IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

MARK D. GOLDMAN, *Plaintiff/Appellant*,

v.

MARK K. SAHL, et al., *Defendants/Appellees*.

No. 1 CA-CV 18-0687
FILED 3-5-2020

Appeal from the Superior Court in Maricopa County
No. CV2017-011347
The Honorable Daniel J. Kiley, Judge

AFFIRMED IN PART; REVERSED IN PART

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OPINION

Judge Paul J. McMurdie delivered the opinion of the Court, in which Judge Jennifer M. Perkins joined. Judge Samuel A. Thumma specially concurred.

M c M U R D I E, Judge:

¶1 Attorney Mark Goldman appeals the dismissal of his claims for defamation and abuse of process against another attorney, Mark Sahl, arising out of a letter Sahl sent to Goldman and others and a bar charge Sahl filed accusing Goldman of misconduct. We affirm the superior court's dismissal of the complaint but vacate the court's award of attorney's fees against Goldman imposed under Arizona Revised Statutes ("A.R.S.") section 12-349. We hold that: (1) communication that occurs preliminary to a judicial proceeding is privileged when the defendant was seriously considering commencing litigation or had a good-faith basis to believe someone else was; (2) Rule 48(*l*) of the Rules of the Supreme Court of Arizona ("Rule") codifies common-law privileges and immunities; (3) under the common law, professional-discipline proceedings are subject to claims of improper litigation conduct, and the Arizona Constitution prevents the abrogation of such claims; and (4) we cannot affirm a sanction based on the superior court's finding that a claim was groundless because it was contrary to well-established law if we do not affirm the court's judgment based on the application of that law.[1]

FACTS AND PROCEDURAL BACKGROUND

¶2 In April 2016, a dispute arose between CopperWynd Resort (the "Resort") and the Villas at CopperWynd's homeowners' association (the "Association") over the Association's opposition to the Resort's frequent use of temporary noise permits. To allow the Resort to extend an outdoor event until midnight, a noise ordinance required the Resort to obtain a permit from the Town of Fountain Hills for each outdoor event that ran after 10:00 p.m. On average, the Resort applied for, and the town administratively granted, two permits per month. The town issued permits without a complaint until a villa owner objected in April 2016. The villa owner complained that after new ownership took over the Resort, there had been excessively loud music coming from the Resort in general, and specifically after 10 p.m.

¶3 The relationship between the Association and the Resort is governed by the declarations of covenants, conditions, and restrictions

[1] We thank the State Bar of Arizona, the Arizona Attorney General's Office, and the Consumer Law Firms for their insightful *amicus* briefs on the issues raised in this appeal.

("CC&Rs") created when the Resort and the neighboring villas were developed. The CC&Rs contemplate that villa owners may purchase club memberships with the Resort allowing the residents to use the Resort's amenities. The CC&Rs provide that "any rights to membership and to use any facilities which are part of the Club Property are solely within the discretion of the Club Owner." The year before this dispute arose, William Hinz purchased the Resort and three of the villas.[2] Hinz then invested more than five million dollars in renovating the Resort, focusing on making the Resort competitive as a venue for weddings and special events, claiming that with only 32 guest rooms, the Resort was not otherwise viable.

¶4 Around the same time that the disagreement arose over the noise permits, the town resumed a review of the noise ordinance affecting the Resort. Sahl represented the Association, which opposed both the administrative grant of permits and the proposed amendments to the noise ordinance. Both Hinz and Sahl actively participated in the noise review, advocating for their respective positions. Sahl advocated for volume and time restrictions on noise from the Resort. Hinz maintained that such restrictions would prevent the Resort from being financially viable and proposed increasing the hours that the Resort could host outdoor events to allow it to become more competitive with other venues in the surrounding cities. The Association's position was that Hinz's management of the Resort's activities was detrimental to the peace, comfort, and general welfare of the Association. The town council ultimately resolved the permit issue and the amendment to the noise ordinance favorably for the Resort.

¶5 On December 15, 2016, the same day the town approved the amendment to the noise ordinance, Goldman wrote Sahl on behalf of his client, Sarah Nolan, a villa resident. The letter stated in part that Nolan believed that Sahl and his law firm were "not acting in the best interest of the unit owners/Association members," and were "acting to the extreme detriment of the unit owners, either knowingly and intentionally or negligently." Goldman asserted that the letter served as "notice to [Sahl and his] law firm that Ms. Nolan intend[ed] to hold [Sahl and his] law firm accountable for [his] and its conduct." He requested Sahl and the firm "cease and desist from advocacy on behalf of the Association . . . until such

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[2] Hinz is the manager of Crown Rock Ventures, LLC, which is the manager of Palisades Resorts, LLC doing business as CopperWynd Resort & Club. In town council meetings, Hinz represented he was the Resort's owner and that he owned three villas. We refer to Hinz as the Resort's owner.

time as all of the unit owners/Association members have been given the opportunity to be fully informed as to the serious nature and consequences of [Sahl and his] law firm's conduct." The letter stated it served as "notice to the Association and its Board that Ms. Nolan intend[ed] to hold the Association and its individual Board members accountable and liable for their conduct."

¶6 The letter also asserted that Nolan believed that the Association's retention of the law firm and its advocacy has "caused and w[ould] continue to cause damage" to the villa owners, including "risking lawsuits that may arise in various manners," devaluing the property, and compelling the Resort "to take actions that w[ould] deprive the Villas of the use of and enjoyment of CopperWynd." The letter claimed that Sahl and his "law firm's conduct and advocacy against CopperWynd w[ould] be directly responsible for *forcing* CopperWynd into that position." Goldman's letter concluded: "please advise the members of the board of directors of the Association that Ms. Nolan intends to hold them personally liable for their conduct. Would you please let me know as to whether your law firm represents the members of the Board individually and/or will accept service of process on their behalf. Based upon the [CC&Rs] we believe that the director exceptions to immunity from personal liability are applicable." Sahl did not respond to Goldman's letter.

¶7 The following week, an attorney from Sahl's law firm contacted the State Bar's ethics hotline, asking about the ethical propriety of Goldman's request that Sahl "cease and desist" advocacy on behalf of the Association and also suggesting that the Association did not need representation. Notes from that conversation indicate the State Bar advised that Goldman's conduct appeared "to be a violation of the spirit if not the letter of the rules," and the attorney suggested he would consider filing a bar charge.

¶8 After the beginning of the new year, the tension between the Association and the Resort escalated. On January 5, 2017, the Association sent the villa owners a notice of an "Executive Board Workshop to Review Issues of Contemplated Litigation." The same day, Goldman, again representing that he was Nolan's attorney, sent a letter to Sahl expressing concerns about the notice, asserting Nolan's belief that litigation would be detrimental to the Association and the villa owners, and asking whether any Association fees were used in connection with the workshop or attorney's fees. Goldman, noting that Sahl did not respond to his first letter, stated: "it appears that the Association is desirous of litigation rather than an amicable resolution of issues."

¶9 Sahl responded in a letter the next day (the "January 6 Letter") accusing Goldman of being "patently misleading" by presenting himself as the attorney of a singular villa owner without disclosing that he represented the Resort and that Nolan was Hinz's long-time significant other. Sahl also noted that the Association was "already aware of several actions taken against unit owners within the Association to 'curtail, limit or end the unit owners' ability to utilize CopperWynd'" and that "[Goldman's] attempt to dissuade [his] representation and leave the Association without legal counsel is entirely inconsistent with ethical requirements." Sahl informed Goldman that his firm had consulted with the ethics hotline for the State Bar and believed it had an obligation to report Goldman's demand that the firm abandon its advocacy on behalf of the Association. He further stated that despite what appeared to be Nolan's position that the Association should not have representation, "in the event of litigation, the Association will vigorously defend its actions and positions and will seek an award of attorney's fees," although he hoped it would not be necessary.

¶10 Goldman responded to Sahl that because of the Association's ongoing efforts in opposition to the Resort, the Resort was demanding that the Association's entire board resign, there be an election of a new board—in which no existing member could run—and that the Resort's attorney must be present at any meeting. Goldman wrote "that absent compliance with the Resort's demands, the Resort would issue a moratorium on membership in the Resort by future Villa owners, notify parties with current listings for the sale of Villa units about the moratorium," and "immediately take such other action as [the Resort] must do to protect itself from the conduct of the Association." The following day, Sahl filed a bar charge[3] against Goldman, reporting Goldman's request that Sahl cease his representation and Goldman's alleged misrepresentations.

¶11 The Resort followed through with its threat by imposing a moratorium on membership on January 16, 2017. Goldman notified listing agents of the moratorium on membership for any new purchasers and sent letters to villa owners informing them of the moratorium and that "the

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[3] Reporting an attorney to the State Bar is often referred to as making or filing a bar complaint. A bar complaint is a formal document, prepared by Bar Counsel and filed with the disciplinary clerk initiating disciplinary proceedings. Ariz. R. Sup. Ct. 46(f)(7), 58(a). A bar charge is "any allegation or other information of misconduct or incapacity that comes to the attention of the state bar." Ariz. R. Sup. Ct. 46(f)(4). Thus, Sahl's January 12, 2017 filing with the State Bar is a bar charge, not a bar complaint.

Association, through its legal counsel, further exacerbated and escalated the situation and **actually threatened to sue CopperWynd Resort** on January 11, 2017."

¶12 Sahl responded by sending a letter to all 108 villa owners on behalf of the Association's board (the "January 27 Communication"). The letter noted that after reviewing the correspondence the Resort sent regarding the moratorium, the Board found it essential to share all correspondence exchanged between Goldman and Sahl "to bring full transparency to the matter and explain the Association's position and its necessary actions taken," and invited the villa owners to an informal town hall meeting to address any questions or concerns. As part of the mentioned transparency, the January 27 Communication included a copy of the January 6 Letter wherein Sahl accused Goldman of unethical conduct.

¶13 Goldman then commenced this litigation by filing a ten-count complaint against Sahl, Sahl's wife, and Sahl's law firm (collectively the "Law Firm Defendants"); and the Association, the Association's management company, the villas' property manager, and the property manager's wife (collectively the "Association Defendants") alleging defamation (both libel *per se* and libel *per quod*), tortious interference (both with business relations and business expectancy), intentional infliction of emotional distress, abuse of process arising out of what was alleged as Sahl's unnecessary and malicious publishing of the January 6 Letter, and his conduct in making a false bar charge for an improper purpose.[4]

¶14 After discovery and motion practice, the superior court granted summary judgment on all claims except the abuse-of-process claim, which the court dismissed on the pleadings. The court awarded the Law Firm Defendants attorney's fees and costs for the defense of the abuse-of-process claim under A.R.S. § 12-349. Goldman appealed and we have jurisdiction under A.R.S. §§ 12-120.21 and -2101(A)(1).

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[4] The Association Defendants are not parties to the appeal of the abuse-of-process claim or the resulting attorney's fees awarded. Because of their identical positions, and because Goldman's complaint arises out of Sahl's conduct as the Association Defendants' attorney, for simplicity, we refer to all the appellees collectively as "Sahl."

DISCUSSION

¶15 Goldman argues that the court erred by: (1) improperly applying the litigation privilege to the January 27 Communication between Sahl and the villa owners because at the time, "no litigation was then threatened or pending"; (2) interpreting Rule 48(*l*) to grant an absolute immunity against any civil liability arising out of the filing of a bar charge; and (3) awarding Sahl attorney's fees under A.R.S. § 12-349.

A. The Litigation Privilege Provided Sahl Absolute Immunity Against a Defamation Claim for Statements Contained in the January 6 Letter.

¶16 We view the facts and the inferences to be drawn from those facts in the light most favorable to Goldman, as the party against whom judgment was entered. *Ritchie v. Costello*, 238 Ariz. 51, 53, ¶ 7 (App. 2015). "We review a trial court's grant of summary judgment *de novo* and independently determine whether [the] court's legal conclusions were correct." *Ledvina v. Cerasani*, 213 Ariz. 569, 570, ¶ 3 (App. 2006). We will affirm if there is no genuine issue of material fact in dispute, and Sahl is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). "Whether and to what extent a privilege applies is a matter of law we review *de novo*." *Ledvina*, 213 Ariz. at 571, ¶ 3.

1. Whether a Privilege Exists Is a Question of Law for the Court to Decide.

¶17 Goldman argues that the superior court erred by concluding that the January 6 Letter was privileged under the litigation privilege. He maintains the court improperly found that the communication was made preliminary to a proposed proceeding without a threat of litigation when the letter was published. Goldman also claims that he is entitled to a jury trial on whether a communication is made preliminary to a proposed proceeding.

> In the area of absolute privileges one of the most common is that involving the participant in judicial proceedings. The socially important interests promoted by the absolute privilege in this area include the fearless prosecution and defense of claims which leads to complete exposure of pertinent information for a tribunal's disposition.

Green Acres Tr. v. London, 141 Ariz. 609, 613 (1984). "[J]udges, parties, lawyers, witnesses and jurors" are "absolutely privileged to publish

defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which" they participate, if the defamatory publication "relate[s] to, bear[s] on or [is] connected with the proceeding." *Id.* (citing the Restatement (Second) of Torts ("Restatement") § 586 (1977)). "The defense is absolute in that the speaker's motive, purpose or reasonableness in uttering a false statement do not affect the defense." *Id.*

¶18 While recognizing the privilege, Goldman argues the court erred by "usurp[ing] the jury's prerogative by determining whether the defamatory statements were preliminary to litigation that was immediate or imminent." Goldman contends that because here, where "the application of immunity depends upon a finding that the parties were considering litigation," *Chamberlain v. Mathis* dictates that "the jury [must] determine[] the facts and the court then determines whether those facts are sufficient to establish immunity." 151 Ariz. 551, 554 (1986).

¶19 We reject this contention because it would convert all pre-filing settlement negotiation communication, communication with a witness or an expert, and even non-privileged communication with a client into a factual dispute for a jury to determine whether the attorney was seriously considering litigation, or just "posturing," as Goldman claims he was here. Goldman's position is counter to the purpose of protecting pre-litigation communications and would conflict with the protection of the privilege. We also decline to adopt a position that discourages pre-filing communications between attorneys and clients, potential witnesses, experts, and between attorneys themselves.

> To grant immunity short of absolute privilege to communications relating to pending or proposed litigation, and thus subject an attorney to liability for defamation, might tend to lessen an attorney's efforts on behalf of his client. The conduct of litigation requires more than in-court procedures. An attorney must seek discovery of evidence, interrogate potential witnesses, and often resort to ingenious methods to obtain evidence; thus, he must not be hobbled by the fear of reprisal by actions for defamation.

Green Acres, 141 Ariz. at 616 (quoting *Russell v. Clark*, 620 S.W.2d 865, 868 (Tex. Civ. App. 1981)).

¶20 All determinations of privilege turn somewhat on the facts. *See, e.g.*, *Chamberlain*, 151 Ariz. at 555–56, 556, n.2 (the court found the director's statement about an audit was discretionary rather than ministerial although "even executive officials do not have discretion to make statements in every conceivable situation"); *Green Acres*, 141 Ariz. at 615 (the court found the newspaper reporter "lacked a sufficient connection to the proposed proceedings"); *cf. S. Union Co. v. Sw. Gas Corp.*, 205 F.R.D. 542, 546 (D. Ariz. 2002) ("Whether an attorney-client relationship exists is a question of law, but the decision is dependent on the facts."). Here, however, there is no dispute of material fact.

2. The January 6 Letter was Related and Preliminary to a Proposed Proceeding.

¶21 Goldman maintains that no Arizona case has clarified what is "preliminary to a proposed proceeding." He claims the superior court erred by ruling the January 6 Letter was privileged because when Sahl published the letter, "no litigation was then threatened or pending." *But see Green Acres*, 141 Ariz. at 615 (recognizing that a demand letter sent to the representative of the plaintiff's insurer, a letter sent to a potential defendant, a letter sent to investors seeking information relating to a prospective proceeding, and a printed list of questions prepared in anticipation of a proceeding all had been deemed preliminary to a proposed proceeding by other courts). Goldman contends that even if we conclude that the communication occurred preliminary to a proposed proceeding, the communication was not "in furtherance of the litigation." *See id.* at 613.

¶22 When a defendant asserts the litigation privilege to protect a communication made preliminary to a contemplated proceeding that does not ultimately ensue, the court must determine whether the defendant was seriously considering filing suit or had a good-faith basis for believing someone else was. "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding . . . in which he [or she] participates as counsel," if it "has some relation to a proceeding that is contemplated in good faith and under serious consideration." Restatement § 586. But "[t]he bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered." *Id.* § 586 cmt. e. "[T]he court must consider the entire communication in its context . . . ." *Russell*, 620 S.W.2d at 870. Given the facts here, we conclude Sahl's January 27 Communication occurred preliminary to at least one of several potential proceedings.

¶23 Goldman asserts that his exchanges with Sahl contained mere "vague litigation references" and were "obvious posturing at most and not actual threats of reasonably contemplated litigation." He maintains, for example, that the January 11 letter in which he demanded the Board's immediate resignation "made no mention of any intended or immediate threat of litigation"; the January 27 Communication dispelled a claim that a party was considering litigation because the Resort had already implemented the moratorium on memberships; and by January 27, the town had adopted the new noise ordinance, and if any litigation were considered it would have been against the town.

¶24 Goldman's attempt to dissect the communications to analyze the circumstances of each passage separately and what the parties must have been thinking when making or receiving each communication is unpersuasive. We also disagree with his suggestion that when applying all reasonable inferences in his favor, we must conclude that litigation was not seriously contemplated. Goldman claims that by the relevant time, the issues concerning his clients had been resolved, and any litigation would have been between the Association and the town. Yet, Goldman sent the first letter to Sahl the same day the town's council adopted the new ordinance requesting that Sahl cease and desist from advocacy on behalf of the Association in connection with any proposed noise ordinances. When the Association sent the villa owners the notice of the Board's meeting to discuss contemplated litigation, Goldman again contacted Sahl stating that "it appear[ed] that the Association is desirous of litigation rather than an amicable resolution of issues."

¶25 The day the town approved the amendment to the noise ordinance, Goldman wrote Sahl to ask if he would accept service of process for the members of the Board. In the month that followed, Goldman demanded that the current Association board resign, and warned that the Resort would take retaliatory action against the villa owners if it did not. Goldman stated that the Association, the Board, Sahl, and Sahl's firm could be held liable for any retaliatory actions the Resort may take against the villa owners, or for any decrease in property value. The Resort then imposed a moratorium barring villa owners from obtaining new memberships and revoking the existing memberships of some villa owners.

¶26 Moreover, it is not relevant whether the contemplated proceeding would have included the Resort or Goldman. *See Bailey v. Superior Court*, 130 Ariz. 366, 368 (App. 1981) ("The fact that [the allegedly defamed individual] was not a party to the proceedings . . . does not bar assertion of the privilege. The defamatory statements can be about a

stranger to the proceeding provided they bear a relationship to the proceedings."). At the time of the January 27 Communication, Sahl and Goldman represented adverse parties embroiled in several escalating disputes, any one of which carried more than a bare possibility of leading to litigation. Sending the villa owners the communications between the attorneys was in furtherance of the potential litigation Sahl could expect either from the villa owners, with the Resort—or both. Accordingly, the court did not err by finding that the litigation privilege applied to the communications and granting summary judgment.

B. The Court Erred by Interpreting Rule 48(*l*) to Grant an Absolute Immunity Against All Civil Actions Predicated on a Bar Charge.

¶27 In the complaint, Goldman alleged that Sahl sought to use the attorney disciplinary process to inflict harm, and as a result of the bar charge, Goldman suffered reputational injury, humiliation, emotional distress, and anxiety. The elements of abuse of process are "(1) a willful act in the use of [a] judicial process; (2) for an ulterior purpose not proper in the regular conduct of the proceedings." *Nienstedt v. Wetzel*, 133 Ariz. 348, 353 (App. 1982).

¶28 The superior court dismissed Goldman's abuse-of-process claim based on Rule 48(*l*), which provides:

> Communications to the court, state bar, committee, presiding disciplinary judge, acting presiding disciplinary judge, hearing panel members, settlement officers, mediators, the client protection fund, the peer review committee, the fee arbitration program, the committee on the Rules of Professional Conduct, monitors of the Member Assistance or Law Office Management Assistance Programs, state bar staff relating to lawyer misconduct, lack of professionalism or disability, and testimony given in the proceedings *shall be absolutely privileged conduct, and no civil action predicated thereon may be instituted against any complainant or witness.* Members of the board, members of the committee, the presiding disciplinary judge, hearing panel members, the peer review committee, client protection fund trustees and staff, fee arbitration committee arbitrators and staff, the Committee on the Rules of Professional Conduct, monitors of the Member Assistance or Law Office Management Assistance Programs, state bar staff, and court staff shall be immune from suit for any conduct in the course of their official duties.

(Emphasis added.) According to Goldman, the rule protects the content of the communication, but not the conduct of filing a bar charge for an improper purpose. He asserts that a rule that protects both the content and the conduct would violate the Arizona Constitution. *See* Ariz. Const. art. 18, § 6 ("anti-abrogation clause"). Sahl responds that the plain language of Rule 48(*l*) protects against liability on *any* civil action and that the anti-abrogation clause does not apply because the absolute privilege associated with reporting professional misconduct was recognized at common law.

¶29 "[The Arizona Supreme Court's] adoption of a rule does not constitute a prior determination that the rule is valid and constitutional against any challenge." *Scheehle v. Justices of the Supreme Court of Ariz.*, 211 Ariz. 282, 298 (2005). We review the interpretation of a court rule *de novo* and according to the principles of statutory interpretation. *Phillips v. O'Neil*, 243 Ariz. 299, 301, ¶ 8 (2017). Although ordinarily when the plain text of a rule is clear and unambiguous we apply it without further analysis, *Siete Solar, LLC v. Ariz. Dep't of Revenue*, 246 Ariz. 146, 151, ¶ 21 (App. 2019), we will avoid an interpretation that would render the rule unconstitutional, *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 193 Ariz. 195, 209, ¶ 29 (1999).

¶30 Here, the superior court erred when it concluded Rule 48(*l*) provided an absolute immunity against any civil action. A privilege applies to the content of the communication, which serves to defeat an action predicated on the privileged *statement*, but the rule does not provide the actor with an immunity against a right of action premised on improper litigation conduct.

1. A Privilege Is Not an Immunity.

¶31 Rule 48(*l*) provides that the conduct of a complainant or witness about communicating disciplinary matters with disciplinary personnel is "absolutely privileged." At the same time, the rule states that the State Bar and other disciplinary personnel "shall be immune from suit for any conduct in the course of their official duties." Although a privilege is sometimes referred to as an immunity—

> to say the speaker is immune from civil liability is a misnomer. As its name implies, it is a privilege and, therefore, precludes the use of those privileged communications to sustain a cause of action. It does not bar the cause of action but only renders it unsustainable if based exclusively on statements privileged under the law.

Halle v. Banner Indus. of N.E., Inc., 453 S.W.3d 179, 184 (Ky. Ct. App. 2014); *see also Maggard v. Kinney*, 576 S.W.3d 559, 560 (Ky. 2019) ("A privilege is not synonymous with or equivalent to immunity because it does not relieve the holder of the burdens of litigation or even, necessarily, the imposition of liability.").

¶32 An absolute immunity—usually afforded to officials—exempts an *actor* from civil liability when acting in his or her official capacity. *See, e.g.*, *State v. Superior Court (Ford)*, 186 Ariz. 294, 297 (App. 1996) (prosecutorial immunity) ("Prosecutors are generally immune from civil liability for actions taken in their official capacities. This immunity is absolute when the prosecutor acts within the scope of his or her authority and in a quasi-judicial capacity. . . . 'Quasi-judicial' activities are those that are intimately associated with the judicial process. But a prosecutor's conduct while acting as an administrator or investigative officer is not 'quasi-judicial' and, therefore, does not enjoy absolute immunity." (citations omitted)); *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 136–37, ¶¶ 15–18 (App. 2003) (legislative immunity) (a legislator acting within the "legitimate legislative sphere" enjoys absolute immunity from civil or criminal liability, but the protection does not extend to political acts); *see also* A.R.S. § 12-820.01 (absolute immunity); A.R.S. § 12-820.02 (qualified immunity). An absolute privilege immunizes "conduct which otherwise would be actionable [] to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection." *Darragh v. Superior Court*, 183 Ariz. 79, 81 (App. 1995) (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 114 at 776 (5th ed. 1984)).

2. Rule 48(*l*) Codifies Common-Law Privileges and Immunities.

¶33 The anti-abrogation clause prevents the abrogation of a right of action of a common-law tort that existed at the time our constitution was adopted. Ariz. Const. art. 18, § 6. Application of a common-law privilege or immunity does not violate the anti-abrogation clause. Goldman argues that Rule 48(*l*) codifies the common-law privileges and immunities only applicable to judicial proceedings and that extending the privilege to protect any more than that would violate the Arizona Constitution. Sahl responds that Rule 48(*l*) provides absolute immunity against any civil action predicated on the filing of a bar charge, and the basis for such protection is deep-rooted in Arizona common law.

i. The Anti-Abrogation Clause Protects Common-Law Rights of Action That Existed at the Time of Statehood.

¶34 Article 18, Section 6 of the Arizona Constitution provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." *See also* Ariz. Const. art. 2, § 31 ("No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person . . . ."). This provision "prevents abrogation of all common law actions for negligence, intentional torts, strict liability, defamation, and other actions in tort which trace origins to the common law." *Cronin v. Sheldon*, 195 Ariz. 531, 538, ¶ 35 (1999). By the same token, the application of a common-law privilege or immunity that would have barred the plaintiff from pursuing an action at the time our constitution was adopted does not unlawfully abrogate a right of action. *Evenstad v. State*, 178 Ariz. 578, 586 (App. 1993). The Arizona Constitution does not protect a right that has never existed. *Id.*

¶35 Deciding whether a rule or statute violates the anti-abrogation clause requires the court first to determine whether the common-law right of action existed at the time of our statehood, and if so, whether the subject rule or statute still allows an adequate remedy for the injured party. *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 313, ¶¶ 28–29 (2003) (the anti-abrogation clause precludes abrogation but not regulation). Sahl's interpretation of Rule 48(*l*) would abrogate an abuse-of-process claim predicated on the filing of a bar charge; thus, we turn our attention to whether Goldman would have had such a right at the time of statehood.

¶36 Abuse of process is a common-law action protected by the anti-abrogation clause. A "cousin of" the other improper litigation conduct torts—malicious prosecution and wrongful institution of a civil proceeding—abuse of process "evolved as a 'catch-all' category to cover inappropriate uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution." *Phillips v. Ingham County*, 371 F. Supp. 2d 918, 932 (W.D. Mich. 2005) (first quote); *Barquis v. Merchs. Collection Ass'n*, 496 P.2d 817, 824, n.4 (Cal. 1972) (second quote); *see Italian Star Line v. U.S. Shipping Bd. Emergency Fleet Corp.*, 53 F.2d 359, 361 (2d Cir. 1931) (citing to various instances where abuse of process was used when "the narrowly circumscribed action of

malicious prosecution was inapplicable"); *see also* Restatement, div. 7 ("unjustifiable litigation" causes of action).[5]

¶37 Sahl and the *amici* supporting his position for a broad interpretation of Rule 48(*l*) argue that the Arizona Constitution does not guarantee the right of an attorney to pursue an action against an individual who reports professional misconduct to the State Bar and that an absolute common-law privilege would apply; thus, they contend the superior court's interpretation of Rule 48(*l*) is compatible with the anti-abrogation clause. However, the anti-abrogation clause extends to wrongs recognized at common law. The right of action for abuse of process existed before our statehood, and is, therefore, protected under our constitution. *See Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 344 (1993) ("Article 18, § 6 was not enacted to protect particular doctrines, theories or 'causes of action.' The text of the constitution protects a broader concept—'the *right of action* to recover damages for injuries.'" (quoting *Bryant v. Cont'l Conveyor & Equip. Co., Inc.*, 156 Ariz. 193, 198 (1988) (Feldman, V.C.J., dissenting))). Actions for abuse of process extend to processes that were not contemplated at the time of our statehood.

¶38 Next, Sahl argues our caselaw suggests an individual is afforded immunity from liability for reporting misconduct to the State Bar based on a long-standing public policy basis "to encourage reporting of perceived unethical conduct." *Ashton-Blair v. Merrill*, 187 Ariz. 315, 317 (App. 1996) (citing *Drummond v. Stahl*, 127 Ariz. 122, 126 (App. 1980)). But a court cannot "create" a privilege or immunity for public policy purposes, it may only consider public policy when preserving an existing common-law privilege or immunity—and in each of the cases the proponents cite for support, that is what the court has done.

¶39 Sahl and the *amici* who support him contend that the immunity granted to participants in judicial or quasi-judicial proceedings has existed for centuries. *See Desert Palm Surgical Grp., P.L.C.*, 236 Ariz. 568, 580, ¶ 32 (App. 2015) ("At common law, an absolute privilege existed for those reporting professional misconduct to administrative agencies.") (citing *Drummond*, 127 Ariz. at 125–26). Although we recognize that our prior caselaw has held that an absolute privilege applies to those that submit a bar charge, that recognition does not provide us with a basis to

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[5] The Restatement classifies wrongful use of a civil proceeding, malicious prosecution, and abuse of process as "unjustifiable litigation" causes of action; we refer to the actions as "improper litigation conduct."

interpret a rule in a manner that would grant an alleged tortfeasor an absolute immunity, undoubtedly abrogating all the injured party's rights of action associated with the conduct, without first identifying the origin of such immunity.[6]

ii. The Litigation Privilege Applies to Bar an Action Based on the Content of the Communication.

¶40 An examination of our jurisprudence reflects an application of a privilege protecting the content of the bar charge—reasoning that a disciplinary proceeding is a quasi-judicial proceeding and a bar charge is entitled to the ligation privilege. *See, e.g.*, *Ashton-Blair*, 187 Ariz. at 317; *see also Advanced Cardiac Specialists, Chartered v. Tri-City Cardiology Consultants, P.C.*, 222 Ariz. 383, 386, ¶ 7 (App. 2009) (citing *Drummond*, 127 Ariz. at 125). This is an appropriate application of the privilege because quasi-judicial proceedings were afforded the same protection at the time of our statehood. *See Fulton v. Ingalls*, 151 N.Y.S. 130, 132 (App. Div. 1914) (proceeding before the police commissioner was likely a judicial proceeding entitled to litigation privilege).

¶41 In Arizona, *Drummond v. Stahl* is the foundation for all later cases addressing a privilege for reporting professional misconduct. In that case, the defendant attorney, who had been Drummond's opposing counsel, threatened to file a bar charge against Drummond if he did not withdraw from the litigation because of an alleged conflict of interest; filed the bar charge when Drummond did not withdraw; and subsequently moved to compel Drummond to withdraw as counsel. 127 Ariz. at 123–24. After "Bar counsel concluded that there was no actual conflict of interest and the Bar found no probable cause to proceed against Drummond," Drummond initiated an action against the complaining attorney alleging tortious interference with a contractual relationship. *Id.*

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[6] Sahl cites several cases from other jurisdictions that provide an absolute immunity to an individual making a bar charge, but "the Arizona Constitution is almost unique in its provisions regarding tort law." *Kenyon v. Hammer*, 142 Ariz. 69, 79 (1984). Even among states that have "open court" provisions in their constitution, which "typically require courts to be 'open' and provide a remedy for injury," the anti-abrogation clause in our constitution is "a more specific and stronger requirement." *Id.* at 73–74. Thus, out-of-state cases do not help us interpret our law.

¶42 Drummond did not contest that a privilege applied to both the statement made in the motion to compel and the statement made in the bar charge—the question before this court was whether the privilege was conditional or absolute. *Drummond*, 127 Ariz. at 126. We held that "[t]he allegation in the motion to compel Drummond to withdraw on the grounds that he had a conflict of interest is the type of defamatory statement in litigation proceedings that should be absolutely privileged," and that "public policy and legal precedent compel us to adopt the position that there is an absolute privilege extended to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney." *Id.* at 125, 126.

¶43 The basis of the privilege in *Drummond* was the Restatement, §§ 585–589, which addresses various participants in judicial proceedings that are afforded the litigation privilege. *See* Restatement § 585 (judicial officers); § 586 (attorneys); § 587 (parties); § 588 (witnesses); § 589 (jurors). These sections are found in the Restatement chapter 25, which is titled "Defenses to Actions for Defamation." Moreover, in reaching this conclusion, we likened a disciplinary hearing to a judicial proceeding. *Drummond*, 127 Ariz. at 126 ("The State Bar of Arizona is an arm of the Arizona Supreme Court. The Supreme Court has directed that written complaints against lawyers are to be filed with the State Bar. The State Bar acts in a judicial capacity in dealing with the conduct of attorneys. [The Restatement, §§ 585–589], grants an absolute privilege for defamatory statements made in a judicial proceeding, so long as such statements bear some relationship to the proceedings." (citations omitted)); *see also Bailey*, 130 Ariz. at 368 (litigation privilege applies because, like the State Bar, "[t]he Commission on Judicial Qualifications is an arm of the Arizona Supreme Court") (citing *Drummond*, 127 Ariz. at 122).

¶44 In *Ashton-Blair v. Merrill*, while applying the privilege to a *response* to a bar charge because "we s[aw] no reason why the policy would not extend to a response that may act as a complaint in part," and also addressed the anti-abrogation clause's applicability to the litigation privilege, stating:

> An absolute privilege in these matters does not unconstitutionally abrogate Ashton-Blair's right to sue for damages to his reputation. Common law immunities, including *judicial immunity*, do not abrogate a cause of action but are longstanding public policy determinations that causes of action do not exist in certain privileged situations. Thus, our decision does not abrogate Ashton-Blair's right to sue. Rather, it concludes that the Arizona Constitution never

> guaranteed a cause of action for any perceived harm coming from these statements in this context.

187 Ariz. at 317–18 (emphasis added) (citations omitted).

¶45 This court mistakenly referred to the litigation privilege as judicial immunity, noting "[t]he Arizona Supreme Court stated that in the context of defamation actions, the term absolute privilege is interchangeable with the term absolute immunity." *Ashton-Blair*, 187 Ariz. at 316, n.2 (citing *Green Acres*, 141 Ariz. at 613, n.1). Although using the term "judicial immunity," we used the reasoning of the litigation privilege, explaining, "in the context of judicial immunity, '[t]he defamatory content of the communication need not be strictly relevant,' but need only have some 'reference to the subject matter of the proposed or pending litigation,'" citing again to *Green Acres*, which, in turn, quotes Restatement § 586, the litigation privilege. *Ashton-Blair*, 187 Ariz. at 317, n.3 (alteration in original). This interchangeable use of "litigation" with "judicial" and "privilege" with "immunity" has since created confusion around the precise protection afforded to an individual who makes a bar charge. *See, e.g.*, *Sobol v. Alarcon*, 212 Ariz. 315, 318, ¶ 13 (App. 2006) ("This court has afforded absolute immunity to individuals who have filed complaints with the State Bar against attorneys accusing them of unethical conduct.").

¶46 To say that a participant in a judicial proceeding is afforded absolute immunity from any civil liability under the common law is incorrect. As noted in *Green Acres*, "[w]e use the term 'immunity' interchangeably with the term 'absolute privilege' because the courts have generally used the term 'privileges' in connection with defamation actions even though 'immunity' might more properly describe the classification." 141 Ariz. at 613, n.1. Only for a *defamation action* would the term immunity be appropriate, where an absolute privilege bars the use of the content of the communication, and the allegedly defamatory statement is required to sustain the action. *See Chamberlain*, 151 Ariz. at 554 ("[I]n defamation actions . . . we use 'immunity' because we think it better describes the substantive effect of the asserted defense."). But unlike an immunity, which shields the actor from liability when acting in his or her official capacity, the litigation privilege does not shield the participant from liability from his or her improper litigation-related conduct. *See, e.g.*, *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 361–62, ¶¶ 7–11 (App. 1999); *Sierra Madre Dev., Inc. v. Via Entrada Townhouses Ass'n*, 20 Ariz. App. 550, 554 (1973); *Stewart v. Fahey*, 14 Ariz. App. 149, 151 (1971).

iii. Judicial Immunity Does Not Apply to All Conduct Within a Judicial Proceeding; It Applies Only to Judicial Conduct.

¶47 Our prior caselaw has held that the litigation privilege applies to preclude a cause of action that is based on the content of the bar charge. Any reference made to judicial immunity in this context appears to have been a misstatement—the litigation privilege served as the basis supporting the conclusion. To the extent our caselaw suggests judicial immunity applies, it does not. We agree with *Drummond* when classifying a disciplinary proceeding as a "judicial proceeding" for purposes of the litigation privilege, *see* Restatement § 588 cmt. d ("Judicial proceedings include all proceedings in which an officer or tribunal exercises judicial functions . . . ."), but Rule 48(*l*) codifies common-law privileges and immunities, and it cannot extend any immunity—including judicial immunity—beyond the protection provided at common law.

¶48 Judicial immunity protects a judge or a court official "who perform[s] [a] function[] intimately related to, or which amount[s] to an integral part of the judicial process" from civil liability for damages resulting from his or her judicial acts. *Acevedo by Acevedo v. Pima County Adult Prob. Dep't*, 142 Ariz. 319, 321 (1984) (citations and quotations omitted); *In re Aubuchon*, 233 Ariz. 62, 70, ¶ 38 (2013) ("[J]udges [are] absolutely immune from a civil damages lawsuit based on their judicial acts."). But merely because an act occurs in a court or is taken by a judge, does not make it a "judicial act." *See Forrester v. White*, 484 U.S. 219, 227 (1988) (judicial immunity only applies to a truly judicial act, not an "act[] that simply happen[s] to have been done by [a] judge[]"). "The rationale for granting judges immunity from liability for even intentional and malicious conduct while acting in their judicial capacity is that judges should be free to make controversial decisions and act upon their convictions without fear of personal liability." *Meek v. County of Riverside*, 183 F.3d 962, 965 (9th Cir. 1999).

¶49 A bar complainant is not performing a "judicial act," which has been described as a function usually performed by a judge. *Acevedo*, 142 Ariz. at 322. "Administrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts." *Forrester*, 484 U.S. at 228; *Meek*, 183 F.3d at 966 (a personnel decision "is not a judicial or adjudicative act, but rather an administrative one"). Our constitution directs that "[t]he supreme court shall have administrative supervision over all the courts of the state." Ariz. Const. art. 6, § 3. "Administrative supervision contemplates managing the conduct of

court personnel" and "[a]ttorneys are universally recognized as 'officers of the court.'" *In re Shannon*, 179 Ariz. 52, 76–77 (1994). Thus, through the disciplinary process, the supreme court exercises its constitutionally granted power to manage the conduct of "court officers." *Id.* at 77; *see also Acevedo*, 142 Ariz. at 322 (administrative and supervisory "activities are not part of the judicial function; they are administrative in character"); *Arpaio v. Davis*, 221 Ariz. 116, 122, ¶ 24 (App. 2009) ("This court also pointed out that this administrative function [of a superior court presiding judge over an elected constable not performing statutory duties] was to be distinguished from such functions or acts that are judicial.").

¶50 We also cannot justify the application of judicial immunity for attorney regulation, where the same conduct in the regulation of other professions is not afforded the same. *See, e.g.*, A.R.S. § 32-1451(B) (reporting to the medical board) ("A person who reports information *in good faith* pursuant to this subsection is not subject to civil liability." (emphasis added)); A.R.S. § 32-1904(E) (the pharmacy board is entitled qualified immunity); *see also Grimm v. Ariz. Bd. of Pardons & Paroles*, 115 Ariz. 260, 265 (1977) ("We hold that absolute immunity for public officials in their discretionary functions acting in other than *true judicial proceedings* is not required and, indeed, is improper." (emphasis added)); *Forrester*, 484 U.S. at 220 (declining to extend judicial immunity for administrative decisions in part because "[s]uch decisions are indistinguishable from those of an executive branch official responsible for making similar personnel decisions, which, no matter how crucial to the efficient operation of public institutions, are not entitled to absolute immunity from liability in damages").

¶51 Moreover, the policy rationale that judges should be free to make controversial decisions and act upon their convictions without fear of personal liability does not apply to the non-adjudicative acts by participants in attorney regulation. *See also Forrester*, 484 U.S. at 228 ("Likewise, judicial immunity has not been extended to judges acting to promulgate a code of conduct for attorneys."). Accordingly, when regulating attorneys, except when performing a "truly judicial act" in a "true judicial proceeding," the supreme court acts in an administrative capacity—for which judicial immunity does not apply—and thus, cannot be extended to those who assist the supreme court in its administrative function. *See Randall v. Brigham*, 74 U.S. 523, 531 (1868) ("Both the admission and removal of attorneys are judicial acts."); Restatement § 588 cmt. d ("Judicial proceedings include all proceedings in which an officer or tribunal exercises judicial functions . . . ."). *But see Bridegroom v. State Bar*, 27 Ariz. App. 47, 49 (1976) (the State Bar is an administrative arm of the supreme court).

3. When the Litigation Privilege Protects a Proceeding's Communications, Then Conduct in the Action is Subject to Claims of Improper Litigation Conduct.

¶52 The superior court concluded that there was no relevant distinction in Arizona law between the content of a bar charge and the act of filing a bar charge. Although no Arizona court has addressed the issue in the context of a disciplinary proceeding, we have recognized a distinction between a defamation action and an action premised on improper litigation conduct. As Goldman points out, if the litigation privilege applied to claims based on improper litigation conduct—which necessarily involves a judicial or quasi-judicial proceeding—it would essentially bar all such claims.

¶53 This court has routinely held that the litigation privilege does not preclude an action for improper litigation conduct. *See Giles*, 195 Ariz. at 362, ¶ 11*; Sierra Madre*, 20 Ariz. App. at 554; *Stewart*, 14 Ariz. App. at 151; *see also* Restatement § 587 (litigation privilege) ("One against whom civil or criminal proceedings are initiated may recover in an action for the wrongful initiation of the proceedings . . . if the proceedings have terminated in his favor and were initiated without probable cause and for an improper purpose."); *Chalpin v. Snyder*, 220 Ariz. 413, 419, ¶ 20, n.5 (App. 2008) (although malicious prosecution is often used for both criminal and civil actions, the correct term for malicious prosecution in a civil action is the wrongful institution of civil proceedings).

¶54 In *Sierra Madre*, after the plaintiff filed suit alleging the defendants engaged in criminal activity and conspiracy, the defendants counterclaimed for abuse of process and libel. 20 Ariz. App. at 552. The superior court dismissed the libel claims because the statements were made in the pleadings and subject to the litigation privilege but allowed the abuse-of-process claims to stand. *Id.* This court affirmed the superior court's ruling, holding that "[a] party should be privileged to plead any claim or defense containing defamatory statements so long as it is not completely frivolous," but that the "privilege is not unlimited" and "nothing said herein is intended to affect the validity of any claim for relief based upon malicious prosecution or abuse of process." *Id.* at 554; *see also Stewart*, 14 Ariz. App. at 151 (while applying the litigation privilege to a slander of title action, noted that "[w]e do not intend to intimate that anything we have said herein would necessarily insulate a person who maliciously institutes a wrongful judicial proceeding from all liability for his malicious acts").

¶55 In *Shockley v. Moore*, the State criminally prosecuted Shockley for aggravated assault after two doctors reported to law enforcement that Shockley had assaulted them and testified to the same at his trial. 1 CA-CV 18-0326, 2019 WL 4513577, at *1 (Ariz. App. Sept. 19, 2019) (mem. decision). Shockley was acquitted and sued the doctors alleging various torts. He later sought to amend the complaint to add abuse of process and malicious prosecution, but the court denied the request to amend as futile and dismissed the complaint, ruling that the doctors' statements were privileged. *Id.* On appeal, we vacated the superior court's denial of the plaintiff's motion to amend and remanded for the court to reinstate the complaint because, although the proposed amendment "failed to set forth a legally viable abuse of process claim, it adequately stated a claim for malicious prosecution." *Id.*

4. A Disciplinary Hearing is a Quasi-Judicial Proceeding, But Filing a Bar Charge Invokes an Administrative, Not A Judicial, Process.

¶56 Goldman's abuse-of-process claim alleges that Sahl and the other defendants each participated and conspired to file a baseless bar charge to cause Goldman reputational harm and potential liability. "This court will affirm a dismissal for failure to state a claim only if the allegations of the complaint do not state a cause of action recognized by law." *Owens v. City of Phoenix*, 180 Ariz. 402, 405–06 (App. 1994). In reviewing a judgment based on the pleadings, we accept as true the factual allegations of the complaint. *Save Our Valley Ass'n v. Ariz. Corp. Comm'n*, 216 Ariz. 216, 218, ¶ 6 (App. 2007). We review *de novo* whether a complaint states a claim for relief, *Levine v. Haralson, Miller, Pitt, Feldman & McAnally, P.L.C.*, 244 Ariz. 234, 237, ¶ 7 (App. 2018), and we will affirm the dismissal if the superior court was correct for any reason, *Ariz. Real Estate Inv., Inc. v. Schrader*, 226 Ariz. 128, 130, ¶ 10 (App. 2010).

i. A Disciplinary Hearing Is Subject to the Improper Litigation Conduct Actions.

¶57 Sahl asserts that an abuse-of-process claim cannot stand because he was not a party to any proceeding, *see* Ariz. R. Sup. Ct. 53(a) ("The complainant is not a party to discipline . . . proceedings."); and because a disciplinary proceeding is neither criminal nor civil, *see* Ariz. R. Sup. Ct. 48(a) ("Discipline and disability proceedings are neither civil nor criminal, but are sui generis."); *see Fappani v. Bratton*, 243 Ariz. 306, 309, ¶ 10 (App. 2017) ("Thus, a valid claim for abuse of process requires well-pleaded

facts alleging that the defendant used a judicial process during civil litigation or criminal prosecution."). Neither fact is dispositive here.

¶58 As noted above, the elements of abuse of process are "(1) a willful act in the use of [a] judicial process; (2) for an ulterior purpose not proper in the regular conduct of the proceedings." *Nienstedt*, 133 Ariz. at 353. There is no requirement that Sahl be a party to the proceedings. Like a claim for wrongful institution of a civil action, "[o]ne who takes an active part in the initiation, continuation or procurement of civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, is subject to liability for any special harm caused thereby, if . . . he acts without probable cause to believe that the charge or claim on which the proceedings are based may be well founded, and primarily for a purpose other than that of securing appropriate action by the board, and . . . the proceedings have terminated in favor of the person against whom they are brought." Restatement § 680.

¶59 Likewise, *Fappani* procured the language "requiring" either a criminal or civil proceeding from Restatement § 682, which provides—

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

We read this as being inclusive rather than exclusive. Malicious prosecution occurs within a criminal proceeding, a wrongful institution of civil proceedings occurs within a civil proceeding, and Restatement § 682 provides that an action for abuse of process can arise out of either.[7]

¶60 Moreover, Restatement § 680 includes an administrative proceeding as a "civil proceeding." It is not consistent with the purpose of the abuse of process right of action, and the inclusion of administrative proceedings in the improper litigation conduct actions, to impose such rigid

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[7] The tentative draft of the Restatement (Third) of Torts: Liability for Economic harm § 26, abuse of process, no longer states "whether criminal or civil." The comment explains that "[t]he tort discussed in this Section addresses specific misconduct that *typically occurs* within a criminal or civil case." Restatement (Third) of Torts: Liab. for Econ. Harm § 26 cmt. a (Am. Law Inst., Tentative Draft No. 3, 2018) (emphasis added).

requirements on a claim that "has been interpreted broadly, and encompasses the entire range of procedures incident to the litigation process." *Nienstedt*, 133 Ariz. at 352.

ii. An Administrative Procedure Does Not Become a "Judicial Process" Solely Because a Court Rule Governs It.

¶61 Sahl alternatively argues that reporting misconduct is not a judicial process; instead, it is analogous to filing a police report, *see Fappani*, 243 Ariz. at 311, ¶ 14. Goldman distinguishes *Fappani* by asserting that, unlike filing a police report or demanding that a prosecutor file a complaint, "the bar charge process does not involve non-judicial personnel exercising discretion in determining whether to initiate a judicial process." Goldman subscribes to the State Bar's position that filing a bar charge is "use" of a judicial process because once Bar Counsel receives information about possible attorney misconduct, Rule 55(a) requires that it evaluate the information to determine if further investigation is warranted. The basis of the State Bar's argument is that because a court rule is implicated, it is a judicial process. We have not found any authority on the issue, but we conclude that—like determining whether judicial immunity applies—determining whether a process is judicial is dependent on the function of the process.

¶62 A process is not a judicial process simply because the judiciary implements it. *Cf. Forrester*, 484 U.S. at 227–28; *Acevedo*, 142 Ariz. at 321 (whether an act "is protected by judicial immunity depends upon the nature of the activities performed and the relationship of those activities to the judicial function"). The disciplinary rules "regulat[e] the practice of law, from admitting an attorney to disciplining an attorney, [and] have nothing to do with regulating pleading, practice and procedure in judicial proceedings." *Shannon*, 179 Ariz. at 78 (quotation omitted). As previously discussed, "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts." *Forrester*, 484 U.S. at 228. The medical board's disciplinary procedures are outlined in A.R.S. § 32-1451; however, when the medical board is performing its disciplinary duties, we would not classify the procedure as a legislative process just because the legislature enacted the procedure. Whether a procedure is administrative or quasi-judicial depends on the specific processes, not who created the process.

¶63 Finally, Goldman contends that it is contradictory to hold that the filing of a charge is not a judicial process—but that a disciplinary

proceeding is a quasi-judicial proceeding—without explaining how "a judicial proceeding can exist without judicial processes involved." Ultimately, a judicial process may exist in a disciplinary proceeding, but the mere filing of a bar charge without more is not a use of a judicial process. Filing a bar charge is like an individual making a police report and allowing a prosecutor—here the State Bar—to exercise his or her discretion in determining whether to proceed. *See Fappani*, 243 Ariz. at 310–11, ¶ 14. The fact that the administration of discipline is contained within the judicial branch does not make it a judicial process.

¶64 Accordingly, because Bar Counsel dismissed the charge before a proceeding, Goldman failed to state a claim for relief in his complaint. Although we hold that an action within a disciplinary proceeding may implicate an action for improper litigation conduct, the mere filing of a bar charge is not "use" of a judicial process and, therefore, we affirm the superior court's dismissal. *See Schrader*, 226 Ariz. at 130, ¶ 10 (despite a misapplication of the law, "we will nevertheless affirm if the court was correct for any reason"). In this case, there was no process, nor was there a proceeding to sustain a claim for the wrongful institution of civil proceedings. *See Watkins v. Arpaio*, 239 Ariz. 168, 173, ¶ 18, n.5 (App. 2016) (an element of malicious prosecution is the existence of a proceeding); *Lane v. Terry H. Pillinger, P.C.*, 189 Ariz. 152, 154 (App. 1997) (wrongful institution of a civil proceeding requires *favorable* termination).

C. We Reverse the Superior Court's Award of Attorney's Fees Under A.R.S. § 12-349.

¶65 Goldman also appeals the court's imposition of a sanction against him under A.R.S. § 12-349 for Sahl's attorney's fees. "We view the evidence in a manner most favorable to sustaining the award and affirm unless the trial court's finding that the action can be so characterized is clearly erroneous." *Phoenix Newspapers, Inc. v. Dep't of Corrs.*, 188 Ariz. 237, 243 (App. 1997). But we review the court's application of a statute *de novo*. *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 23 (App. 2014).

¶66 Under A.R.S. § 12-349(A)(1), the superior court "shall" award reasonable attorney fees against an attorney or party who "[b]rings or defends a claim without substantial justification." A claim lacks substantial justification when it is groundless and not made in good faith. A.R.S. § 12-349(F). "An objective standard may be utilized to determine groundlessness, but a subjective standard determines . . . bad faith." *Phoenix Newspapers*, 188 Ariz. at 244. The superior court found that Goldman's claim also constituted harassment to satisfy the requirements of

A.R.S. § 12-349(A)(1). However, A.R.S. § 12-349(A)(1) has been amended and no longer requires a finding of harassment. *See Rogone*, 236 Ariz. at 50, ¶ 22, n.1. A finding of harassment is necessary for an award of attorney's fees under A.R.S. § 12-349(A)(2), which requires the court to award attorney's fees when a party "[b]rings or defends a claim solely or primarily for delay or harassment."

¶67 The court awarded Sahl attorney's fees under A.R.S. § 12-349 in connection with the abuse-of-process claim, finding that Goldman's claim was "clearly groundless" because his position that an absolute privilege applies only to the content of a bar charge and not the act of filing a bar charge was "directly contrary to long-standing and well-established case law," and that Goldman did not act in good faith because he continued to pursue the abuse-of-process claim based on the bar charge after Sahl "cited binding legal authority establishing that the claim was meritless" and "even though [Goldman] admitted, months ago, that the claim is 'likely' barred as a matter of law" in an email to Sahl's counsel. Because we have determined that the court dismissed the abuse-of-process claim based on an incorrect interpretation of Rule 48, the court's finding that Goldman's abuse-of-process claim was groundless because of existing caselaw lacks a basis. *See Phoenix Newspapers*, 188 Ariz. at 245 (a finding of groundlessness cannot be based on an application of the law that is determined to be erroneous on appeal).

¶68 Sahl encourages us to affirm the court's award of attorney's fees under any one of the bases he raised in the superior court proceeding, A.R.S. §§ 12-341.01, 12-349 or Arizona Rule of Civil Procedure 11. We are unable to do so. Although the court did make a finding of harassment, it did not find that the action was solely or primarily brought for purposes of harassment to satisfy A.R.S. § 12-349(A)(2). We are unaware of any contract between the parties, and Sahl fails to argue how A.R.S. § 12-341.01 applies. The basis for a sanction according to Civil Procedure Rule 11 is the same as A.R.S. § 12-349(A)(1). Even if Goldman believed his claim was a long shot, the five briefs submitted to assist this court with the issues presented yielded five distinct—but each thoughtful, well-reasoned, and well-supported—positions on the law. Therefore, we cannot say that the abuse-of-process claim was "insubstantial, frivolous, groundless or otherwise unjustified." *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 319 (App. 1993) ("We evaluate the attorney's conduct under an objective standard of reasonableness."). Sahl is, however, entitled to his costs for the superior court proceeding under A.R.S. § 12-341, and we affirm that award.

D. We Respectfully Disagree with the Premise of the Concurrence.

¶69 The concurrence questions whether the anti-abrogation clause applies to a court rule. The plain language of the clause does not exclude judicial abrogation, and our supreme court has not questioned the applicability of the clause to its development of the common law. *See Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 27, ¶ 27 (2016) (adoption of the learned intermediary doctrine "does not abrogate a right to recover damages," because "[i]t does not prevent a plaintiff from asserting an action against the manufacturer in appropriate circumstances," nor does it "prevent the plaintiff from suing the prescribing medical provider"); *Nunez v. Prof'l Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, 123, ¶ 25 (2012) (abandoning the heightened "common carrier" standard of care, the court held that "[a]pplication of the traditional negligence standard of care to actions against common carriers does not violate the anti-abrogation clause because it does not prevent the possibility of redress for injuries; the claimant remains entirely free to bring his claim against all responsible parties" (quotation omitted)). The concurrence states that "[o]ur anti-abrogation jurisprudence normally asks whether a statute unconstitutionally deprives a litigant of access to the courts," yet omits the portion that goes on to state, "if the legislature may regulate common law tort actions as long as reasonable legal redress remains available for those claiming injury, the Constitution imposes no greater restriction when this Court exercises its obligation to participate in the evolution of tort law so that it may reflect societal and technological changes." *Nunez*, 229 Ariz. at 123, ¶ 26 (citations and quotation omitted).

¶70 Although correct that the parties did not identify a case applying the anti-abrogation clause to a court rule, that is likely because rules are procedural and, but for this context, are unlikely to affect a substantive right. We fail to see how the plain language of our constitution applies only to legislative and executive acts, but not judicial. *See Boswell*, 152 Ariz. at 17 ("As we have shown, art. 18, § 6 was intended to take the right to seek justice out of executive and legislative control, preserving the ability to invoke judicial remedies for those wrongs traditionally recognized at common law."); *see also Hazine*, 176 Ariz. at 347 (Martone, J. dissenting) ("Does the anti-abrogation clause restrict abrogation by the legislature, but not this court?"); Roger C. Henderson, *Tort Reform, Separation of Powers, and the Arizona Constitutional Convention of 1910*, 35 Ariz. L. Rev. 535, 601 (1993) ("[The anti-abrogation clause] presumably prohibit[s] both the legislature and the courts from abrogating [common-law tort] actions, and denying to the legislature the power to limit the amount of damages that could be recovered in such actions.").

¶71 Moreover, we disagree that we can review this case without considering the basis of the superior court's ruling. Goldman appealed the award of attorney's fees, which the court awarded after finding that Goldman pursued a groundless claim. We cannot review the propriety of the award without determining whether the court's basis was premised on the correct interpretation of Rule 48(*l*).

CONCLUSION

¶72 We affirm the superior court's judgment dismissing the claims but reverse the award of attorney's fees. Sahl requests attorney's fees on appeal under A.R.S. § 12-349 and Arizona Rule of Civil Appellate Procedure 25. We decline to award attorney's fees as a sanction. As the successful parties on appeal, Law Firm Defendants and Association Defendants are entitled to costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

T H U M M A, Presiding Judge, specially concurring in part and concurring in the judgment:

¶73 I agree with the analysis of the well-written majority opinion and its conclusions, except for ¶¶ 28–56, 69–71, including the discussion of Arizona's anti-abrogation clause and the difference between privileges and immunities in this context. Because, as the majority ultimately concludes, filing a bar charge as defined under Arizona law does not invoke process (a necessary element of an abuse-of-process claim), I would affirm the judgment on that count on that narrow ground alone.

¶74 "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation . . . ." Ariz. Const. art. 18, § 6. As typically stated by the Arizona Supreme Court, Arizona's anti-abrogation clause "protects from *legislative* repeal or revocation those tort actions that 'either existed at common law or evolved from rights recognized at common law.'" *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1, 3, ¶ 9 (2003) (emphasis added) (quoting *Cronin v. Sheldon*, 195 Ariz. 531, 539, ¶ 39 (1999)). As that court has stated more than once, "[o]ur anti-abrogation jurisprudence normally asks whether a *statute* unconstitutionally deprives a litigant of access to the courts." *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 27, ¶ 26 (2016) (quoting *Nunez v. Prof'l Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, 123, ¶ 26 (2012)) (citing *State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 228–29, ¶ 32 (2007)); *accord Samaritan Health Sys. v. Superior Court*, 194 Ariz.

284, 292–93, ¶ 37 (App. 1998) ("The purpose of the anti-abrogation clause was to curtail the legislature's power to limit the amount of recoverable tort damages and to ensure that tort claimants have open access to the courts." (citing *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 17 (1986))). Here, there is no legislative action that is alleged to have deprived Goldman of his day in court on his abuse-of-process claim. Accordingly, as classically formulated, this case presents no need to address Arizona's anti-abrogation clause.

¶75 The parties have not cited a case where an Arizona Supreme Court rule has violated the anti-abrogation clause or where the anti-abrogation clause has been used as a tool to interpret a court rule. At oral argument, the parties conceded that, to their knowledge, no such case exists. To the contrary, more than once, the Arizona Supreme Court has stated the anti-abrogation clause "does not preclude this Court from declaring, clarifying, or modifying the common law." *Watts,* 239 Ariz. at 27, ¶ 26 (citing *Nunez*, 229 Ariz. at 123, ¶ 26).

¶76 In the end, the majority opinion finds that filing a bar charge invokes an administrative, not a judicial process, which dooms Goldman's abuse-of-process claim. I agree with that analysis and conclusion without reservation. Given that conclusion, I would not address whether Arizona's anti-abrogation clause applies to rules made by the Arizona judiciary (and, if so, how). Accordingly, I would stop short of addressing that constitutional issue here. As a result, I do not join in ¶¶ 28–56, 69–71 of the majority opinion, instead concurring in the result. In all other respects, however, I agree with the thoughtful analysis of the majority opinion and its conclusions.

AMY M. WOOD • Clerk of the Court
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