retirements "generally" or "usually" entail[51]—rather than claiming that all retirements necessarily involve an agreed resolution with the State, which Mr. Mynatt's Complaint specifically alleges did not happen here.[52]

This Court's opinion in *Sewell v. Par Cable, Inc.*, 1988 WL 112915, is particularly instructive on the matter. There, as here, this Court observed that "[t]he material issue is whether the dismissal of the charges against [the plaintiff]—no matter how it is characterized—is a termination of the criminal proceedings in his favor." *Id*. at *4. In *Sewell,* all parties agreed that the district attorney had agreed to dismiss the plaintiff's criminal charges, but because "[t]he Memorandum of Understanding and the order dismissing the charges [were] neutral on their face[,]" *id.* at *5, the underlying reason *why* the plaintiff's charges had been dismissed was disputed.

For his part, the plaintiff in *Sewell* contended that his criminal charges had been dismissed due to his innocence—a fact that, if true, would permit his malicious prosecution claim to go forward. *Id.* at *3 ("Mr. Sewell's case must stand or fall on his proof that the charges

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[49] *See* Tr. at 5, lines 7–13.
[50] R. at 85.
[51] *See* Tr. at 4, line 25 –5, line 3.
[52] *See* R. at 23, ¶ 100 (alleging that Mr. Mynatt "repeatedly refused all 'deals'").

against him were dismissed because of his innocence and not for some other reason."). By contrast, the defendants in *Sewell* contended that the plaintiff's criminal charges had been dismissed due to the plaintiff's agreement to accept diversion—a fact that, if true, would preclude the plaintiff's malicious prosecution claim. *Id.* at *2. Within this context, the defendants moved for summary judgment based on the "favorable termination" element of the plaintiff's malicious prosecution claim.

Upon review, this Court agreed with the plaintiff that "[t]he prosecutor's reasons for not proceeding with a criminal prosecution are relevant to the favorable termination issue." *Id.* at *5. It also observed that "[p]roof on this issue has been admitted in other malicious prosecution cases." *Id.* (citing *Miller v. Wahl*, 66 S.W.2d 608, 613 (Tenn. Ct. App. 1933); *Miller v. Martin*, 10 Tenn. App. at 151–52). This Court emphasized, however, that in response to a motion for summary judgment, "in order to be considered, [a plaintiff's] proof must be in admissible form[,]" while in *Sewell*, "the statements Mr. Sewell and his attorney attributed to the two assistant district attorneys general [we]re hearsay and [did] not meet the requirements of Tenn. R. Civ. P. 56.05." *Id.* Consequently, given that the plaintiff had not introduced any competent evidence that demonstrated favorable termination *at the summary judgment stage*, the plaintiff's malicious prosecution claim was dismissed. *Id.* at *6.

This case compels the same analysis but a different result, given that the Defendants' Rule 12.02(6) motion to dismiss Mr. Mynatt's Complaint and the *Sewell* defendants' Rule 56 motion for summary judgment are in such different procedural postures. Unlike the plaintiff

in *Sewell*—who was required to produce admissible evidence of favorable termination to avoid summary judgment—in response to a Rule 12 motion, Mr. Mynatt was not required to produce any evidence at all. Instead, Mr. Mynatt was merely required to *allege* favorable termination—an allegation that can be tested through discovery and then challenged at a later stage in proceedings. Here, there is also no doubt that Mr. Mynatt did allege that his criminal prosecution terminated in his favor. *See* R. at 25, ¶ 110 (alleging that: "The criminal prosecution terminated in the favor of the Plaintiff."). Thus, at the current stage of proceedings, Mr. Mynatt's allegation settles the matter.

In fact, Mr. Mynatt's Complaint alleges far more than is necessary to overcome the Defendants' motion to dismiss. As detailed above, dismissed criminal charges can support a malicious prosecution claim in several contexts, *see supra*, at pp. 24–30, and Mr. Mynatt's Complaint specifically alleges that his criminal charges were dismissed. *See* R. at 23, ¶ 102 ("On November 28, 2016 all charges against Plaintiff were formally dismissed."). Further, Mr. Mynatt specifically alleged that his criminal charges were not dismissed due to any settlement with prosecutors. *See id.* at ¶ 100 (alleging that Mr. Mynatt "repeatedly refused all 'deals'"). Further still, Mr. Mynatt alleged that the evidence "showed that the Plaintiff was innocent of any wrongdoing and that this was a politically motivated conspiracy to retaliate against the Plaintiff for exposing governmental waste." *See* R. at 20, ¶ 84.

Taking these allegations as true, and drawing all reasonable inferences regarding them in Mr. Mynatt's favor, Mr. Mynatt's Complaint easily alleges facts that support the favorable termination

element of his malicious prosecution claim. Upon remand, the Defendants will, of course, be entitled to test these allegations and require Mr. Mynatt to produce admissible evidence to support them at the summary judgment stage. At that juncture, "[t]he prosecutor's reasons for not proceeding with [Mr. Mynatt's] criminal prosecution [will be] relevant to the favorable termination issue," *see Sewell*, 1988 WL 112915, at *5, and "[p]roof on this issue [will be] admitted," *id.* (collecting cases). Thus, like the plaintiff in *Sewell*, to overcome a future motion for summary judgment, Mr. Mynatt will be required to come forward with admissible evidence to support his claim of favorable termination at the summary judgment stage, rather than merely alleging it. *See id.*

This case is not before the Court on a motion for summary judgment, however. Instead, it is before the Court on a Rule 12.02(6) motion to dismiss. Thus, given Mr. Mynatt's clear and unambiguous allegations regarding the favorable termination of his criminal proceedings, the liberal standard of review that governs a motion to dismiss is dispositive of this appeal. Consequently, the trial court's Order must be reversed, Mr. Mynatt's malicious prosecution claim must be reinstated, and this case should be remanded for further proceedings.

B. THE TRIAL COURT ERRED IN HOLDING THAT THE INTERMEDIATE RETIREMENT OF A PLAINTIFF'S CRIMINAL CHARGES CATEGORICALLY PRECLUDES A PLAINTIFF FROM MAINTAINING A MALICIOUS PROSECUTION CLAIM.

This Court has previously held that, "[o]bviously, an acquittal suffices" to support the favorable termination element of a malicious prosecution claim. *Id.* at *2. Significantly, though, the trial court's ruling

below conflicts with this Court's "obvious[]" holding on the matter—and several others. Specifically, according to the trial court, *regardless of the ultimate disposition of a criminal case*—whether acquittal, dismissal due to innocence (as in Mr. Mynatt's case), or any other disposition that this Court has previously held will support a malicious prosecution action—if a plaintiff's criminal charges were retired at any time prior to their final disposition, a malicious prosecution claim cannot be sustained. *See* R. at 85 (holding that: "The retirement of criminal charges (even when followed by dismissal after a specified period) does not reflect a determination on the merits. It does not go to guilt or to innocence.").

This holding cannot be correct, and precedent does not support it. If this were the law, each of the many instances in which Tennessee's appellate courts have permitted malicious prosecution claims to go forward following the conclusion of favorably terminated criminal proceedings would require an asterisk. Specifically, every prior holding on the matter would have to be qualified to reflect that it does not apply if a plaintiff's criminal charges were retired at some point prior to their final disposition. This Court would also have to overrule at least one previous case in which it held that a retired criminal charge supported a malicious prosecution claim. *See Joyner*, 1992 WL 204468, at *1–2 ("[W]e are mindful of the Plaintiff's contention that the first warrant was 'reinstated' after the *nolle prosequi* dismissal, **and later retired**. . . . The cause is remanded for disposition of the malicious prosecution charge against Deputy Stoetzel[.]") (emphasis added).

This is not some trivial conflict with existing precedent, either. Retirement is—and is designed to be—an interim, *temporary*, and non-

final disposition. *See, e.g.*, Tenn. Op. Att'y Gen. No. 10-18 (Feb. 19, 2010) ("When a trial court retires a case from the docket, the case is not dismissed and may be subject to further prosecution." (citing *State ex rel. Underwood v. Brown*, 244 S.W.2d 168, 171 (Tenn. 1951) ("When the case is placed on the retired docket, as is frequently done by the courts of this State, in doing so the court in no way says that the case is dismissed or will not be further prosecuted. The case is merely retired until a time when the defendant may be brought into court and properly tried on the then pending indictment."); *State ex rel. Lewis v. State*, 447 S.W.2d 42, 43 (Tenn. Crim. App. 1969) ("Our criminal procedure recognizes the right of a trial judge to retire a case from the docket. . . . We recognize the fact that redocketing the case and requiring the defendant to stand trial on the case which had been retired may result in depriving him of a speedy trial unless the defendant has waived his right to avail himself of that defense."))). *See also* DAVID LOUIS RAYBIN, 10 TENN. PRAC.: CRIM. PRAC. & P. § 22:18.36 (2007) ("Tennessee law recognizes a 'retirement' as a permissible—although somewhat **temporary**—disposition of a charge.") (emphasis added). Thereafter, once redocketed, a retired charge may be followed by an acquittal, or it may be dismissed due to innocence, as in Mr. Mynatt's case. Alternatively, a retired charge may be followed by a conviction. Every possible outcome in between is available as well. For the reasons detailed in the section that follows, though, only a case's *final* disposition has any bearing on whether "the criminal prosecution was terminated in favor of the plaintiff" for purposes of a malicious prosecution claim, *see Cannon*, 2003 WL 22335087, at *1, rendering any interim retirement irrelevant to the inquiry.

C. ONLY THE *FINAL* TERMINATION OF MR. MYNATT'S CRIMINAL PROSECUTION WAS RELEVANT TO WHETHER HIS "CRIMINAL PROSECUTION WAS TERMINATED IN FAVOR OF THE PLAINTIFF."

The Parties do not dispute that whether Mr. Mynatt's "criminal prosecution was terminated in favor of the plaintiff" is an essential element of Mr. Mynatt's malicious prosecution claim.[53] *Id.* They do, however, dispute what "terminated" means in this context.[54] For his part, Mr. Mynatt contends that "terminated" means the *final* outcome of his criminal case—which, as noted repeatedly, was "dismissed[,]" not retired. *See* R. at 23, ¶ 102 ("On November 28, 2016 all charges against Plaintiff were formally dismissed."). By contrast, according to the Defendants, all that matters is that Mr. Mynatt's charges were subject to an interim retirement prior to their ultimate dismissal—something that the Defendants contend precludes Mr. Mynatt's malicious prosecution claim as a matter of law. *See* Tr. at 4, lines 20–23 ("[T]he retirement is the lynchpin of this malicious prosecution claim, and it's where this case starts and ends, defendants would submit.").

The trial court sided with the Defendants on the matter. Specifically, the trial court ruled:

> The retirement of criminal charges (even when followed by dismissal after a specified period) does not reflect a determination on the merits. It does not go to guilt or to innocence. Retirements are entered all the time for various

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[53] *See, e.g.*, Tr. at 3, lines 7–10 (in which the Defendants argue that "to maintain malicious prosecution claim [sic], Mr. Mynatt needs to show that the underlying criminal proceeding was favorably terminated in his favor.").

[54] *See supra*, at pp. 13–14.

> reasons, and it is hardly ever stated in the order of retirement why they are done, but the defendant and the State agree to retire their case.

R. at 85.

For myriad reasons, this ruling was wrong. To begin, "[t]ermination"—defined as "[t]he act of ending something[,]" *see Termination*, BLACK'S LAW DICTIONARY (11th ed. 2019)—is an unambiguous term that carries a precise meaning. For purposes of a malicious prosecution claim, "termination" specifically refers to a case's "***final***[]" disposition. *See, e.g.*, *Roberts*, 842 S.W.2d at 248 (emphasis added). It also determines when the applicable statute of limitations begins to run. *See, e.g.*, *Christian*, 833 S.W.2d at 73 ("A cause of action for malicious prosecution accrues when a malicious suit is ***finally*** terminated in the defendant's favor.") (emphasis added; citation omitted). *See also Anderson*, 2008 WL 1994822, at *6 ("The 'final and favorable' termination requirement has a dual role: it starts the tolling of the statute of limitations and it is an element of the claim itself." (quoting *Christian*, 833 S.W.2d at 73)).

It is similarly clear that the way a case ended—rather than what occurred during some intermediate stage in proceedings—is the only relevant consideration as far as its "termination" is concerned. When civil juries are instructed on the matter, for example, they are told, very simply, that "[t]he plaintiff must prove by a preponderance of evidence [that] . . . [t]he case against the plaintiff ***ended*** in the plaintiff's favor." *See* 8 TENN. PRAC. PATTERN JURY INSTR. T.P.I.-CIVIL 8.21 (2020 ed.) (emphasis added). *See also Parker v. Robertson*, No. 14C4620, 2020 WL

4383982 (Tenn. Cir. Ct. Davidson Cty. Jan. 29, 2020). By contrast, no interim, intermediate, or otherwise non-final disposition of a proceeding comes up anywhere in malicious prosecution jury instructions, *see id.*, because interim, intermediate, or otherwise non-final dispositions are not "final" terminations of a proceeding for purposes of a malicious prosecution claim. *See, e.g.*, *Himmelfarb*, 380 S.W.3d at 40 (noting that a voluntary non-suit of a civil case without prejudice is not a favorable final determination in part because "[t]he case may be refiled subject to the applicable statutes of limitations"); *Sewell*, 1988 WL 112915, at *3 ("An indecisive termination, without more, will not support a malicious prosecution action.").

Given this context, the intermediate retirement of a criminal charge does not reflect—or even affect—its final termination. *See, e.g.*, Tenn. Op. Att'y Gen. No. 10-18 (Feb. 19, 2010) ("When a trial court retires a case from the docket, the case is not dismissed and may be subject to further prosecution." (citing *State ex rel. Underwood*, 244 S.W.2d at 171; *State ex rel. Lewis*, 447 S.W.2d at 43)). It is thus irrelevant in any respect to whether—for malicious prosecution purposes—a "criminal prosecution was terminated in favor of the plaintiff[.]" *Cannon*, 2003 WL 22335087, at *1.

Put differently: following an interim retirement, a criminal defendant's criminal charges may terminate favorably, or they may terminate unfavorably. An interim retirement, however, is not a termination of proceedings at all. As a consequence, an interim retirement is irrelevant to the "final termination" element of a malicious prosecution claim, and the trial court erred by holding otherwise.

D. THE TRIAL COURT ERRED BY ADOPTING THE DEFENDANTS' ARGUMENT THAT THE INTERMEDIATE RETIREMENT OF MR. MYNATT'S CRIMINAL CHARGE PRIOR TO ITS DISMISSAL PRECLUDES HIS MALICIOUS PROSECUTION CLAIM BECAUSE IT IS AKIN TO DIVERSION.

During the proceedings below, the Defendants insisted that the intermediate retirement of Mr. Mynatt's criminal case prior to its dismissal categorically precluded Mr. Mynatt's malicious prosecution claim as a matter of law. *See, e.g.*, Tr. at 4, lines 20–23 ("[T]he retirement is the lynchpin of this malicious prosecution claim, and it's where this case starts and ends, defendants would submit."). As a purported justification for that claim, the Defendants argued that "retirement or some other form of diversion . . . reflects some sort of quid pro quo, some type of compromise that does not reflect innocence, actually." *See id.* at lines 14–17. *See also* R. at 56 (contending that "a retirement is a compromise resolution, not analogous to either a *nolle prosequi* or an acquittal," even though retirement is not a resolution at all, and in any event, Mr. Mynatt's charges were dismissed). The Defendants also asserted repeatedly that "retirement" of an individual's criminal charges is akin to diversion. *See, e.g.*, Tr. at 4, line 25–5, line 3 ("[R]etirements generally are sort of akin to pretrial diversion, maybe without some of the paperwork and some of the statutory requirements. And since that -- usually, they're conditional."). As grounds for this claim, the Defendants relied heavily upon *Anderson v. Wal-Mart Stores, Inc.*, 2008 WL 1994822—a federal district court case—which the Defendants contended "squarely addressed the status of a retirement of charges under Tennessee law" for purposes of a malicious prosecution claim. *See*

R. at 56.

Although the trial court adopted the Defendants' argument on the matter, *see* R. at 83 (adopting the reasoning stated in "the relevant sections of Defendants' Motion"), it is wrong in every conceivable respect.

First, the retirement of a criminal charge is *not* evidence of a plea bargain, a compromise, or a quid pro quo, as the Defendants repeatedly but inaccurately represented. A retirement is nothing more than an intermediate disposition. *See, e.g.*, Tenn. Op. Att'y Gen. No. 10-18 (Feb. 19, 2010) ("When a trial court retires a case from the docket, the case is not dismissed and may be subject to further prosecution." (citing *State ex rel. Underwood*, 244 S.W.2d at 171; *State ex rel. Lewis*, 447 S.W.2d at 43)). Thus, a retirement may be the product of an agreement, or it may not be. *See, e.g.*, TENN. PRAC.: CRIM. PRAC. & PROC. § 22:18 (noting that "the 'absent defendant' is the true purpose of a retirement," and that retirements may also be used to preserve the State's ability to seek conviction of a charge if an accompanying conviction is vacated); *Hutten v. Knight*, 521 F. App'x 417, 419 (6th Cir. 2013) ("Neither is this a case involving some type of agreement, plea deal, or pre-trial diversion. . . . The General Sessions Judge simply retired the charges. Nothing more."). Similarly, a retirement may involve conditions, or it may not. *See* TENN. PRAC.: CRIM. PRAC. & PROC. § 22:18 ("In instances where a case is retired under conditions such as restitution, these conditions should also be stated."). In this case, though—and certainly on the present record—Mr. Mynatt never accepted any deal at all, *see* R. at 23, ¶ 100 (alleging that "Plaintiff repeatedly refused all 'deals'"), and his criminal charges were dismissed outright without one, *see id.* at ¶ 102 ("On November 28, 2016

all charges against Plaintiff were formally dismissed.").

Second, contrary to the Defendants' misapprehension on the matter, a retirement is *not* akin to diversion under Tennessee law—either a judicial diversion or a pretrial diversion—in any material way. Unlike retirement, judicial diversion involves a defendant being *found guilty*. *See Rodriguez v. State*, 437 S.W.3d 450, 455 (Tenn. 2014) ("Tennessee Code Annotated section 40-35-313, commonly referred to as judicial diversion, is 'legislative largess' whereby a 'qualified defendant' enters a guilty or nolo contendere plea or is found guilty of an offense without the entry of a judgment of guilty."). *See also State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999) ("Judicial diversion is legislative largess whereby a defendant adjudicated guilty may, upon successful completion of a diversion program, receive an expungement[.]"). Judicial diversion additionally requires a defendant's agreement. *See Alder v. State*, 108 S.W.3d 263, 268 (Tenn. Crim. App. 2002) ("Furthermore, judicial diversion can only be imposed with the defendant's consent." (citing TENN. CODE ANN. § 40-35-313(a)(1)(A))). So, too, is pre-trial diversion an agreed disposition. *See* TENN. CODE ANN. § 40-15-105(a)(1)(A). Indeed, pre-trial diversion requires "a memorandum of understanding with the prosecution" and monthly "payment of expenses incurred by the agency, department, program, group or association in supervising the defendant" during the diversionary period. *Id.*

By contrast, retirement requires none of these things—no adjudication of guilt, no agreement with the prosecution, and no payment of the State's expenses. As a consequence, no form of diversion is the same—or even similar—to retirement under Tennessee law. Diversion

is also expressly at odds with what Mr. Mynatt's Complaint alleges occurred in his criminal case: that it was dismissed outright[55] because he was "innocent of any wrongdoing,"[56] and that his dismissal was not a product of any agreement with the State, let alone an adjudication of guilt.[57] Thus, equating Mr. Mynatt's interim retirement (or any retirement) with either form of diversion available under Tennessee law—dispositions that are well defined by statute—is patently incorrect.

Third, *Anderson v. Wal-Mart Stores, Inc.*, 2008 WL 1994822—the case that the Defendants insisted not only supported but controlled their theory of retirement-as-diversion under Tennessee law—does not actually stand for the proposition regarding which the Defendants extensively cited it. As even a cursory review of that opinion reveals, it simply is not the case that *Anderson*—a non-precedential ruling anyway—"squarely addressed the status of a retirement of charges under Tennessee law" for purposes of malicious prosecution claims and forbade such claims, as the Defendants wrongly represented.[58]

Instead, *Anderson* is—and it makes clear that it is—a *diversion* case. *See Anderson*, 2008 WL 1994822, at *4 ("The parties have agreed that the charges were 'retired' by the Attorney General, but **it may be more precise to refer to the disposition as a 'diversion.'**") (emphasis added). The plaintiff in *Anderson* even supplied proof of her

[55] R. at 23, ¶ 102 ("On November 28, 2016 all charges against Plaintiff were formally dismissed.").
[56] R. at 20, ¶ 84.
[57] R. at 23, ¶ 100 (alleging that Mr. Mynatt "repeatedly refused all 'deals'").
[58] R. at 56.

diversion date in that case. *Id.* at *4 n.5 ("[T]he Order of Expungement, which, under a box labeled 'Disposition Information,' states: 'Theft (MA)-retired for one year.' In that same box, however, on a line labeled '**Diversion Date (if applicable),' the date '5-11-05' is written.**") (emphasis added). And unlike Mr. Mynatt, who "repeatedly refused all 'deals'" in his criminal proceedings, R. at 23, ¶ 100, pre-trial diversion requires "a memorandum of understanding with the prosecution," TENN. CODE ANN. § 40-15-105(a).

Notably, *Anderson* itself emphasized this critical fact. *See Anderson*, 2008 WL 1994822, at *4 ("In addition, the Pretrial Diversion Act, Tenn. Code Ann. § 40-15-101, *et seq*., provides that a prosecution can be suspended for a maximum of two years **upon the agreement of the defendant and the prosecutor**." (emphasis added) (citing TENN. CODE ANN. §40-15-105(a)(1)(A))). While maintaining that *Anderson* "squarely addressed" Mr. Mynatt's materially different factual circumstances, though, the Defendants curiously did not.[59] This essential difference between retirement and pre-trial diversion also is not merely relevant to this case; as noted above, it is dispositive of this appeal, and it compels reversal as a consequence. *See supra*, at pp. 42–43.

The takeaway is this: Even assuming, for the sake of argument, that a criminal defendant's agreement to accept diversion precludes any subsequent malicious prosecution claim (and there is some authority suggesting otherwise[60]), retirement is fundamentally different from

[59] *See* R. at 56.

[60] *See, e.g.*, *Davis v. Beckham*, 1989 WL 67197, at *1 (Tenn. Ct. App. June 19, 1989) (reversing a jury's verdict in malicious prosecution case due to

diversion under Tennessee law. Retirement is an interim disposition that requires nothing of a criminal defendant and does not terminate proceedings. By contrast, diversion requires either an admission of guilt (judicial diversion) or payment to the State (pre-trial diversion), and in either instance, a defendant must agree to accept it. And while those diversionary outcomes—none of which occurred in this case—likely do preclude a subsequent finding that "the criminal prosecution was terminated in favor of the plaintiff" for purposes of a malicious prosecution claim, given that they necessarily imply guilt, settlement, or both, *see Cannon*, 2003 WL 22335087, at *1, *they did not happen here*. Instead, Mr. Mynatt's Complaint reflects that his criminal case was dismissed outright, *see* R. at 23, ¶ 102 ("On November 28, 2016 all charges against Plaintiff were formally dismissed."), and that that dismissal was not the product of any agreement at all. *See id.* at ¶ 100 (alleging that Mr. Mynatt "repeatedly refused all 'deals'"). As a result, Mr. Mynatt's situation is not analogous in any material respect.

Despite all of this, the trial court dismissed the Plaintiff's Complaint on the basis that there "is no set of facts that Mr. Mynatt could prove that would make the retirement of the criminal charges against

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element of probable cause—rather than due to lack of favorable termination—in case where plaintiff "had successfully completed her probation"), *perm. to app. dismissed* (Tenn. Sept. 11, 1989). *Cf. Stone*, 765 F. Supp. 2d at 1078 (holding that "the Court is of the opinion that there is sufficient ambiguity to render it appropriate to leave a determination on the favorable termination element in the hands of the jury" in case involving a mutual no-contact order printed on the judgment).

him a determination on the merits, which is a necessary element of a malicious prosecution claim."[61] Again, this is error, and for at least three straightforward reasons:

First, the trial court's Order misstates the actual disposition of Mr. Mynatt's case—which was dismissed, not retired. *See id.* at ¶ 102 ("On November 28, 2016 all charges against Plaintiff were formally dismissed.").

Second, a dismissal may absolutely support a malicious prosecution claim when the dismissal is a reflection of innocence, as this Court has previously held. *See Sewell*, 1988 WL 112915, at *3 (holding that a plaintiff's case "must stand or fall on his proof that the charges against him were dismissed because of his innocence and not for some other reason").

Third, contrary to the trial court's conclusion that "no set of facts" could ever enable a retired criminal charge to support a malicious prosecution claim,[62] this Court has already blessed a set of facts in which a retired criminal charge supported a malicious prosecution claim. *See Joyner*, 1992 WL 204468, at *1–2 ("[W]e are mindful of the Plaintiff's contention that the first warrant was 'reinstated' after the nolle prosequi dismissal, and later retired. . . . The cause is remanded for disposition of the malicious prosecution charge against Deputy Stoetzel[.]"). This is hardly surprising, given that retirement of a criminal charge does not—by itself—evidence either an agreement or an admission of guilt. *Cf.*

[61] R. at 86.
[62] *Id.*

Hutten, 521 F. App'x at 419 ("Neither is this a case involving some type of agreement, plea deal, or pre-trial diversion. The General Sessions Judge simply retired the charges. Nothing more. There was no admission of guilt.").

For all of these reasons, Mr. Mynatt's malicious prosecution claim should be reinstated, and the trial court's final order dismissing his malicious prosecution claim must be reversed.

E. THIS COURT SHOULD CLARIFY THAT A PLAINTIFF WHO ASSERTS A MALICIOUS PROSECUTION CLAIM BASED ON CONCLUDED CRIMINAL PROCEEDINGS MUST DEMONSTRATE THAT THE PROSECUTION ENDED "IN A MANNER NOT INCONSISTENT WITH INNOCENCE," RATHER THAN IN A MANNER THAT *DEMONSTRATES* INNOCENCE.

This Court has previously held that "[a] disposition that does not **indicate** the plaintiff's innocence is not considered a favorable termination." *Sewell*, 1988 WL 112915, at *3 (emphasis added). At the same time, however, it has held that: "Obviously, an acquittal suffices." *Id.* at *2. These holdings—which are part of the same case—are in significant tension with one another, because an acquittal actually is not an indication of innocence at all. *Cf. State v. Turner*, No. W2007-00891-CCA-R3-CD, 2010 WL 2516901, at *9 (Tenn. Crim. App. June 22, 2010) ("Evidence of a prior acquittal is not relevant because it does not prove innocence but, rather, indicates that the prior prosecution failed to meet its burden of proving beyond a reasonable doubt at least one element of the crime.") (citations omitted), *aff'd*, 352 S.W.3d 425 (Tenn. 2011).

Although reversal of the trial court's Order is warranted regardless of whether or not this Court provides additional clarity on the matter, it is appropriate for this Court to resolve this lingering dissonance. This

Court should do so by joining the "clear majority of American courts" that have held that "a formal end to a prosecution in a manner **not inconsistent with** a plaintiff's innocence is a favorable termination" for purposes of a malicious prosecution claim. *See Laskar*, 972 F.3d at 1289 (emphasis added). Several of Tennessee's neighboring or near-neighboring states are—and have long been—in accord. *See, e.g.*, *Kroger Co. v. Puckett*, 351 So. 2d 582, 586 (Ala. Civ. App. 1977) ("[T]he rule permitting a malicious prosecution action if there has been a termination of the particular prosecution against the accused is applicable even in situations where the discharge by the magistrate, or withdrawal by the prosecution, would not preclude future criminal proceedings against the accused on the same charge.") (citation omitted); *S. Farmers Ass'n v. Whitfield*, 383 S.W.2d 506, 507 (Ark. 1964) ("[T]he undisputed facts would support a finding by a jury that appellants had abandoned the prosecution and this is a sufficient termination of the action against the accused to form the basis for an action for malicious prosecution."); *Vadner v. Dickerson*, 441 S.E.2d 527, 528 (Ga. Ct. App. 1994) (holding that a dismissal on jurisdictional grounds is prima facie evidence of favorable termination if the prosecutor does not recommence the prosecution); *Dickerson v. Atl. Ref. Co.*, 159 S.E. 446, 449 (N.C. 1931) ("[A] dismissal of a warrant by a justice of the peace at the instance of the prosecutor, without the consent or procurement of the defendant therein, was a sufficient determination of the proceeding to support an action of malicious prosecution based thereon.") (citation omitted); *Westerstorn v. Dunleavy*, 9 Ky. Op. 635, 636 (1877) ("It is essential in an action of this character to allege and prove a trial and acquittal, or at least a discharge

from custody.") (collecting cases); *Vinal v. Core*, 18 W. Va. 1, 2 (1881) ("[T]he plaintiff must have been arrested under a process not absolutely void; and by its being ended is meant, not that the plaintiff had been so discharged, as that no subsequent prosecution for the same alleged crime could ever be instituted, but only that this particular prosecution was ended[.]"), *superseded by statute on other grounds as stated in Norfolk S. Ry. Co. v. Higginbotham*, 721 S.E.2d 541 (W. Va. 2011); *Chapman v. Woods*, 6 Blackf. 504, 506 (Ind. 1843) ("If it be shown that the original prosecution, wherever instituted, is at an end, it will be sufficient."); *Thomas v. De Graffenreid*, 11 S.C.L. 143, 145 (S.C. 1819) ("It is not to be understood, that an action, for a malicious prosecution, will not lie unless the party has been acquitted by a jury on trial. On the contrary, a person may have his action after a bill rejected by the grand jury, or even where no bill has been preferred, if there is a final end of the prosecution and the party discharged.").

Adopting this rule is appropriate for several reasons:

For one, with the sole exception of defendants who are initially convicted but then have their convictions vacated based on proof of actual innocence at a later stage, there is no actual procedural mechanism that enables a criminal defendant to "indicate . . . innocence" in a criminal proceeding. *Sewell*, 1988 WL 112915, at *3. Proving innocence is not the purpose of a criminal proceeding, and no orders are ever issued on the matter. *Cf. State v. Dukes*, No. M2007-01164-CCA-R3-CD, 2008 WL 343163, at *2 (Tenn. Crim. App. Feb. 4, 2008) ("'A court speaks through its orders.'" (quoting *Palmer v. Palmer*, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1977))), *app. denied* (Tenn. May 27, 2008). Instead, absent robust

evidence of *guilt*, innocence is presumed unless a conviction is secured. *See* TENN. CODE ANN. § 39-11-201(b) ("In the absence of the proof required by subsection (a), the innocence of the person is presumed."); *State v. Clark*, 452 S.W.3d 268, 290 (Tenn. 2014) (emphasizing that "[a] defendant is not required to present any proof at all[,]" and noting "the constitutional rules that a criminal defendant is presumed innocent and has no burden to prove innocence"). Thus, criminal proceedings do not afford defendants any mechanism to "indicate . . . innocence[,]" *Sewell*, 1988 WL 112915, at *3—which is presumed unless and until conviction—and a defendant's innocence is required to be *disproven* by the State instead. Consequently, a requirement that innocence be demonstrated affirmatively would invite malicious prosecutions and leave defendants who suffer from them without adequate redress. *See id.; see also* Brief of Nat'l, State, & Local Civil Rights, Racial Justice, & Crim. Defense Orgs. as Amici Curiae in Support of Petitioner, Thompson v. Clark, No. 20–659, (U.S. 2021), https://www.supremecourt.gov/DocketPDF/20/20-659/165353/20210104171945783_20%20659%20amici%20brief.pdf (arguing that, for purposes of § 1983 malicious prosecution claims, "an innocence requirement is inconsistent with the legal foundation and practical reality of our criminal system," and that "an innocence requirement invites constitutional violations in state criminal cases and leaves defendants who suffer those violations without federal recourse").

Furthermore, if it is true that "[o]bviously, an acquittal suffices" for purposes of a malicious prosecution claim, *see Sewell*, 1988 WL 112915, at *2, then all outcomes of criminal proceedings that are even more favorable than an acquittal—for instance, dismissals achieved before

trial—should suffice as well. Few criminal defendants would prefer—or feel a greater sense of vindication by—being brought to trial and then being acquitted than securing an early dismissal and avoiding a trial at all. Consequently, clarifying that dispositions that are properly characterized as being *more* favorable than acquittal may support malicious prosecution claims would not only bring Tennessee in line with the "clear majority of American courts" that have held that "a formal end to a prosecution in a manner not inconsistent with a plaintiff's innocence is a favorable termination" for purposes of malicious prosecution claims, *see Laskar*, 972 F.3d at 1289; it would also comport with extensive, pre-existing Tennessee precedent on the issue, notwithstanding that "Tennessee courts have never fully determined what type of disposition satisfies the favorable termination requirement." *See Sewell*, 1988 WL 112915, at *2; *cf. id.* ("Tennessee courts have also found several dispositions short of an acquittal to be sufficient." (citing *Scheibler*, 167 S.W. at 866–67 (nolle prosequi); *Williams*, 10 Tenn. at 336 (magistrate's dismissal of a warrant); *Tenn. Valley Iron & R.R. v. Greeson*, 1 Tenn. Civ. App. 369, 388–89 (1910) (grand jury's failure to indict); *Townsell v. Louisville & N. R.R.*, 4 Tenn. Civ. App. 211, 214 (1912) (return of a search warrant stating that no stolen property was found); *Miller v. Martin*, 10 Tenn. App. at 151 (district attorney general's decision not to prosecute after determining that the accused was innocent))).

Significantly, clarifying that an outcome "not inconsistent with a plaintiff's innocence" satisfies the favorable termination element of a criminal proceeding-based malicious prosecution claim also would not risk opening the floodgates to such claims, for several reasons.

First, every defendant who is subject to such a malicious prosecution claim is protected by an initial layer of qualified statutory immunity under the Tennessee Anti-SLAPP Act of 1997. *See* TENN. CODE ANN. § 4-21-1003(a) ("Any person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency.").

Second, most civil defendants who are subject to such malicious prosecution claims will be protected, additionally, by the robust protections afforded by the recently-enacted Tennessee Public Participation Act as well, which serves to weed out, deter, and expedite resolution of non-meritorious claims even further. *See* TENN. CODE ANN. § 20-17-101, *et seq.* *See also* Final Order, Vonhartman v. Butterton, No. 20C740, (Tenn. Cir. Ct. Davidson Cty. June 10, 2020) (ordering, in a malicious prosecution case, that "judgment shall be **ENTERED** in favor of the Defendant against the Plaintiff in the amount of twenty-six thousand and five hundred dollars ($26,500.00)—inclusive of all available claims for attorney's fees, discretionary costs, and sanctions" under the Tennessee Public Participation Act).

Third, defendants who are subject to criminal proceeding-based malicious prosecution claims are in many instances protected, even further still, by the conditional public interest and common interest privileges, which function to immunize from liability good-faith reports

to law enforcement. *See, e.g.*, *Pate v. Serv. Merch. Co.*, 959 S.W.2d 569, 576–77 (Tenn. Ct. App. 1996); *McGuffey v. Belmont Weekday Sch.*, No. M2019-01413-COA-R3-CV, 2020 WL 2754896, at *15 (Tenn. Ct. App. May 27, 2020), *app. denied* (Tenn. Sept. 16, 2020).

Fourth, the remaining elements of a malicious prosecution claim are, by design, unusually difficult to satisfy, *see, e.g., Kauffman v. A.H. Robins Co.*, 448 S.W.2d 400, 404 (Tenn. 1969) ("There is a heavy burden of proof on the plaintiff in malicious prosecution actions in establishing malice and lack of probable cause.") (citation omitted), and myriad defenses are available that preclude liability for malicious prosecution in all but the most extreme cases. *See generally* Daniel A. Horwitz, *Defending Against Malicious Prosecution Claims in Tennessee,* TENN. FREE SPEECH BLOG (June 15, 2020), https://tnfreespeech.com/defending-against-malicious-prosecution-claims-in-tennessee/ (detailing many obstacles to malicious prosecution liability in Tennessee, and noting that "defendants who are sued for malicious prosecution have several powerful defenses available to them that often make defending against malicious prosecution claims a simple matter.").

Given these many overlapping protections, it follows that if this Court opts to join the "clear majority of American courts" that have held that "a formal end to a prosecution in a manner not inconsistent with a plaintiff's innocence is a favorable termination" for purposes of a malicious prosecution claim, *see Laskar*, 972 F.3d at 1289, civil defendants would still remain well-positioned to defend against non-meritorious malicious prosecution claims that arise out of terminated criminal proceedings. All that would be lost is the persistent ambiguity

associated with the fact that "Tennessee courts have never fully determined what type of disposition satisfies the favorable termination requirement" to this point. *See Sewell*, 1988 WL 112915, at *2. Consequently, this Court should join the "clear majority of American courts" in holding that "a formal end to a prosecution in a manner not inconsistent with a plaintiff's innocence is a favorable termination" for purposes of a malicious prosecution claim. *See Laskar*, 972 F.3d at 1289.

F. BECAUSE MR. MYNATT'S MALICIOUS PROSECUTION CLAIM WAS ERRONEOUSLY DISMISSED, MR. MYNATT'S CIVIL CONSPIRACY CLAIM MUST SIMILARLY BE REINSTATED.

"[A]n actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff." *Watson's v. McCormick*, 247 S.W.3d 169, 186 (Tenn. Ct. App. 2007) (citation omitted). Thus, a claim of conspiracy is only actionable where there is an underlying predicate tort. *Id.* at 180 ("Civil conspiracy requires an underlying predicate tort allegedly committed pursuant to the conspiracy.") (citations omitted).

The trial court dismissed Mr. Mynatt's civil conspiracy claim strictly because its order dismissing Mr. Mynatt's malicious prosecution claim left Mr. Mynatt without an underlying predicate tort claim.[63]

[63] R. at 86 ("A claim of conspiracy is only actionable where the underlying tort is actionable. . . . Here, because the malicious prosecution fails as a matter of law, the conspiracy claim therefore must be dismissed as well.").

Because Mr. Mynatt's malicious prosecution claim was erroneously dismissed and must now be reinstated, however, *see supra*, at pp. 23–54, the trial court's order dismissing Mr. Mynatt's civil conspiracy claim due to the absence of an underlying predicate tort claim must also be reversed. Accordingly, Mr. Mynatt's civil conspiracy claim should be reinstated as well, and this case should be reversed and remanded for further proceedings.

IX. CONCLUSION

For the foregoing reasons, the trial court's final order should be reversed; the Plaintiff's malicious prosecution and civil conspiracy claims should be reinstated; and this matter should be remanded to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, the relevant sections of this brief contain 11,744 words pursuant to § 3.02(a)(1)(a), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2021, a copy of the foregoing was served via the Court's electronic filing system upon:

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