2017 IL App (1st) 161378-U

FOURTH DIVISION
December 14, 2017

Nos. 1-16-1378 and 1-16-1891 (Cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHARLES EDWARD SPICER, Plaintiff-Appellant, v. GAYLE RINALDI SPICER n/k/a GAYLE RINALDI FREY, WILLIAM S. WIGODA, JAKUBS WIGODA LLP, and LAW OFFICES WILLIAM S. WIGODA, LTD., Defendants-Appellees.	)	Appeal from the Circuit Court Cook County. No. 14 L 12652 Honorable Eileen M. Brewer, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly dismissed plaintiff's claim of malicious prosecution for failure to state a cause of action against Wigoda where plaintiff failed to allege malice to overcome the qualified attorney privilege; and (2) the trial court properly dismissed plaintiff's accounting claim against Frey where this court lacks personal jurisdiction over plaintiff as it relates to the child support proceedings.

¶ 2 Plaintiff Charles Edward Spicer filed a complaint alleging claims of malicious prosecution, unjust enrichment, and accounting against his former wife, defendant Gayle Rinaldi

Spicer n/k/a Gayle Rinaldi Frey (Frey), and a claim of malicious prosecution against Frey's former attorney and his law firms, defendants William S. Wigoda, Jakubs Wigoda, LLP, and Law Offices William S. Wigoda, Ltd. (collectively, Wigoda) based on proceedings related to Frey's action seeking a modification of a child support order entered in Louisiana. Both Frey and Wigoda filed motions to dismiss plaintiff's complaint. The trial court granted Frey's motion to dismiss as to the accounting claim with prejudice and denied her motion as to the remaining claims, and the court granted Wigoda's motion to dismiss the malicious prosecution claim without prejudice. Plaintiff subsequently filed an amended complaint and filed a motion to reconsider the dismissal of the accounting claim with prejudice and to allow him to replead. Wigoda filed a motion to dismiss the malicious prosecution count against them in the amended complaint, which the trial court granted. The trial court also denied plaintiff's motion to reconsider its dismissal of the accounting claim against Frey. Plaintiff appealed both orders.

¶ 3 On appeal, plaintiff argues that the trial court erred in (1) dismissing his malicious prosecution claim against Wigoda because he sufficiently stated a claim alleging malice; and (2) dismissing his accounting claim against Frey with prejudice and denying his motion to reconsider and replead because the accounting claim was not controlled by the Louisiana court.

¶ 4 This case arises out of proceedings related to the divorce and subsequent child support orders of plaintiff and Frey. Plaintiff and Frey finalized their divorce in Louisiana in June 2000, which was their residence during the marriage. Frey subsequently moved to Chicago, Illinois, in 2005 with the parties' youngest child, who was a minor at that time. Their two older children were legal adults at that time. The Louisiana district court entered two orders modifying child support and custody in November 2007 and November 2008, with no objection by Frey. The November 2008 order provided for $350 per month in child support for the minor child, as well

as requiring plaintiff to cover the minor child's health, vision, and dental insurance, though the parties were to equally divide all uncovered expenses, including copayments and deductibles.

¶ 5 In May 2009, Frey sought to register the divorce decree and the November 2008 Louisiana child support order with the Circuit Court of Cook County. She then filed a petition to modify the November 2008 order, requesting: (1) an increase in child support for the 17-year-old minor child and for support to continue after she turned 18[1] because the minor was disabled; and (2) contribution to college expenses for the couples' older children. Frey also filed a rule to show cause for a finding of indirect civil contempt based on plaintiff's alleged failure to comply with the November 2008 order requiring him to pay his share of uncovered medical expenses. Plaintiff entered a general appearance and filed a response to the petitions. Plaintiff also testified at a hearing on the petition to modify which was held in November 2009.

¶ 6 On January 5, 2010, Frey filed a motion for entry of order which stated that due to the court's oral rulings following the November hearing, Frey and plaintiff had been working together to prepare a written order. The motion went on to state that Frey could not obtain plaintiff's approval on the final order and requested that the court nevertheless enter her proposed order, as it "represent[ed] this Court's findings and rulings in connection with the November 30, 2009 hearing." Approximately one week later, plaintiff filed a motion in opposition to entry of any order modifying child support on the basis that the court lacked subject matter and personal jurisdiction. Both motions were scheduled to be heard on January 14, 2010.

¶ 7 At the hearing, the court held that because Illinois was the minor child's state of residence, the court had jurisdiction to modify the Louisiana child support order. The court then entered Frey's proposed order, which reflected that certain provisions, including plaintiff's

[1] The minor child turned 18 on February 14, 2010.

income for child support purposes and the need for plaintiff to continue supporting the minor child after she turned 18, were "by agreement." Additionally, the order stated that plaintiff "withdraws any and all defenses to the payments of any and all bills for medical expenses, dental expenses, or vision expenses for [the children] that have been incurred as of the date of this order." On January 21, 2010, the court entered an order denying plaintiff's motion to deny entry of any order modifying child support. The court later denied plaintiff's motion to reconsider, which again raised arguments pertaining to jurisdiction and also challenged the application of Illinois rather than Louisiana law in calculating child support.

¶ 8 In February 2010, Frey and Wigoda sent a notice to withhold income for support to plaintiff's employer. An amended notice was also sent in March 2010. Plaintiff's wages were garnished in accordance with the notice in 2010 and 2011. Plaintiff left this employment and took a position with a new employer. In June 2011, Frey sent a garnishment request to the new employer.

¶ 9 One month after the modified order was entered, Frey filed second and third verified petitions for a rule to show cause for a finding of indirect civil and criminal contempt alleging that plaintiff had not complied with provisions of the January 14 order, including paying child support for the minor child, providing Frey with paycheck stubs, contributing to the older children's college expenses, and contributing to all three children's medical expenses. In September 2010, after holding a hearing, the circuit court found plaintiff in civil and criminal contempt of court and granted Frey's motions for attorney fees and sanctions.

¶ 10 In the meantime, Frey had filed the Illinois modification order in the divorce record in Louisiana. Plaintiff petitioned the Louisiana trial court for a declaratory judgment seeking to have the Illinois judgment vacated for lack of subject matter and personal jurisdiction. In June

2010, the Louisiana district court granted plaintiff's motion and vacated the Illinois order, finding that the Illinois court lacked personal jurisdiction over plaintiff. In March 2011, the Court of Appeal of Louisiana affirmed on a different basis, finding that the Illinois court had personal jurisdiction over plaintiff, but lacked subject matter jurisdiction to modify the November 2008 support order because the parties did not file written consents to Illinois jurisdiction in the Louisiana tribunal, Louisiana had continuing, exclusive jurisdiction of the case. *Spicer v. Spicer*, 62 So.3d 798, 802 (La.Ct.App.2011). Thus, the court concluded that the Illinois order was unenforceable in Louisiana. *Id*.

¶ 11 In October 2010, plaintiff appealed the trial court's orders. Another panel of this court initially dismissed the appeal on Frey's motion, but the Illinois supreme court directed this court to consider the appeal on its merits. In December 2012, the appellate court issued its decision. The panel observed that:

> "under the Uniform Interstate Family Support Act (UIFSA), personal jurisdiction is governed in part by section 201. 750 ILCS 22/201 (West 2010). One of the bases through which an Illinois court can acquire jurisdiction over a nonresident individual is if 'the individual submits to the jurisdiction of this State by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction.' 750 ILCS 22/201(a)(2). It is undisputed that [plaintiff] here both entered a general appearance and filed several responsive pleadings to [Frey's] motion. However, this alone is insufficient to establish personal jurisdiction, as section 201 goes

> on to state: '[t]he bases of personal jurisdiction set forth in subsection (a) or in any other law of this State may not be used to acquire personal jurisdiction for a tribunal of this State to modify a child support order of another state *unless the requirements of Section 611 or 615 are met*.' 750 ILCS 22/201(b) see also *In re Marriage of Vailas*, 406 Ill. App. 3d 32, 41 (2010) (personal jurisdiction under UIFSA requires compliance with both section 201 and section 611)." (Emphasis in original.) *Spicer v. Spicer*, 2012 IL App (1st) 103261-U, ¶ 13.

¶ 12 The panel concluded that the circuit court had subject matter jurisdiction, but lacked personal jurisdiction under section 611 of the UIFSA because the statute's requirement of written consent was neither satisfied nor waived. *Id.* ¶ 19. The court further declined to consider any errors regarding the substance of the circuit court's order. *Id.*

¶ 13 In December 2014, plaintiff filed his complaint against Frey and Wigoda, alleging malicious prosecution, unjust enrichment, and accounting against Frey, and a single count of malicious prosecution against Wigoda. In March 2015, Frey filed a motion to dismiss all three counts of the complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615, 2-619 (West 2014). Wigoda also filed motions to dismiss the malicious prosecution count pursuant to section 2-615 of the Code. All motions were fully briefed. In June 2015, the trial court granted Wigoda's motion to dismiss the malicious prosecution count against Wigoda without prejudice, finding that plaintiff had failed to allege malice. Additionally, the trial court denied Frey's motion to dismiss the counts for malicious prosecution and unjust enrichment, but dismissed the accounting claim with prejudice.

¶ 14 In July 2015, plaintiff filed a motion reconsider the dismissal of his accounting claim against Frey. Plaintiff filed his amended complaint in August 2015, reasserting all four counts, though the accounting claim was a proposed amended count pending his motion to reconsider. In August 2015, the trial court struck plaintiff's motion to reconsider, but the court later granted plaintiff leave to file a corrected motion. In September 2015, Wigoda filed a motion to dismiss the amended complaint's count of malicious prosecution against the Wigoda defendants. All motions were fully briefed.

¶ 15 In January 2016, the trial court denied plaintiff's motion to reconsider dismissal of accounting claim with prejudice. In April 2016, the trial court granted Wigoda's motion to dismiss the amended complaint, malicious prosecution count, with prejudice. The court included a finding under Supreme Court Rule 304(a) that there was no just reason to delay enforcement or appeal, and stayed the remaining litigation. See Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). In May 2016, plaintiff filed a motion requesting a Rule 304(a) finding with respect to the dismissal of the accounting claim against Frey. In June 2016, the trial court granted plaintiff's request, finding that as to its June 2015 and January 2016 orders, there was no just reason to delay enforcement or appeal of those orders. See Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016).

¶ 16 This appeal followed. In appeal number 1-16-1378, plaintiff appealed the dismissal with prejudice of the malicious prosecution count against Wigoda and was timely filed on May 19, 2016. In appeal number 1-16-1891, plaintiff appealed the dismissal of his accounting claim against Frey and was timely filed on July 6, 2016.

¶ 17 First, we consider plaintiff's argument that the trial court erred in dismissing his malicious prosecution claim against Wigoda. Specifically, plaintiff asserts that he sufficiently pled malice and that this court should not recognize the qualified attorney privilege.

¶ 18 "A section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2002)) challenges the legal sufficiency of a complaint based on defects apparent on its face." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). We review a trial court's dismissal of a complaint under section 2-615 of the Code *de novo*. *Id.* "In ruling on a section 2-615 motion to dismiss, a reviewing court must examine the allegations of the complaint in the light most favorable to the plaintiff and accept as true all the well-pleaded facts and reasonable inferences therefrom." *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10. "If the facts are insufficient to state a cause of action upon which relief may be granted then dismissal pursuant to section 2-615 is appropriate." *Id.* Where the existence of an attorney litigation privilege appears on the face of the complaint and do not require any consideration beyond the allegations of the complaint, a section 2-615 motion to dismiss is appropriate. *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 20.

¶ 19 Illinois is a fact-pleading jurisdiction, and while plaintiff is not required to set forth evidence in the complaint, he must allege facts sufficient to bring a claim within a legally recognized cause of action, not simply conclusions. *Marshall*, 222 Ill. 2d at 429-30. Further, "this court reviews the judgment, not the reasoning, of the trial court, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24 (citing *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995)).

¶ 20 "Actions for malicious prosecution of a civil proceeding are not favored in Illinois on the ground that courts should be open to litigants for resolution of their rights without fear of prosecution for calling upon the courts to determine such rights." *Keefe v. Aluminum Co. of America*, 166 Ill. App. 3d 316, 317 (1988). "A malicious prosecution action is brought to recover

damages suffered by one against whom a suit has been filed maliciously and without probable cause." *Miller v. Rosenberg*, 196 Ill. 2d 50, 58 (2001). "To state a claim for malicious prosecution, a plaintiff must prove five elements: '(1) the commencement or continuation of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice on the part of defendant; and (5) damages resulting to the plaintiff. *Turner v. City of Chicago*, 91 Ill. App. 3d 931, 934 (1980).' " (Emphasis omitted.) *Johnson v. Target Stores, Inc.*, 341 Ill. App. 3d 56, 72 (2003), quoting *Illinois Nurses Association v. Board of Trustees of the University of Illinois*, 318 Ill. App. 3d 519, 533-34 (2000). If one of these elements is lacking, a plaintiff is barred from pursuing the claim of malicious prosecution. *Swick v. Liautaud*, 169 Ill. 2d 504, 512 (1996).

¶ 21 Here, the trial court found that plaintiff had failed to sufficiently plead malice by Wigoda in the circuit court action brought by Frey to modify the child support orders entered in Louisiana. Specifically, the court held that plaintiff had failed to "overcome the qualified privilege argument *** where they claim to be acting in support of their client's interest irrespective if they made a mistake of law absent allegations of malice." The court allowed plaintiff to file an amended claim of malicious prosecution against Wigoda, but following Wigoda's motion to dismiss, the court dismissed the claim with prejudice in April 2016. The court again concluded that plaintiff failed to plead malice independent of Wigoda's desire to protect its client.

¶ 22 "Malice has been defined as being actuated by improper and indirect motives." *Hulcher v. Archer Daniels Midland Co.*, 88 Ill. App. 3d 1, 5 (1980). "A legally sufficient complaint must set forth factual allegations from which actual malice may reasonably be said to exist as opposed

to the bare assertion of actual malice." *Salaymeh v. InterQual, Inc.*, 155 Ill. App. 3d 1040, 1046 (1987).

¶ 23 Moreover, " '[p]ublic policy requires that an attorney, when acting in his professional capacity, be free to advise his client without fear of personal liability to third persons if the advice later proves to be incorrect.' " *Farwell v. Senior Services Associates, Inc.*, 2012 IL App (2d) 110669, ¶ 23 (quoting *Schott v. Glover*, 109 Ill. App. 3d 230, 235 (1982)). See also *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1052 (1998); *Salaymeh*, 155 Ill. App. 3d at 1046. We note that while *Schott*, *Salaymeh*, and *Cuculich* involved claims of tortious interference alleged against attorneys, the malice requirement remains the same under the cause of action of tortious interference and malicious prosecution, and thus, these cases are relevant to the analysis of plaintiff's allegations against Wigoda in the instant case.

¶ 24 "While this privilege is not absolute, a plaintiff carries the burden to overcome the privilege by pleading malice, meaning that the attorney intended to harm, which is independent of and unrelated to his desire to protect his client." *Farwell*, 2012 IL App (2d) 110669, ¶ 23.

> "Although incorrect advice as to a client's contractual obligations might cause that client to become liable to a third party in contract, it does not follow that the attorney would also be liable to that party. To impose such liability on an attorney would have the undesirable effect of creating a duty to third parties which would take precedence over an attorney's fiduciary duty to his client. Public policy requires that an attorney, when acting in his professional capacity, be free to advise his client without fear of

> personal liability to third persons if the advice later proves to be incorrect." *Schott*, 109 Ill. App. 3d at 234-35.

¶ 25 In his amended malicious prosecution claim against Wigoda, plaintiff alleges malice by Wigoda based on (1) allegedly improper legal advice given to Frey that the child support action could be filed in Illinois and modified on her motion; (2) the Illinois action was an "improper attempt to circumvent" the Louisiana order of November 2008, and obtain fees to which it was not entitled and compel plaintiff to pay a portion of such fees; (3) Wigoda's acts of sending a March 2010 letter to plaintiff's employer to garnish plaintiff's wages for child support; (4) Wigoda continued to pursue the action and sent a letter to garnish plaintiff's wages to his new employer and filed petitions for civil and criminal contempt against plaintiff in the Illinois circuit court after the Louisiana district court held that Illinois lacked personal jurisdiction and the support obligations had terminated under Louisiana law; and (5) continued to seek to garnish plaintiff's wages after the Louisiana Court of Appeal issued its decision.

¶ 26 We are unpersuaded by plaintiff's argument that the qualified attorney privilege has not been recognized in this court, since it is contrary to the above cited case law which supports such a privilege. Moreover, the cases relied on by plaintiff fail to support plaintiff's argument. First, the decision in *Berlin v. Nathan*, 64 Ill. App. 3d 940, 948-49 (1978), predated the authority setting forth the qualified attorney privilege. In that case, the plaintiff was a physician who treated one of the defendants. The patient and her husband filed an action against the plaintiff alleging medical malpractice. While that action was still pending, plaintiff filed his suit against the patients and her husband as well as their attorneys in the malpractice action. The plaintiff never made a direct allegation of malicious prosecution, but instead asserted that the defendants brought the malpractice action willfully and wantonly and without probable cause. The plaintiff

further alleged that the defendant attorneys had a duty not to file the malpractice action without reasonable evidence to support their allegations. The case proceeded to a jury trial, and the jury was not instructed as to malicious prosecution. The jury found in favor of plaintiff. *Id*. at 943-45.

¶ 27 On appeal, the reviewing court reversed the jury verdict, finding that the plaintiff never pled all the elements for malicious prosecution, specifically he did not allege that the prior litigation terminated in his favor as it was ongoing when his complaint was filed, nor did he allege special damages. *Id.* at 945-46. The reviewing court recognized that malicious prosecution may be alleged against attorneys, but the plaintiff had not alleged malicious prosecution against the attorneys in that case, which the court observed that the plaintiff had not argued on appeal. Rather, the plaintiff was seeking relief based on his allegation that the malpractice action was frivolous and brought willfully and wantonly. *Id*. at 949-50.

¶ 28 Nevertheless, *Berlin* recognized the significant burden required to plead malice against an attorney.

> "If an attorney, acknowledging there is no cause of action, and knowing this dishonestly and for some improper purpose files suit, or even if an attorney merely acts knowing that his client has no just claim and that his client is actuated by illegal or malicious motives, the attorney may be held liable for malicious prosecution." *Id*. at 948 (citing *Burnap v. Marsh*, 13 Ill. 535 (1852)).

¶ 29 The *Berlin* court concluded that neither willful and wanton conduct, nor the filing of a frivolous lawsuit, amounted to malice. *Id.* at 948-49, 951-52.

¶ 30 Plaintiff also relied on the First Division's decision in *Grundhoefer v. Sorin*, 2014 IL App (1st) 131276, but that case is not germane to plaintiff's argument. In that case, the malicious prosecution count was not alleged against an attorney. *Id.* ¶ 7. Further, malice was not one of the elements of malicious prosecution contested on appeal, rather the reviewing court considered the absence of probable cause and special damages. *Id.* ¶ 12. This case does not support plaintiff's claim.

¶ 31 Turning to the malice allegations in the amended complaint, plaintiff's allegations of malice can be grouped into two general claims: (1) Wigoda improperly advised Frey to file her petition for modification in Illinois without obtaining jurisdiction, and (2) Wigoda's actions in seeking to enforce orders to garnish plaintiff's wages.

¶ 32 As to the first general allegation, plaintiff alleged that Wigoda acted with malice by advising Frey that she could obtain a modification of the Louisiana stipulated judgment for child support in Illinois in order to "circumvent" the Louisiana judgment and to obtain attorney fees to which it was not entitled. In his brief on appeal, plaintiff contends that this action was done by Wigoda "knowing that there was never any basis for the exercise of jurisdiction by the Illinois Circuit Court." Plaintiff has made broad conclusions of malice by Wigoda, but has failed to allege any facts establishing the malice claimed was directed at plaintiff. Rather, the actions alleged in the complaint were taken to serve their client, Frey. As we previously stated, plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action, not simply conclusions. *Marshall*, 222 Ill. 2d at 429-30. Any allegation that Wigoda gave Frey improper legal advice, even if the legal advice was incorrect, which we do not reach, does not support malice directed toward plaintiff who was not their client.

¶ 33 Moreover, plaintiff cannot plead any facts to support his claim that Wigoda knew that Illinois lacked personal jurisdiction over him in the child support proceedings. Personal jurisdiction under the UIFSA is determined by section 201. See 750 ILCS 22/201 (West 2010). Section 201(a) governs personal jurisdiction in Illinois over a nonresident to establish support, enforce an existing support order, or to determine parentage. 750 ILCS 22/201(a) (West 2010). Section 201(b), however, provides that the bases set forth in section 201(a) cannot be used to obtain personal jurisdiction over a nonresident to modify an existing support order unless the requirements of sections 611 or 615 have been met. 750 ILCS 22/201(b) (West 2010). Section 615 details jurisdiction to modify child support orders entered in a foreign country (750 ILCS 22/615 (West 2010)), and accordingly, is not applicable to the present case.

¶ 34 Personal jurisdiction under section 611 can be obtained in two ways. Under section 611(a)(1), personal jurisdiction exists in Illinois to modify a foreign state's order if "(A) neither the child, nor the petitioner who is an individual, nor the respondent resides in the issuing state; (B) a petitioner who is a nonresident of this State seeks modification; and (C) the respondent is subject to the personal jurisdiction of the tribunal of this State." 750 ILCS 22/611(a)(1) (West 2010). The second method under section 611(a)(2) provides "this State is the State of residence of the child, or a party who is an individual is subject to the personal jurisdiction of the tribunal of this State and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this State to modify the support order and assume continuing, exclusive jurisdiction." 750 ILCS 22/611(a)(2) (West 2010). Since respondent was a resident of Louisiana at all times during the child support proceedings, personal jurisdiction was governed by section 611(a)(2).

¶ 35 It was not until the decision in *In re the Marriage of Vailas*, 406 Ill. App. 3d 32 (2010), that an Illinois court considered jurisdiction under the UIFSA. In that case, the reviewing court considered as a matter of first impression the compliance with UIFSA to obtain jurisdiction in Illinois, finding that a petitioner must comply with both section 201(b) (750 ILCS 22/201(b) (West 2010)) and section 611 (750 ILCS 22/611 (West 2010)) of the UIFSA to obtain modification in Illinois of another state's order for child support. *Id.* at 35-37. Plaintiff contends that Wigoda's action in continuing to prosecute the action after the *Vailas* decision in was issued shows malice. However, the *Vailas* decision was filed on November 16, 2010, after the notice of appeal had been filed in this case and thus, plaintiff's contention in this respect cannot support malice. In the circuit court case, Frey had already received the child support modification relief prior to the issuance of the *Vailas* opinion. It was only on appeal that the panel in *Spicer*, following the reasoning in *Vailas*, concluded that Illinois lacked personal jurisdiction.

¶ 36 We further point out that plaintiff's personal jurisdiction challenge did not arise until six months into the proceedings. Plaintiff filed his general appearance in July 2009, and participated in the proceedings for several months without raising a challenge to jurisdiction. In January 2010, after the hearing on Frey's petition to modify the support, plaintiff first raised a challenge to jurisdiction. The circuit court conducted a hearing on plaintiff's objection to jurisdiction, and found that section 611 had been satisfied and subsequently denied plaintiff's motion to reconsider. The circuit court then modified the child support order. We note that section 611(e) provides that, "On issuance of an order by a tribunal of this State modifying a child-support order issued in another state, the tribunal of this State becomes the tribunal having continuing, exclusive jurisdiction." 750 ILCS 55/611(e) (West 2010). Plaintiff thus has not pled facts to show how Wigoda knew Illinois lacked personal jurisdiction under section 611(a)(2) in light of

the circuit court's ruling and subsequent modification. While the circuit court was later reversed by the appellate court and the orders vacated, plaintiff has failed to cite any authority that an unsuccessful legal position in a pleading amounts to malice. Instead, plaintiff's own cited authority belies this claim.

¶ 37 In *Berlin*, the reviewing court quoted from the decision of the Court of Appeal of Louisiana, Fourth Circuit in its analysis.

> " 'There are no factual allegations to suggest that when defendant filed his client's suit he knew the allegations were false or that he had a reckless disregard as to whether the allegations were false or not. On the contrary, plaintiff's allegations are to the effect that defendant simply did not know enough about the case at the time he filed it and now in retrospect plaintiff would say this was malice on defendant's part. If that be so many a successful lawsuit would never have been or never would be filed because oftentimes the case comes to the attorney just prior to prescription date and the evidence is not discovered and developed until after the suit is filed. We therefore conclude that the allegation of 'frivolously filing suits' cannot be construed as an allegation of malice.
>
> Finally, there is the allegation that defendant failed to obtain 'competent medical advice,' etc. Does this constitute an allegation of malice? It would seem that an affirmative answer to this query would mean that before the attorney brings a malpractice case to trial he must find a medical person who

> supports the attorney's theory or that of his client, who is willing to testify favorably and who is 'competent' by someone's (plaintiff's?) standards. If he finds no such person but he nevertheless, places whatever evidence he can before the court perhaps relying on circumstantial evidence, reasonable inferences and common sense and perhaps realizing that he will probably lose, he runs the risk of having his conduct branded as malicious. When the bald allegation in question is considered in this light it can hardly be construed as one alleging malice. At worst, the allegation is that defendant went to trial with a poor case and got his just desserts, to wit, he lost. If that constitutes malice, the courtrooms are full of malicious attorneys. This we cannot accept.' " *Berlin*, 64 Ill. App. 3d at 948-49 (quoting *Spencer v. Burglass*, 337 So. 2d 596, 599, 600 (La. Ct. App. 1976)).

¶ 38 Moreover, plaintiff's contention that Wigoda was attempting to "circumvent" the Louisiana stipulated judgment by seeking relief not available under Louisiana law is without merit. Louisiana courts have granted child support after age 18 for a disabled child, as was the circumstances in the instant case. See *Hester v. Hester*, 874 So. 2d 859, 862 (La. App. 4th Cir. 2004) (where the Court of Appeal upheld a reduction in support for mentally disabled child over 19 years old under Article 229 of the Louisiana Civil Code (La. C.C. Art. 229)). Further, Article 230(B)(2) of the Louisiana Civil Code, in effect at the time of the proceedings, allowed for support for education of a disabled child until the age of 22. La. C.C. Art. 230(B)(2). Additionally, in *Gray v. Gray*, 862 So. 2d 1097, 1099 (La. App. 2nd Cir. 2003), the Court of

Appeal of Louisiana enforced a stipulated judgment which included a provision for college expenses for the children after reaching the age of majority. Such a provision for college expenses for the adult children was included in the stipulated judgment.

¶ 39 Plaintiff also makes several allegations regarding Wigoda's earning of fees in connection with the circuit court case, but fails to offer any factual support that such fees were earned in a direct action aimed at plaintiff. Plaintiff spends time discussing whether Wigoda would have been able to earn fees in Louisiana as counsel had not been admitted in Louisiana, and even if counsel was granted leave to appear in Louisiana, Wigoda would not have been awarded attorney fees. These allegations have minimal connection to any act of malice. Moreover, court orders requiring plaintiff to pay a portion of Wigoda's fees generated in the circuit court action benefited Frey, not Wigoda, as it reduced its client's financial burden. Additionally, attorney fees generated in the order course of litigation do not constitute malice. See *In re Estate of Albergo*, 275 Ill. App. 3d 439, 448 (1995) ("[I]t is immaterial whether an actor who is protected by a conditional privilege to give honest advice also profits by the advice. (Restatement (Second) of Torts § 772, Comment C, at 50-51 (1979)."). Further, the award of attorney fees was entered in a ruling on Frey's petition for a rule to show cause for a finding of civil contempt due to plaintiff's failure to pay past-due amounts from the Louisiana stipulated judgment. Such an award of attorney fees may have been possible in Louisiana. See *Bickham v. Bickham*, 849 So. 2d 7070, 711-12 (La. App. 1st Cir. 2003) (affirming an award of attorney fees for past due amounts of child support under La. R.S. 9:375).

¶ 40 We also point out that plaintiff's malice allegations are based in part on an anachronistic timeline in that he alleged Wigoda acted with malice by maintaining the circuit court case after the Court of Appeal of Louisiana issued its decision. However, we point out that the Louisiana

Court of Appeal decision was issued in March 2011 after plaintiff appealed the child support orders to this court in October 2010.

¶ 41 Additionally, we find plaintiff's allegations relating to the garnishment of his wages fail to establish any malice because such actions were taken in accordance with a required statute. Section 20 of the Income Withholding Support Act requires a letter be sent to the employer of any individual ordered to pay child support unless an agreement has been reached by the parties. See 750 ILCS 28/20(a)(1) (West 2010). Wigoda's actions in accordance with Illinois statutory authority do not support a claim of malice toward plaintiff.

¶ 42 Accordingly, plaintiff has not set forth any factual allegations suggesting actual malice by Wigoda directed toward him. None of these allegations state a claim of malice by an attorney toward plaintiff, a third party. Thus, plaintiff has not pled the required malice element for a claim of malicious prosecution.

¶ 43 Alternatively, plaintiff has also failed to allege any facts showing he suffered a special damage or injury as a result of the circuit court proceeding. "Special injury has been defined as ' "injury not necessarily resulting in any and all suits prosecuted to recover for like causes of action." ' " *Independence Plus, Inc. v. Walter*, 2012 IL App (1st) 111877, ¶ 18 (quoting *Doyle v. Shlensky*, 120 Ill. App. 3d 807, 817 (1983), quoting *Schwartz v. Schwartz*, 366 Ill. 247, 250 (1937)). "The long-standing rule is that without the arrest of a person or the seizure of a person's property or some other special injury, a cause of action for malicious prosecution will not lie." *Reed v. Doctor's Associates, Inc.*, 355 Ill. App. 3d 865, 874 (2005) (citing *Cult Awareness Network v. Church of Scientology International*, 177 Ill. 2d 267, 280 (1997); *Smith v. Michigan Buggy Co.*, 175 Ill. 619 (1898)). "Thus, the ordinary trouble and expense which arise from '*ordinary forms of legal controversy*, should be endured by the law-abiding citizen as one of the

inevitable burdens, which [individuals] must sustain under civil government.' " (Emphasis in original.) *Cult Awareness*, 177 Ill. 2d at 281 (quoting *Smith*, 175 Ill. at 629). "However, the societal interest in permitting the honest assertion of rights in our court rooms must be balanced against the societal interest in preventing harassment through lawsuits." *Independence Plus*, 2012 IL App (1st) 111877, ¶ 19 (citing *Cult Awareness*, 177 Ill. 2d at 284).

¶ 44 With this requirement for the plaintiff to show a special injury or damages beyond the usual costs of litigation, we turn to plaintiff's amended claim of malicious prosecution. Plaintiff alleges that he has sustained the following special damages.

> "In addition to incurring legal fees and costs exceeding $160,000, humiliation, mental anguish and suffering resulting from the malicious prosecution by [Wigoda] of Frey's action before the Illinois Circuit Court, [plaintiff] has suffered the seizure of his property in the form of the garnishment of his wages. [Plaintiff] also suffered a significant loss of income and other employment related benefits as a consequence of having to quit his job *** and to take a [new job], in order to stop the continued wrongful garnishment of his *** wages."

¶ 45 None of these allegations amount to the special damages required to state a cause of action for malicious prosecution. First, legal fees and costs are considered ordinary costs involved in litigation and do not amount to special damages. See *Cult Awareness*, 177 Ill. 2d at 281. Next, "it is well established that injury to one's reputation 'is an unfortunate consequence of most litigation and does not constitute a special loss.' " *Independence Plus*, 2012 IL App (1st) 111877, ¶ 25 (quoting *Doyle*, 120 Ill. App. 3d at 817). Therefore, plaintiff's claims of

"humiliation, mental anguish and suffering" also fail to support a claim of special damages. Finally, plaintiff contends that he suffered the seizure of property as a result of the garnishment of his wages for child support and that he lost income when he changed jobs to avoid the wage garnishment. However, as we have already discussed, the garnishment of plaintiff's wages was required under section 20(a)(1) of the Income Withholding Support Act (750 ILCS 28/20(a)(1) (West 2010)), and accordingly, the garnishment was an ordinary cost of litigation relating to child support. Further, plaintiff's claim of lost income was the result of his own actions in an attempt to avoid the legally required garnishment of his wages and cannot support an allegation of special damages. Since plaintiff has failed to allege any damage or injury beyond the ordinary costs of litigation, including compliance with statutory requirements, plaintiff cannot establish the element of special damages necessary for a claim of malicious prosecution.

¶ 46 Additionally, because we have found that plaintiff failed to state facts to establish two required elements for malicious prosecution, we need not reach the question of whether plaintiff sufficiently pled a lack of probable cause or a favorable termination in his favor even though an argument could be made that plaintiff's complaint fails to set forth sufficient facts to support these elements as well.

¶ 47 Since plaintiff has failed to allege both sufficient malice toward plaintiff by Wigoda beyond its actions in the interest of its client and the claim of special damages, Frey, plaintiff's claim of malicious prosecution cannot stand. Accordingly, the trial court properly dismissed the malicious prosecution claim against Wigoda for failure to state a cause of action.

¶ 48 Next, plaintiff argues that the trial court erred in dismissing his accounting claim against Frey with prejudice without allowing him an opportunity to amend the claim. Frey maintains that

the trial court properly dismissed the claim because the basis for the accounting occurred in the child support proceedings, not the instant action.

¶ 49 A motion to dismiss, pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)), admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Section 2-619 motions present a question of law, which this court reviews *de novo*. *Id.* "The decision to grant a motion to amend pleadings is within the discretion of the circuit court, and a reviewing court will not reverse the circuit court's decision absent an abuse of discretion." *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 69.

¶ 50 " 'An accounting is a statement of receipts and disbursements' to and from a particular source." *Devyn Corp. v. City of Bloomington*, 2015 IL App (4th) 140819, ¶ 71 (quoting *Polikoff v. Levy*, 132 Ill. App. 2d 492, 499 (1971)). "To sustain an action for an equitable accounting, the plaintiff must show 'the absence of an adequate remedy at law and one of the following: (1) a breach of a fiduciary relationship between the parties; (2) a need for discovery; (3) fraud; or (4) the existence of mutual accounts which are of a complex nature.' " *Id*. (quoting *People ex rel. Hartigan v. Candy Club*, 149 Ill. App. 3d 498, 500-01 (1986)).

¶ 51 Plaintiff's accounting claim alleges that between November 8, 2008 and February 14, 2010, the minor child's 18th birthday, he paid to Frey and to health care providers sums in excess of the $32,000, based on Frey's claims and demands that plaintiff "was obligated to pay those amounts in connection with" the minor child's medical expenses. Under the November 14, 2008 stipulated judgment from the Louisiana district court, plaintiff and Frey were to " 'equally divide' " " 'all uncovered medical, dental and vision expenses, including all co-payments and deductible amounts.' " On information and belief, the minor's medical expenses under that time

period were covered under insurance policies maintained by plaintiff as well as Frey and her husband. Plaintiff contended that he was not provided information from Frey and her husband's insurers setting forth the amounts covered under the policies which would allow plaintiff to determine what expenses were covered and how much plaintiff was required to pay.

¶ 52 Plaintiff further alleged that

> "the accounts between Frey and [plaintiff] are complicated and discovery is required in order to determine whether [plaintiff] paid in excess of the amounts he was required to pay under the terms of the November 14, 2008 Stipulated Judgment and whether Frey has been unjustly enriched as a consequence."

¶ 53 Plaintiff claimed he had "no adequate remedy at law with respect to any overpayment" of the minor's medical expenses and asked the trial court to order Frey to provide an accounting of all amounts paid under any policy of insurance maintained by her or her husband toward medical expenses for the minor child and all amounts paid toward any uncovered medical expenses. He asked the court to determine the amount by which Frey was unjustly enriched, impose a constructive trust on all such amounts, order Frey to remit the amounts to plaintiff, and any additional relief deemed just and appropriate. Plaintiff's accounting claim in his first complaint made no reference to any Illinois judgment or order, but only requested an accounting on payments made after the date of the Louisiana stipulated judgment and the minor's 18th birthday.

¶ 54 Frey asserts that plaintiff's accounting claim fails to plead that he lacks an adequate remedy at law because any potential redress of any overpayment of medical expenses belongs in the child support proceedings, not the instant case since the allegations relating to the accounting

requested are based on orders entered in those proceedings. Frey's argument in her motion to dismiss and before this court does not specify if the proper proceedings were the Louisiana district court or the domestic relations case previously pending before the circuit court of Cook County. Defendant's argument on appeal focuses only on the trial court's question asking if Louisiana controlled the medical payments and Frey's counsel responded in the affirmative, and its subsequent ruling stating that it was striking the accounting claim "as those payments are subject to the Louisiana Court's ordered payments. And any issue should have been addressed relative to those proceedings." However, as previously stated, we give no deference to the trial court's basis for its ruling and consider the issue *de novo*.

¶ 55 Plaintiff's accounting claim lacks any facts to support his allegations that he lacks an adequate remedy at law. He makes a single conclusory statement with no facts to detail how he lacks an adequate remedy at law. Similarly, he offers only a conclusion that his and Frey's accounts are complicated and discovery is necessary. However, plaintiff is simply seeking a monetary award regarding an alleged overpayment of medical expenses. As pointed out above, Illinois is a fact-pleading jurisdiction, and while plaintiff is not required to set forth evidence in the complaint, he must allege facts sufficient to bring a claim within a legally recognized cause of action, not simply conclusions. *Marshall*, 222 Ill. 2d at 429-30.

¶ 56 Nevertheless, as we have discussed, the reviewing court in *Spicer v. Spicer*, 2012 IL App (1st) 103261-U, concluded that Illinois lacked personal jurisdiction over plaintiff in the child support proceedings brought by Frey. That court found that the circuit court had subject matter jurisdiction, but lacked personal jurisdiction under section 611 of the UIFSA because the statute's requirement of written consent was neither satisfied nor waived. *Id.* ¶ 19. In accordance with that conclusion, the appellate court vacated the January 2010 order as well as findings of

contempt against plaintiff. No orders regarding support remained in effect in Illinois. There has been no indication that any subsequent compliance with Section 611 has occurred. Since Illinois has no personal jurisdiction over plaintiff on those matters, plaintiff's accounting claim in this case cannot stand because the medical payments specifically relate to child support proceedings. Louisiana remains the only forum in which plaintiff can seek an accounting of medical expenses paid in accordance with the November 2008 stipulated judgment entered in Louisiana. Therefore, the trial court properly dismissed the plaintiff's accounting claim against Frey.

¶ 57 Moreover, plaintiff's proposed amended accounting claim cannot cure this jurisdictional hurdle. If Illinois lacks personal jurisdiction over plaintiff as it pertains to the child support proceedings, then no amendment can resolve that defect. Accordingly, the trial court did not abuse its discretion in denying plaintiff leave to amend his accounting claim.

¶ 58 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 59 Affirmed.