DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCOTT K. TRAASDAHL, and MARNE TRAASDAHL, husband and wife, Plaintiffs/Appellants, v. LES A. ROMFO and DENISE STEVE, husband and wife; IVAN K. MATHEW and SUSAN T. MATHEW, husband and wife; MATHEW & ASSOCIATES, P.C., an Arizona corporation, Defendants/Appellees.	No. 1 CA-CV 10-0904 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-009892

The Honorable Edward O. Burke, Judge

AFFIRMED

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O R O Z C O, Judge

¶1 Plaintiffs/Appellants Scott and Marne Traasdahl appeal the trial court order entering summary judgment on the Traasdahls' claim for wrongful institution of civil proceedings in favor of Defendants/Appellees Les A. Romfo, Denise Steve, Ivan and Susan Mathew, and Mathew & Associates. Because we find that the underlying litigation was not terminated in favor of the Traasdahls, we affirm the order.

FACTS AND PROCEDURAL HISTORY

¶2 Romfo and Scott Freymuller were principals in a business called Out-in-Back Landscaping Pools Masonry, Inc. (Out-In-Back). Traasdahl, a CPA and a principal in Chaffee Traasdahl CPAS, P.C. (Chaffe Traasdahl), was engaged to provide accounting services to Out-in-Back.

¶3 In January 2006, Romfo sued Freymuller and Out-in-Back, alleging breach of fiduciary duty, breach of contract, fraud, and negligent misrepresentation. Romfo sought an accounting, judicial dissolution of Out-in-Back, and the appointment of a receiver. The complaint alleged that Freymuller was responsible for the accounting for the business and that he failed to maintain accurate records, misappropriated

funds, misrepresented the financial status of the business and refused to provide Romfo access to the books.

¶4 Romfo and his then-wife Denise Steve subsequently filed suit against Scott and Marne Traasdahl and Chaffee Traasdahl. Romfo and Steve alleged that Traasdahl aided and abetted Freymuller in breaching his fiduciary duties to Romfo by: (1) eliminating Romfo as a shareholder in the records of Out-in-Back; (2) concealing bills for Freymuller's personal expenses; (3) assisting Freymuller in concealing the diversion of funds from Out-in-Back to Freymuller; and (4) preparing financial documents so as to create tax liability for Romfo.

¶5 In June 2009, the Traasdahls and Chaffee Traasdahl tendered separate offers of judgment to Romfo and Steve pursuant to Rule 68, Arizona Rules of Civil Procedure. The offers stated that the Traasdahls and Chaffee Traasdahl offered "to allow judgment to be entered against them and in favor of Plaintiff [Romfo and Steve] in the amount of $1 which is inclusive of all damages, taxable costs, interest and attorneys' fees." Romfo and Steve accepted the offers of judgment. On August 10 and August 19, 2009, the court entered separate judgments, each of which stated in part: "[Romfo and Steve] shall have judgment jointly and severally against Defendants Scott Traasdahl, Marne Traasdahl and Chaffee Traasdahl, CPAS, P.C. in the amount of $1.00. This is inclusive of attorneys' fees and costs."

¶6 On March 22, 2010, the Traasdahls filed an action for wrongful institution of civil proceedings (wrongful institution) against Romfo and Steve as well as their attorney in the prior action, Ivan K. Mathew, his wife, Susan T. Mathew, and his firm, Mathew & Associates. The complaint alleged that defendants brought the prior action with malice and without probable cause, and that the prior action was terminated in the Traasdahls' favor.

¶7 Steve and the Mathews defendants filed separate motions for summary judgment, which Romfo joined. The defendants argued that: (1) the judgment entered pursuant to Rule 68 against the Traasdahls was a final adjudication on the merits in favor of Romfo and Steve; (2) the Traasdahls could not demonstrate the required element that the prior litigation was terminated in their favor; and (3) the Rule 68 judgment precluded the Traasdahls from pursuing an action which asserted that the prior lawsuit lacked a proper basis.

¶8 The Traasdahls responded that the underlying case against Scott Traasdahl had no merit and that "every lawyer knows what accepting [a $1 offer of judgment] means." The Traasdahls argued that a determination of who prevailed in a prior action so as to permit a later action for wrongful institution required consideration of the actual facts of the disposition of the prior case rather than simply considering

whether a prior judgment had been entered. The Traasdahls also argued that, by accepting the one-dollar offer of judgment, the defendants had expended more in bringing the prior action than they had recovered and therefore the one-dollar judgment did not establish that defendants had prevailed.

¶9 The trial court rejected the Traasdahls' arguments and granted the motions for summary judgment. Relying on *4501 Northpoint LP v. Maricopa County*, 212 Ariz. 98, 128 P.3d 215 (2006), the court found that the entry of judgment pursuant to Rule 68 against the Traasdahls and in favor of Romfo and Steve was an adjudication on the merits and barred the Traasdahls' action for wrongful institution of civil proceedings.

¶10 The court entered judgment dismissing the case against Romfo, Steve, and the Mathew defendants. The Traasdahls filed a timely notice of appeal. This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.A.1 (2011).[1]

DISCUSSION

¶11 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact

[1] We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). We consider issues of law de novo. *Corbett v. Manorcare of America, Inc.*, 213 Ariz. 618, 623, ¶ 10, 146 P.3d 1027, 1032 (App. 2006).

¶12 To succeed on a claim for wrongful institution, a plaintiff must prove that the defendant instituted a civil action that was: (1) motivated by malice, (2) begun without probable cause, (3) terminated in the plaintiff's favor, and (4) concluded with an award of damages to the plaintiff. *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 416-17, 758 P.2d 1313, 1318-19 (1988). The Traasdahls argue that the trial court erred in concluding that the prior litigation did not terminate in their favor.

¶13 A prior judgment on the merits in favor of the plaintiff after a trial is always a termination in the plaintiff's favor. *Frey v. Stoneman*, 150 Ariz. 106, 110, 722 P.2d 274, 278 (1986). However, when the underlying litigation was not adjudicated on the merits but terminated by settlement, voluntary dismissal or abandonment, the reason for the

termination is inherently ambiguous because a plaintiff could decide to settle or withdraw an action for various reasons. *Id*. at 110-11, 722 P.2d at 278-79. Consequently, a termination that was not on the merits might be favorable depending on the circumstances of the underlying case and the termination. *Id*. at 110, 722 P.2d at 278. In such a case, whether the termination was favorable so as to support a claim for wrongful institution depends on the facts surrounding the termination. *Frey*, 150 Ariz. at 110-11, 722 P.2d at 278-79; *see also Bradshaw*, 157 Ariz. at 419, 758 P.2d at 1321. If the circumstances indicate the innocence or lack of liability of the defendant in the underlying case, the termination may be favorable. *Frey*, 150 Ariz. at 110-11, 722 P.2d at 278-79.

¶14 Relying on *Bradshaw* and *Frey*, the Traasdahls assert that Arizona utilizes a substance-over-form approach to determining whether a wrongful institution plaintiff prevailed in the underlying action. Thus, the Traasdahls contend, the trial court erred in concluding, as a matter of law, that the prior action did not terminate in favor of the Traasdahls, without inquiring into the merits of the action,.

¶15 Regarding the merits of the prior termination, the Traasdahls characterize Romfo's and Steve's acceptance of the Rule 68 offers of judgment as an "abandonment" of the prior action. The Traasdahls argue that a factfinder could conclude

that the acceptance of the one-dollar offers represents a termination in their favor because the lawsuit cost Romfo and Steve more than they obtained from the judgment.

¶16 The Traasdahls misinterpret *Bradshaw* and *Frey*. In *Bradshaw*, Bradshaw was injured in an automobile accident and offered to settle with the other driver's insurer for the policy limits of $100,000. 157 Ariz. at 415, 758 P.2d at 1317. Rather than negotiate with Bradshaw and his wife, the insurer persuaded the widow of its insured to sue the Bradshaws for her husband's death. *Id*. The widow consented, and the insurer filed a complaint in federal district court in the widow's name; the Bradshaws answered and counterclaimed for the injuries Bradshaw sustained. *Id*. After almost two years, the Bradshaws accepted a settlement of $60,000, and the parties signed a stipulation and order for dismissal with prejudice, which was granted by the court. *Id*. A year later, the Bradshaws brought an action for, among other things, malicious prosecution against the insurer in state court. *Id*. at 416, 758 P.2d at 1318. The malicious prosecution claim was tried to a jury, which found in favor of the Bradshaws. *Id*. The insurer appealed. *Id.*

¶17 With regard to whether the prior action had been terminated in favor of the Bradshaws, the Arizona Supreme Court noted that the matter had been concluded by settlement, not judgment, and that settlement could be a favorable termination.

Id. at 419, 758 P.2d at 1321. The court found that the jury could have found that the matter had terminated in the Bradshaws' favor because the insurer withdrew its action, paid the Bradshaws $60,000, and stipulated to dismissal of the wrongful death complaint with prejudice. *Id*.

¶18 In *Frey*, the plaintiff filed a medical malpractice claim against a health plan and a number of physicians. 150 Ariz. at 107, 722 P.2d at 275. Thereafter, plaintiff's attorney filed a motion to dismiss all claims against all defendants, which the court granted. *Id*. at 107-08, 722 P.2d at 275-76. After preparing a formal order of dismissal based on plaintiff's motion to dismiss, defense counsel asked the court to rule on a previously filed motion for summary judgment and submitted a second form of judgment that granted defendants' motion for summary judgment. *Id*. at 108, 722 P.2d at 276. The court granted the first form of judgment, which dismissed all defendants with prejudice, with the parties to bear their own costs. *Id*. Subsequently, the court granted the motion for summary judgment and entered a second judgment in favor of defendants and awarding defendants' costs. *Id*. The defendants later filed an action for malicious prosecution against plaintiff's counsel, which was dismissed on the grounds that there had been no explicit consideration of the merits in the

medical malpractice case and a voluntary dismissal was not a favorable termination. *Id*.

¶19 On appeal, the Arizona Supreme Court concluded that, where there had been no adjudication on the merits, the termination could be favorable depending on the circumstances and merits of the underlying action. *Id*. at 110-11, 722 P.2d at 278-79. The court found issues of material fact remaining regarding the circumstances surrounding the dismissal of the underlying action and remanded the matter for further proceedings. *Id*. at 111-12, 722 P.2d at 279-80.

¶20 Contrary to the Traasdahls' contention, *Bradshaw* and *Frey* do not hold that the trial courts should always inquire into the circumstances of the termination of the underlying action. Instead, those cases involved terminations by voluntary dismissal and settlement and they make clear that the inquiry into the merits of the underlying action was appropriate because the termination did not result from an adjudication on the merits. *Bradshaw*, 157 Ariz. at 419, 758 P.2d at 1321 ("The wrongful death case was concluded by settlement, *rather than judgment*." (emphasis added)); *Frey*, 150 Ariz. at 111, 722 P.2d at 279 ("where there has been *no adjudication on the merits* the existence of a 'favorable termination' of the prior proceeding generally must be found in the substance rather than the form of

prior events and often involves questions of fact" (emphasis added)).

¶21 In this case, in contrast to the situations in *Bradshaw* and *Frey*, the underlying litigation ended in *judgments against* the Traasdahls pursuant to the Rule 68 offers they made to Romfo and Steve. A Rule 68 judgment is considered an adjudication on the merits. *4501 Northpoint LP*, 212 Ariz. at 102, ¶¶ 22-24, 128 P.3d at 219. We decline the Traasdahls' invitation to use *Bradshaw* and *Frey* to go behind an adjudication on the merits against the party later claiming a favorable termination to inquire into the circumstances of the underlying action.

¶22 The Traasdahls argue that *Northpoint* is not applicable because it is not a "wrongful institution" case and did not consider the "favorable termination" standard, but instead addressed the meaning of "prevails by an adjudication on the merits" under A.R.S. § 12-348(B) (2003). The Traasdahls suggest that *Northpoint* is statutory-specific and has little significance to the question of favorable termination.

¶23 In considering the meaning of "adjudication on the merits" under § 12-348, the supreme court in *Northpoint* looked generally to the meaning of the phrase and concluded that the language referred to a final resolution of an action that precludes later relitigation of the claims, regardless of

whether the determination followed a hearing or trial. 212 Ariz. at 101, ¶¶ 15-18, 128 P.3d at 218 ("Outside of the context of § 12–348, courts often describe a judgment as being 'on the merits' if it finally resolves an action in a manner that precludes later relitigation of the claims involved."). The court did not base its conclusion on language specific to the statute.

¶24 More significant was the *Northpoint* court's discussion regarding the nature and effect of a Rule 68 judgment. The court noted that such a judgment constituted a final resolution on the merits of the action. *4501 Northpoint LP*, 212 Ariz. at 201, ¶ 22, 128 P.2d at 219. The court recognized that a Rule 68 judgment did not actually involve any determinations by the court of substantive issues, but nevertheless found the "fact that a Rule 68 judgment is entered as a result of the parties' agreement, [] does not make it any less of an adjudication on the merits." *Id.* at 201, ¶ 23, 128 P.2d at 219.

¶25 The underlying litigation was not dismissed or settled. It was terminated by a judgment entered in accordance with Rule 68 against the Traasdahls based on the Traasdahls' offer "to allow judgment to be entered against them, and in favor of" Romfo and Steve. The Traasdahls made a tactical decision to make the offers pursuant to Rule 68. In doing so, they sought the advantages that would come if Romfo and Steve

rejected the offers and the Traasdahls prevailed, but they also risked possible negative consequences if Romfo and Steve accepted the offers, as they in fact did. The Traasdahls are bound by their offer and the judgment constituting an adjudication on the merits entered against them. *See 4501 Northpoint LP*, 212 Ariz. at 201, ¶ 24, 128 P.2d at 219. Accordingly, the underlying action was not terminated in the Traasdahls' favor, and summary judgment was properly entered against them in their claim for wrongful institution of civil proceedings.

¶26 Romfo, Steve, and the Mathew appellees request an award of attorneys' fees on appeal pursuant to Rule 21, Arizona Rules of Civil Appellate Procedure. Rule 21 is a procedural rule that does not provide a substantive basis for a fee award. *Haynes v. Syntek Fin. Corp.*, 184 Ariz. 332, 341, 909 P.2d 399, 408 (1995). The appellees also cite *Northpoint* in support of their request for attorneys' fees. In *Northpoint* fees were awarded pursuant to A.R.S. § 12-348, which authorizes fee awards against the state, or a city, town, or county; it does not apply here. Because appellees have cited no substantive basis for an award of fees, we deny the request. *See Country Mut. Ins. Co. v. Fonk*, 198 Ariz. 167, 172, ¶ 25, 7 P.3d 973, 978 (App. 2000) (request for fees on appeal will be denied where party fails to state any substantive basis for the request). However,

Appellees are entitled to their costs, upon compliance with ARCAP 21.

CONCLUSION

¶27 For the above stated reasons, the judgment of the superior court is affirmed.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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PHILIP HALL, Judge

/S/
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JOHN C. GEMMILL, Judge