IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA.

CASE NO. 502009CA040800XXXXMB

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

-vs-

SCOTT ROTHSTEIN, individually and BRADLEY J. EDWARDS, individually,

Defendants/Counter-Plaintiffs.
_____/

DEFENDANT/COUNTER-PLAINTIFF BRADLEY EDWARDS' MOTION TO STRIKE PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S MOTION FOR SUMMARY JUDGMENT ON THE FOURTH AMENDED COUNTERCLAIM AND SUPPORTING MEMORANDUM OF LAW

Defendant/Counter-Plaintiff, Bradley J. Edwards, individually, by and through his undersigned counsel, hereby files this Motion to Strike Plaintiff/Counter-Defendant Jeffrey Epstein's Motion for Summary Judgment on the Fourth Amended Counterclaim and Supporting Memorandum of Law, based on the law of the case doctrine.

RELEVANT PROCEDURAL BACKGROUND

In the Fourth Amended Counterclaim, Edwards raised two claims against Epstein: 1) abuse of process and 2) malicious prosecution. As to the malicious prosecution claim, Edwards alleged that the filing of the original complaint by Epstein constituted malicious prosecution because Epstein filed it for the sole purpose of "further attempting to intimidate Edwards . . . and others into abandoning or settling their legitimate claims for less than their just and reasonable value."

After the filing of the Fourth Amended Complaint, Epstein moved for summary judgment, arguing as to the malicious prosecution claim that summary judgment was required based upon the litigation privilege. Alternatively, Epstein argued that the claim failed as a matter of law because the "undisputed facts" established that there was probable cause for his original action against Edwards which barred a claim for malicious prosecution. He also claimed that Edwards could never establish a bona fide termination in his favor. The absence of probable cause for the prosecution and bona fide termination in the plaintiff's favor are two of six elements of a claim for malicious prosecution. *See Rivernider v. Meyer*, 174 So.3d 602, 604 (Fla. 4th DCA 2015) (noting the six elements to a malicious prosecution claim: 1) the commencement of a judicial proceeding; 2) its legal causation by the present defendant against the plaintiff; 3) its bona fide termination in favor of the plaintiff; 4) **the absence of probable cause for the prosecution**; 5) malice; and 6) damages). Edwards responded to the Motion, fully addressing both the litigation privilege argument and the probable cause and bona fide termination arguments.

At the hearing on the Motion for Summary Judgment, this Court explained that it "would not grant the motion because of at least those two reasons; that is that I believe that there are questions of fact related to the probable cause issue, as well as the bona fide determination issue additionally." (1/27/14 hearing transcript, p.24) (A copy of the transcript is attached as Exhibit A). Thus, the Court determined, based upon the evidence submitted and the argument, that the probable cause issue was one for the jury.

However, this Court granted summary judgment in favor of Epstein based on the litigation privilege, relying on *Wolfe v. Foreman*, 128 So.3d 67 (Fla. 3d DCA 2013). Accordingly, Final Judgment was entered in favor of Epstein.

Edwards appealed the summary judgment, addressing in his Initial Brief only the litigation privilege issue, as that was the basis upon which this Court ruled against Edwards. In his Answer Brief, Epstein argued:

> In addition, Appellee argued in his Summary Judgment motion that Appellant could not satisfy all of the elements of a Malicious Prosecution claim, including that the suit by Appellee against Appellant resulted in a bona-fide termination in favor of Appellant. Appellee took a voluntary dismissal without prejudice, which does not constitute a bona-fide termination, one of the six essential elements of a malicious prosecution claim. *See Valdes v. GAB Robins*, 924 So.2d 862 (Fla. 3d DCA 2006). Appellant neither addresses nor submits argument as to Appellee's assertion, so this is not addressed in this Answer Brief. Rather, **Appellee reasserts all argument as delineated in his original Motion for Summary Judgment and relies thereupon**.

(AB, p.7, n1) (emphasis added). (A copy of Epstein's Answer Brief is attached as Exhibit B).

While the appeal was pending at the Fourth District, that court issued an opinion in *Fischer v. Debrincat*, 169 So.3d 1204 (Fla. 4th DCA 2015), *approved*, 217 So.3d 68 (Fla. 2017). In *Fischer*, the court held that the litigation privilege could not be applied to bar a claim for malicious prosecution or abuse of process. The court certified conflict with *Wolfe*; the Florida Supreme Court ultimately approved *Fischer* and disapproved the Third District's decision in *Wolfe*.

In its Opinion in this case, the Fourth District held that its decision in *Fischer* controlled as to the litigation privilege issue. *Edwards v. Epstein*, 178 So.3d 942, 943 (Fla. 4th DCA 2015), *rev. denied*, No. SC15-2286, 2017 WL 2492567 (Fla. June 9, 2017). However, the court did not stop there. The court also addressed the probable cause issue. As to that issue, the court held:

> Epstein suggests that this case could be decided on a tipsy coachman analysis, as he alleges that all the elements of the cause of action were not present. However, **the trial court specifically found that material issues of fact remained as to the elements of the claim**. Based upon the facts presented and the inferences which may be drawn from those facts, **we will not disturb the trial court's evaluation**.

Id. (emphasis added). Thus, the Fourth District considered Epstein's probable cause argument and expressly affirmed this Court's decision that summary judgment was not appropriate on that issue.

ARGUMENT

This Court's decision that there was a genuine issue of material fact as to the probable cause issue was considered and approved by the Fourth District Court of Appeal; further consideration of the issue is barred by the law of the case doctrine.

"The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Florida Dept. of Transp. v. Juliano*, 801 So.2d 101, 105-06 (Fla. 2001) (citing *Greene v. Massey*, 384 So.2d 24, 28 (Fla. 1980) ("All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case."); *Strazzulla v. Hendrick*, 177 So.2d 1, 3 (Fla. 1965)). "Under the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case." *Id.* at 106.

Epstein asks this Court to grant summary judgment in his favor on the basis that there is no genuine issue of material fact that he had probable cause to bring his original action against Edwards. However, Epstein made this same argument to the Fourth District in his Answer Brief. The Fourth District rejected it and approved this Court's ruling on that issue, and "the facts on which this decision [was] based continue to be the facts of the case." *Juliano*, 801 So.2d at 106. Therefore, the law of the case doctrine binds this Court to follow the Fourth District's holding (and therefore this Court's prior determination) on this issue. The Fourth District Court of

Appeal has already affirmed this Court's decision that there is a genuine issue of material fact as to probable cause; thus, consideration of this issue by this Court again is precluded by the law of the case doctrine.

Gabor v. Gabor & Co., Inc., 599 So.2d 737, 739 (Fla. 3d DCA 1992), is directly on point. In *Gabor*, the appellate court held that there was a genuine issue of material fact as to the claim in question and reversed the trial court's entry of summary judgment. On remand, the trial court considered the same issue again in a successive motion for summary judgment and entered summary judgment as to the claim in question. On appeal of the second summary judgment, the appellate court again reversed, based upon the law of the case doctrine. The court explained:

> In the case *sub judice*, this court had determined in the previous appeal that a genuine issue of material fact existed as to whether Frank and Ronald Gabor acted in their capacities as directors or officers of the corporations during the events which formed the basis of Sussex's complaint. On remand, the record reflects that the Gabors did not present any evidence different from, or in addition to, the evidence previously presented to the trial court on this point. Applying the "law of the case" doctrine, therefore, it was error for the trial court to enter summary judgment on a point previously determined not amenable to a summary judgment.

Gabor v. Gabor & Co., Inc., 599 So.2d 737, 739 (Fla. 3d DCA 1992); *see also United Auto. Ins. Co. v. Comprehensive Health Ctr.,* 173 So.3d 1061, 1066 (Fla. 3d DCA 2015) (entry of summary judgment, which was affirmed on appeal, precluded trial court readdressing the same issue on remand); *Wallace v. P. L. Dodge Mem'l Hosp.*, 399 So.2d 114, 115 (Fla. 3d DCA 1981) (holding that the appellate court's determination that there were genuine issues of material fact as to a claim constituted law of the case on remand).

Therefore, for the reasons stated above, this Court is obligated to deny Epstein's Motion for Summary Judgment based upon the law of the case doctrine, and there is no need to even

hear argument on it. This Court previously ruled on this precise issue and the Fourth District upheld its determination.

Wherefore, for the reasons stated above, Edwards requests that this Court strike Epstein's Motion for Summary Judgment.

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on September 25, 2017.

Jack Scarola, Esq.
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
eservice@searcylaw.com
jsx@searcylaw.com
and
BURLINGTON & ROCKENBACH, P.A.
Courthouse Commons/Suite 350
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
Attorneys for Bradley J. Edwards
pmb@FLAppellateLaw.com
kbt@FLAppellateLaw.com

By:/s/ Philip M. Burlington
PHILIP M. BURLINGTON
Florida Bar No. 285862

By:/s/ Nichole J. Segal
NICHOLE J. SEGAL
Florida Bar No. 41232

/kbt

SERVICE LIST

Epstein v. Rothstein/Edwards
Case No. 502009CA040800XXXXMB

W. Chester Brewer, Jr., Esq.
W. CHESTER BREWER, JR., P.A.
250 S. Australian Ave., Ste. 1400
West Palm Beach, FL 33401
(561) 655-4777
wcblaw@aol.com
wcblawasst@gmail.com
Attorneys for Jeffrey Epstein

Jack Goldberger, Esq.
ATTERBURY, GOLDBERGER
& WEISS, P.A.
250 S. Australian Ave., Ste. 1400
West Palm Beach, FL 33401
(561) 659-8300
jgoldberger@agwpa.com
smahoney@agwpa.com
Attorneys for Jeffrey Epstein

Fred Haddad, Esq.
FRED HADDAD, P.A.
1 Financial Plaza, Ste. 2612
Fort Lauderdale, FL 33301
(954) 467-6767
haddadfm@aol.com
fred@fredhaddadlaw.com
dee@fredhaddadlaw.com
Attorneys for Jeffrey Epstein

Tonja Haddad Coleman, Esq.
TONJA HADDAD, P.A.
5315 SE 7th Street., Ste. 301
Fort Lauderdale, FL 33301
(954) 467-1223
tonja@tonjahaddad.com
efiling@tonjahaddad.com
Attorneys for Jeffrey Epstein

Mark Nurik, Esq.
LAW OFFICES OF MARC S. NURIK
1 E. Broward Blvd., Ste. 700
Fort Lauderdale, FL 33301
(954) 745-5849
marc@nuriklaw.com
Attorneys for Scott Rothstein

Bradley J. Edwards, Esq.
FARMER, JAFFE, WEISSING,
EDWARDS, FISTOS & LEHRMAN, P.L.
425 N. Andrews Ave., Ste. 2
Fort Lauderdale, FL 33301
(954) 524-2820
staff.efile@pathtojustice.com
brad@pathtojustice.com

IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO. 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff,

-vs-

SCOTT ROTHSTEIN, individually, and
BRADLEY J. EDWARDS, individually,

Defendants.
_____/

TRANSCRIPT OF HEARING
PROCEEDINGS

DATE TAKEN: Monday, January 27, 2014
TIME: 3:00 p.m. - 4:23 p.m.
PLACE: Palm Beach County Courthouse
205 N. Dixie Highway
Courtroom 9C
West Palm Beach, FL 33401
BEFORE: Donald Hafele, Circuit Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were stenographically reported by:

Robyn Maxwell, RPR, FPR, CLR
Realtime Systems Administrator

Exhibit A

APPEARANCES:

On behalf of the Plaintiff:

W. CHESTER BREWER, JR., P.A.
250 South Australian Avenue
Suite 1400
West Palm Beach, FL 33401
561.655.4777
BY: W. CHESTER BREWER, JR., ESQUIRE
wcblaw@aol.com

ATTERBURY, GOLDBERGER & WEISS, PA
250 South Australian Avenue
Suite 1400
West Palm Beach, FL 33401
561.659.8300
BY: JACK A. GOLDBERGER, ESQUIRE
jgoldberger@agwpa.com

TONJA HADDAD, PA
315 SE 7th Street
Suite 301
Fort Lauderdale, FL 33301
954.467.1223
BY: TONJA HADDAD COLEMAN, ESQUIRE
tonja@tonjahaddad.com

On behalf of Bradley J. Edwards:

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
561.686.6300
BY: JACK SCAROLA, ESQUIRE
JSX@searcylaw.com
BY: WILLIAM B. KING, ESQUIRE
Wbk@searcylaw.com

Thereupon,
the following proceedings began at 3:00 p.m.:

THE COURT: Good afternoon, everybody. Thank you so much. Have a seat. Welcome.

MR. BREWER: Good afternoon, Your Honor.

THE COURT: I had the opportunity to read the binder and the materials sent to me by respective counsel. I don't think the case should take two hours.

MR. BREWER: No.

THE COURT: So what I'm going to ask you to do is kindly tailor your arguments to one-half hour apiece. And the movant may split up the time to save some moments for rebuttal. And I think that should more than adequately deal with the matter.

I think the United States Supreme Court heard the Brown vs. Board Of Education and gave 20 minutes a side. So if that can be done in that amount of time, I think we can take care of this.

And, of course, you all realize -- and I don't think this has anything whatsoever to do with the matter, but I should let you know that I handled the state claims that involved Mr. Epstein when I was in Division B. So I have a significant

amount of familiarity with the claims that were made. However, until I met with Judge Crow involving this case, I had no knowledge whatsoever that a separate and independent action had been brought by Mr. Epstein against the Rothstein entities and Mr. Edwards. So to that extent, I just to want let you know, as you probably already did already know, that I handled those cases I believe to their conclusion, at or near the time that I left that division two years ago or so.

Okay. So are you Ms. Haddad?

MS. HADDAD: I am.

THE COURT: Will you be arguing on behalf Mr. Epstein?

MS. HADDAD: No, Judge. I don't have -- Mr. Brewer will be arguing on our behalf because, as you can hear, I have a cold.

THE COURT: All right.

Mr. Scarola, did you want to say something?

MR. SCAROLA: I did, Your Honor. I just wanted to clarify one matter which I believe to be of some significance.

THE COURT: Sure. Of course.

MR. SCAROLA: And that is Your Honor referenced a claim against the Rothstein entities

and that is not the case.

THE COURT: It was just Rothstein individually?

MR. SCAROLA: It was just against Mr. Rothstein individually. That claim has never really been defended and -- against Mr. Edwards. And the focus of these motions is only on Mr. Edwards' claims for abuse of process and malicious prosecution.

THE COURT: The later I knew. My apologies for misstating the number of defendants involved.

MR. SCAROLA: No apology necessary, sir.

THE COURT: The only defendants involved -- and they may have been voluntarily dismissed without prejudice; is that accurate?

MR. SCAROLA: There was a voluntary dismissal of the initial claims brought against Mr. Edwards, that's correct, sir, on the eve of summary judgment hearing.

THE COURT: I remember that being written in your papers.

MR. SCAROLA: Yes, sir.

THE COURT: So is Epstein's claim against Rothstein still viable at this juncture?

MS. HADDAD: Yes, Your Honor, it is.

THE COURT: So the dismissed case without prejudice was to -- was as to Mr. Edwards only.

MR. SCAROLA: The claims against LM, one of victims of Mr. Epstein's conduct, those claims are also dismissed.

THE COURT: Okay. Thank you for that clarification. I much appreciate it.

Mr. Brewer.

MR. BREWER: Yes, sir. Well, first of all, Your Honor, I'm Chester Brewer appearing on behalf of Jeffrey Epstein.

We have before you today a motion for summary judgment filed on behalf Mr. Epstein with regard to a counterclaim that was filed by Mr. Edwards. The case is currently set before Your Honor, specially set I might say, for a three-week or proposed three-week trial, and it is currently set for May the 6th of this year.

One thing that I did want to talk to the Court about before going into the procedural history is in the package that was provided to you by counsel for Mr. Edwards there is a statement or interview that is with a young lady by the name of Virginia Roberts. Now, I don't know whether you have had an opportunity to read it or not.

THE COURT: I didn't. I saw the reference to Ms. Roberts. Who is she?

MR. BREWER: Ms. Roberts was an alleged victim of Mr. Epstein. There was an interview taken of her by Mr. Scarola and I believe Mr. Edwards. There's a transcript of that interview which is neither sworn to nor even signed. It's something that could not be used for any purpose in the trial of this matter, even for impeachment. So if Your Honor has not read it, I won't go into it.

THE COURT: No, I have not read it. I just saw the name Virginia Roberts bandied about on several different occasions, so that's all I know. And as you can tell, I didn't know her relationship to the case.

MR. BREWER: Okay. Your Honor, the procedural history here is there were a number of claims brought by alleged victims of Mr. Epstein. There were a number of different attorneys that were involved. And a number of different cases were filed both in federal court and in state court on behalf of these alleged victims. The cases proceeded, as you've said, some of them were before you. They have all now -- per my

information, they have now all concluded although there may still be some investigations.

THE COURT: Mr. Edwards at his latest deposition indicated that there's still the victim's case that's going on in the federal court.

MR. BREWER: Nothing has happened on that for a quite some period of time now.

The --

MR. KING: Judge, if I may, in response to your question. I'm not sure what victim's case that's referencing. All -- all of the cases --

THE COURT: This was a federal statutory --

MR. KING: I --

THE COURT: -- that Mr. Edwards indicates he's doing pro bono on behalf of two of the alleged victims.

MR. KING: You're correct.

THE COURT: In the Epstein matters.

MR. KING: That's correct. Sorry for the interruption.

THE COURT: That's okay.

MR. BREWER: During the course of those cases, there was some rather unusual discovery that was taking place. And it was learned, and I

I'll get into this towards the end of my presentation, but there were a number of things that were learned by Mr. Epstein in and around November of 2009 -- November/December 2009. He filed a lawsuit against Mr. Rothstein, Mr. Edwards, and LM who is one of the alleged victims. One of the counts in that was for malicious -- I believe it's -- he only had abuse of process along with some other counts.

In response to that complaint, Mr. Scarola on behalf of Mr. Edwards filed a counterclaim. That counterclaim went through several amendments, but the fourth amended counterclaim speaks to two causes of action; that is abuse of process and malicious prosecution. So those are what we're here to talk about today, is abuse of process and malicious prosecution as it relates to Mr. Epstein's original claim against Mr. Edwards.

In response to Mr. Edwards' counterclaim, there were a number of affirmative defenses raised, but one of them that was raised was the litigation privilege. And we are here today to talk with you about the litigation privilege and its current state as espoused by the Florida Supreme Court and the Third District Court Of

Appeals and, in fact, the Fourth District Court Of Appeals.

THE COURT: One thing I wanted to interrupt you on is this Wolfe case and its current status and the -- I'll call the -- I'll call it the Edwards side to make things be easier. But the Edwards side has raised the issue that apparently this Wolfe case is still in rehearing and therefore of no precedential value to the court.

Mr. King, did you want to speak briefly to that?

MR. KING: Yeah. We submitted a notice of correction to Judge Sasser the other day who stood in for you on the page extension.

THE COURT: Right.

MR. KING: We gave her that and asked her to turn that over to you.

THE COURT: I didn't get it.

MR. KING: Okay. What's actually happened is -- and it's confusing because Westlaw's whole history on this, and Mr. Brewer also understands this because he ran into the same problem.

My reading of the history that Westlaw contains indicates that the mandate has issued but they still use the caveat "this is a Westlaw

citation only, it's not in the final published format, and therefore it can be changed at any time." But with the issuance of the mandate, that signifies that it is -- the rehearing is denied and it is now final.

THE COURT: Okay. Thank you for that. I did not know that until right now.

MR. BREWER: So let's get into the Wolfe case. That's where we're headed next. And really there's a trilogy of cases. There's the Levin case, the Echevarria case, if I'm somewhere close to pronouncing that correctly, and the Wolfe case. All of them deal with litigation privilege which dates back to 1917. And I think that we are all most familiar with the standard that defamation cases, if the, quote, alleged defamation occurred during the course of a judicial proceeding would be protected by the litigation privilege and no action could be taken on them.

Over the years different courts looked at it. There was an attempt -- there were attempts made to determine how far and to which causes of action the litigation privilege would apply.

The seminal case now for us, I guess, now is Levin. This was Levin, Mabie suing. It was

actually a tortious interference case. But the case went up to the Florida Supreme Court. And the issue before them was how far is this privilege or to what causes of action should this privilege apply?

And the Levin court came out and said that it would apply to all torts, including the one that was before them which was tortious interference. And that the standard for determining whether the action complained of would be whether that action had some relation to the proceeding, the judicial preceding.

Later on the question came up, Well, should that -- it's the -- we've already determined that it applies to all torts. And so, does it also apply to statutory violations or cases involving statutory violations? And that's the Echevarria case, also in front of the Florida Supreme Court, some 13 or 14 years after Levin, and they found, yes, that it does apply to, essentially, all civil judicial proceedings.

Now, the issues before us are the litigation privilege as it applies to abuse of process and malicious prosecution. That was all brought to a head in the Wolfe case. In the Wolfe

case, the Third District Court Of Appeal was faced with the issue of do the -- does the litigation privilege apply in those two causes of action.

The answer was yes. The Wolfe case or the Wolfe court went back and essentially referred back to and analyzed the Levin and Echevarria cases. And that's why I say it's kind of a trilogy.

And in the Wolfe case it was determined that this was not -- not only was it privileged for any actions that were related to the judicial process, it was an absolute privilege.

Now, in our case, we have exactly the same issue. We've got a complaint that was filed that is alleged in the counterclaim to be malicious prosecution. We also have the pleadings, everything that was filed after the initiation of the judicial pleading -- judicial process. It's claimed to be an abuse of process.

In fact, in answers to interrogatories and all of the discovery that has been had from the Edwards side, they have said that the filing of the complaint was in itself it was untrue, the information that was there was untrue; Epstein should have known it was untrue, and that he had a

bad purpose in filing which was to intimidate or extort Mr. Edwards and his client.

That's been put to bed in the Wolfe case because the litigation privilege absolutely applies and is absolute. The Wolfe case states that they could think -- or the Wolfe court stated they could think of no action that would be more related to the judicial process than the filing of a complaint. So a complaint, the filing of the complaint is privileged.

Then going back, and then as they related to the Levin case and the Echevarria case, they said anything that was related to the judicial process -- discovery, depositions, interrogatories -- as long as they were related, they were protected by -- the participants were protected by the litigation privilege.

They -- in the trilogy, and I forget which one of the cases it was, but they go even further and clarify that the claim "a bad motive" is really irrelevant to these causes of action when you were talking about the litigation privilege. The -- let me see, where am I here?

In the Wolfe case it was a motion for judgment on the pleadings. In some of these other

cases it was motion for summary judgment. And in all of these cases they found that the litigation privilege barred the causes of action that were being claimed.

The argument has been made by the other sides that because Mr. Edwards -- or, excuse me, because Mr. Epstein had no reason to file the original complaint that he filed, that somehow or another the litigation privilege should not apply. And that because he shouldn't have filed the original complaint, everything that he did thereafter was an abuse of process.

We would put it to Your Honor that's not the standard as espoused by the Third District Court Of Appeal, the Fourth District Court Of Appeal, or the Florida Supreme Court. The standard is: Did the action have some relation to the judicial proceeding?

THE COURT: I think at least in trying to distinguish Wolfe, but at the same time taking a more global approach, the Edwards' side is suggesting that timing and the length of time subsequent to the settlement of the pending claims and his continuing to prosecute the suit more so on the malicious prosecution side would distance

itself from Wolfe, because in Wolfe I believe the court made clear that it was a brief prosecution of the action and was not protracted. How do you respond to that concern?

MR. BREWER: I respond by quoting the Florida Supreme Court, which is: If the action -- and whether they're talking one action, 20 actions or 40 actions, if the action is related to the judicial preceding, then you have a litigation privilege.

THE COURT: And that can go on essentially forever in your mind?

MR. BREWER: I don't know that it can go on forever because also they were talking, particularly in the Levin case, about protections that would be afforded to litigants. But those protections would not be through a cause of action for malicious prosecution or abuse of process; rather, it would be through the court with contempt proceedings, perhaps. It would be through the Florida Bar for, you know, inappropriate actions taken by an attorney. It could be perjury for a litigant which would be handled by the state.

THE COURT: I don't think perjury. Not if

it's guised in the litigation privilege, but perhaps you're right that it could be met with 57.105 standards.

MR. BREWER: 57.105 was the one I was just getting ready to get to, Your Honor. So there are protections against what you're talking about, but again, I have to go back to what did the Supreme Court tell us.

I did want to touch also on another point that was raised in our motion, which is that the Complaint, at least insofar as malicious prosecution, has to fail because there is probable cause demonstrated for Mr. Epstein to have filed or at least have reason to believe that he could file -- properly file the claim that he -- that he did file.

THE COURT: Is probable cause always a legal -- purely legal determination?

MR. BREWER: No. No. If there are questions of fact that are involved with the probable cause, the questions of fact are for the determination of the jury. The jury -- the judge then takes those determinations of the jury to make a finding of probable cause. But it is in the -- at the end of the day the court -- the

issue of probable cause is a matter of law for determination by the court.

But the threshold for establishing probable cause in a civil action is really rather low. Because it is whether the defendant could have reasonable -- what the -- what the defendant could have reasonably believed at the time of asserting the claim.

So I want to go briefly through what Mr. Epstein knew or was available to him at the time November/December of 2009.

First, undisputed, Mr. Edwards was a partner at the Rothstein firm. It's also undisputed and it had been admitted by Mr. Rothstein that this firm was the front for one of the largest Ponzi schemes in Florida history. At the time, Mr. Edwards was the lead attorney for three cases that were being brought by the Rothstein firm against Mr. Epstein.

During the litigation there were numerous discovery attempts which appeared to be unrelated to those; and that was trying to get flight manifests, take depositions of people who may have been on flights on Mr. Epstein's planes, some very, very prominent names. And these things were

escalating during that time period. And it was very, very strange.

In late November of 2009 there was an explanation as to why those things were going on. And the Rothstein firm imploded. And there was a complaint that was brought by Bill Scherer I believe down -- I don't know if it was Broward County or Dade County.

THE COURT: Yeah, I'm familiar with all that.

I remember that day. Do you remember that day, Mr. Edwards?

MR. EDWARDS: I remember it like yesterday.

MR. BREWER: In any event, he filed a complaint on behalf of a group of investors that we refer to as Razorback. And if I can find it. Here we go. One of allegations in the complaint in Razorback was, additionally, "Rothstein used RRA's representation in the Epstein case to pursue issues and evidence unrelated to the underlying litigation but which was potentially beneficial to lure investors into the Ponzi scheme."

THE COURT: You -- five out of the six of you know me very well, and I always am very receptive to argument. You guys know that. The

only one is Ms. Haddad. I think -- I'm not sure if we met before. But I just feel like the probable cause aspect just carries with it too many factual issues for me to rule as a matter of law, so I don't think that I can grant relief on the probable cause issue vel non. So if you will, please move on to --

MR. BREWER: On that note, because I was -- I will close.

THE COURT: Okay. Thank you very much, Mr. Brewer.

MR. BREWER: No, I will close by --

THE COURT: On that issue?

MR. BREWER: I will close on that issue.

THE COURT: Very well.

MR. BREWER: But I would like to close by quoting a very prominent attorney.

THE COURT: Sounds like a plan.

MR. BREWER: This is something that was before Judge Crow.

And it begins out of the attorney saying, "Tab 4, Levin vs. Middle -- Levin vs. Middlebrook is the Tab No. 18?"

Judge Crow says, "I read it a thousand times."

The attorneys says, "Yes, sir, I'm sure you have."

"THE COURT: You have to give it to me again, though."

ATTORNEY: "I will be happy to do that."

"THE COURT: This deals with the litigation privilege?"

The attorney then goes on to say, "Yes, sir, it does deal with litigation privilege. Echevarria also deals with the litigation privilege. Delmonico stands for the proposition that the issues with regard to privilege are some issues of law for the court to determine. And I provided Your Honor with highlighted copies. I'm providing opposing counsel with highlighted copies as well.

"THE COURT: Okay."

THE ATTORNEY: "Basic point here, Your Honor, is that the litigation privilege is an absolute privilege. Once it is established that the actions occur within the course and scope of the litigation, the privilege applies absolutely as a matter of public policy.

"The basis of those decisions, that if there's misconduct in the course of litigation --

if you're talking about improper discovery, if you're filing improper motions -- there are remedies that are available to the court through the court's inherent power to control its own litigation; through the contempt powers of the court through Florida Statute 57.105, and through the filing of bar grievances. And it will cripple the system if litigants are obligated to respond to separate litigation just because somebody has alleged you noticed the deposition that shouldn't have been noticed. You filed a motion that shouldn't have been filed."

That prominent attorney is Mr. Scarola.

THE COURT: In an unrelated case?

MR. BREWER: In this case. In this case when they were arguing that Mr. Edwards was entitled to the litigation privilege with regard to Mr. Epstein's complaint.

THE COURT: Okay. Who --

Off the record for a minute.

(Discussion off the record.)

THE COURT: Okay. Mr. King, please.

MR. KING: Thank, Your Honor. William King and Jack Scarola, Your Honor, for Mr. Edwards who is seated with us at the table.

May it please the Court.

THE COURT: Please.

MR. KING: In light of the Court's ruling on the probable cause issue, I am not going to get into all of the facts with which we did not have an opportunity to identify in detail. I'll simply say to the Court that there still exists the issue of the bona fide determination they have not raised here today. And so, the submission of the facts that we have submitted, that we've prepared for you, would bear on that unless they have -- likewise, because of factual disputes, they're basically taking the position that is no longer -- that's no longer an issue either for purposes of this summary judgment.

Pursuant --

THE COURT: Let me stop you, Mr. King, so that you're not confused by my preliminary statements to Mr. Brewer. And that is, that the global issue that's covered by, as Mr. Brewer puts it, the trilogy of cases, the Levin, Echevarria, and now this Wolfe case is not being disposed of or is not being ceded by Mr. Brewer here. They're still claiming that both counts are covered by the Wolfe, Levin, and Echevarria cases.

My statement is only if, in fact, those cases are, and now the Wolfe case which is now, in my view, on point relative to both abuse of process and malicious prosecution claims globally, if that case for some reason doesn't cover that, then the elements of the malicious prosecution claim are off the table. In other words, I would not grant the motion because of at least those two reasons; that is that I believe that there are questions of fact related to the probable cause issue, as well as the bona fide determination issue additionally.

MR. KING: And I understand the Court's ruling in that regard.

THE COURT: Okay.

MR. KING: My only point was they raised in their initial brief an issue of whether there was a bona fide termination. That, likewise, is very fact specific.

THE COURT: I agree and that's why I want to make clear that that standing alone, the elements of the malicious prosecution claim as opposed to the abuse of process claim, which I will handle separately, will not muster in summary judgment in my view.

MR. KING: Thank you.

Then let me focus, then, on the litigation privilege, Judge, since that's the key issue that the Court is dealing with today.

THE COURT: Thank you.

MR. KING: It is our position that a conflict currently exists with regards to the issue whether the litigation privilege bars a malicious prosecution claim. And I have cited to the case Olson vs. Johnson, 961 So2d. 356, the Second DCA's opinion in 2007, after both Levin and Echevarria. And it holds that malicious prosecution claims are not barred by the litigation privilege.

Then you have Wolfe that stands in contradistinction to that which holds that it does. Although, as I'll point out in a few moments, one of -- Judge Shepherd in his concurring opinion doesn't -- he doesn't rely on that, on that theory.

Our position is that Olson vs. Johnson sets forth the accurate and more persuasive proposition; that is that it does not bar a malicious prosecution claim. Even though Olson vs. Johnson dealt with complaints by a complaining

witness in a case that only resulted in a malicious prosecution claim leading to a wrongful arrest, doesn't -- the facts of the case itself do not go so far as to address issues of what happens once a civil complaint is filed. But the proposition that that Olson states is unequivocal; that is the litigation privilege does not apply to malicious prosecution.

Now, when we get to Judge Sasser's opinion, which I submit in all of the cases that have been cited by everyone, Judge Sasser's opinion is the most cogent, most well-reasoned, and rejects those very propositions that two judges in the Wolfe case adopt.

So let me -- let me just suggest to the Court --

THE COURT: Which Judge Sasser? I'm trying to figure out which one you are talking about.

MR. KING: That is the decision in -- bear with me, Judge.

THE COURT: No problem.

MR. KING: That is the decision in Johnson vs. Libow, a 2012 -- Westlaw 4068409 in 2012.

THE COURT: Okay.

MR. KING: It is concise. It's to the

point. And I'll address that in just a few moments.

THE COURT: All right. Thanks.

MR. KING: Now, what's interesting about Wolfe, and what's almost inexplicable about Wolfe, is that it ignores its own prior precedent by Judge Cope in his concurring decision in Boca Investors Group vs. Potash, 835 So2d. 273.

THE COURT: That was a concurring opinion?

MR. KING: Yes, that was his concurring opinion.

THE COURT: Okay.

MR. KING: Of course, as you know, Judge Cope is very well-respected and his opinions are very articulate, but it also ignores a Third DCA's full panel's decision in SCI Funeral Servcies Inc. vs. Henry, 839 So2d. 702 at Note 4, Third DCA opinion in 2000, both of which both Judge Cope and the panel in the SCI case note that the Supreme Court's citation in Levin to Wright vs. Yurko, which I cited in the memorandum, which was a Fifth DCA decision back in 1984, implicitly recognizes -- that is the Supreme Court itself implicitly recognizes that malicious prosecution claims are not subject to the litigation

privilege.

And if you read Wright vs. Yurko, you read Judge Cope's concurring opinion, and you read the panel's footnote in SCI, one should not come up with any other conclusion other than that's what the Supreme Court did. So you have Wolfe standing in contradistinction to its own -- to its own precedent, which they don't address at all in Wolfe, and it stands importantly in contradistinction to the Supreme Court's own position on that -- on that doctrine.

I -- I would dare say that the Third District will always stand alone on that proposition. Any other district court which is going to undertake this issue will not follow that ruling. And the Supreme Court itself, if it ever gets on the cert's jurisdiction, will not either.

Other courts have likewise commented that the litigation privilege would not bar a malicious prosecution claim. I have cited you to the decision of Judge Corrigan in North Star Capital Acquisition, LLC vs. Krig, 611 F.Supp.2d 1324 (M.D. Fla. 2009), another decision that was decided after Levin and Echevarria. And the court in that case discussed -- let me just for a moment

here --

Well, the bottom line is Judge Corrigan commented about the litigation privilege and stated that neither malicious prosecution nor abuse of process would be barred by the litigation privilege.

I have also cited the Cruz vs. Angelides, the Middle District of -- I'm sorry, 574 So2d. 278, Second DCA 1991, which also suggests that malicious prosecution would not be barred by the litigation privilege.

But as I've indicated, the most cogent and well articulated opinion on this subject is Judge Sasser's opinion in Johnson vs. Libow. She expressly revoked the arguments that are raised by Wolfe, which arguments, of course, are opposed by the assertion in Olson. The court noted the following -- and these are the very compelling reasons why Wolfe would not apply to a malicious prosecution claim.

As she said, "Levin involved actions taken during the course of proceedings" and as you remember what Levin was; that was a situation where there was a motion to disqualify counsel. Then ultimately, when they didn't call counsel,

they filed a separate interference claim and the court barred that on the litigation privilege. But the court stated that when you're dealing with the malicious prosecution lawsuit, it's fundamentally different. It involves the filing of a baseless action against a defendant. And the purpose of a malicious prosecution action is to prevent vexatious prosecution or litigation.

"The purpose of the litigation privilege," she stated expressly, "is not to preclude the tort of malicious prosecution. And if the litigation privilege was applicable to the filing of a suit, the tort of malicious prosecution would not survive."

And as the Court is well aware, the malicious prosecution has been recognized as -- it's an ancient tort in Florida. It's always been around. The Supreme Court has addressed it in the past specifically. And one cannot lightly accept the proposition that the Supreme Court, which itself has indicated -- implicitly indicated at least that the litigation privilege would not bar a malicious prosecution claim. That the Supreme Court itself would not adhere to the those rulings and overturn a century of law recognizing the tort

of malicious prosecution.

We also submit that Wolfe is distinguishable because the litigation privilege was applied to the attorneys in that case. The attorneys were involved, and I need not go over all of the facts of the case, but it was a very, very brief involvement by the lawyers. As I suggested in the brief, lawyers may end up being given a broader immunity under the litigation privilege because of their obligations to their clients to carry out their legal and ethical responsibilities.

And the facts of that case are somewhat compelling in that the attorneys who make a brief appearance shouldn't be exposed to all of this. Maybe their -- maybe the thought process was something along the lines, well, we don't want to put the attorneys through this. This should be cut out right at the beginning.

THE COURT: Off the record for one second.

MR. KING: Yes.

(Discussion off the record.)

MR. KING: And I cited the Taylor case, which was a Supreme Court of Idaho decision, which discusses that issue and which shows that for

those very reasons that I identified, lawyers should have a greater opportunity to -- opportunity to seize upon immunity which would cut off their liability early on. So whether it's a qualified immunity or absolute immunity discussed in that decision, whatever, perhaps that was the -- a factor or although they don't cite to Taylor, but maybe that's a factor in Wolfe.

THE COURT: I guess I understand your position that you're taking in terms of in the Wolfe context, because as I indicated to Mr. Brewer during his argument, the court made it a point to indicate the very brief involvement of the Kenny Knachwalter firm. But since I did ask my question off the record, I'll indicate what I did ask was whether or not Mr. Epstein was represented at all times material to the allegations now made by Mr. Edwards. And Mr. King has answered in the affirmative.

I'm having difficulty then with trying to reconcile why the claim was only brought against Mr. Epstein as opposed to his attorneys, especially where the emphasis has been made quite strongly that despite the settlements that went on Epstein, essentially himself as related to the

court, was the guiding influence here in proceeding against Mr. Edwards in a -- for a -- for a time period that you believe is actionable.

MR. KING: Well, one response, without going into the entire tortured history of Mr. Epstein's actions and the various machinations that he undertook, the initial complaint which charged Mr. Edwards with all sorts of horrific crimes -- fraud, perjury, conspiracy to commit perjury, securities fraud, general fraud, extorsion, all -- all specific crimes that were alleged against him, the lawyers who were involved in that case withdrew. They abandoned those claims.

Well, we can't ask them why, but I submit that what happens is the evolution of that case then becomes a case involving merely -- I shouldn't say merely abuse of process, abuse of process. So one response is that's a situation that -- that you -- that is sort of suggested by, perhaps, the court in Wolfe and in desiring to protecting lawyers who recognize what happened and then get out of the case.

They realize that whatever they were told by their client, and we submit that, for example,

the attorneys would not necessarily know what Mr. Epstein had in his mind. We know what Epstein had in his mind because I have outlined somewhat in the papers here the huge amount of evidence accumulated by not only Mr. Edwards but the federal government, by the state government which showed that not only was -- did he abuse Mr. Edwards' clients repeatedly from the time they were 14 and 15 years old, he was abusing girls as young as 12 years old. He was having -- he was having orgies on his airplane, one of those indications that they may have had reference to in their papers and earlier made reference here about why was discovery pursued by Mr. Edwards.

But they -- the lawyers are just not -- A, they're not sued. That's not a situation that we're facing here.

THE COURT: I know that.

MR. KING: And for the very reasons that Taylor talks about, it's just unwise, it seems to me, to pursue lawyers in a case where you may know inside what's going on with Epstein and why he's doing what he's doing.

And that's a fine line that the lawyers have to face in every case; when do I step out?

The original lawyers in this case did step out. And those claims were all abandoned. And I think that speaks volumes. All of that, of course, goes in part to the issues of malicious prosecution, which we would ultimately argue if I had to get into those facts.

I hope that answers your question. I mean, Epstein stands in our -- from our standpoint, in a completely different position than the lawyers at this stage of the proceedings despite the fact that after he settles the claims he then continues to pursue the allegations.

And to us, your review of the size of those settlements would have an impact on all of the issues, not on this particular issue that we're talking about now. But if we had to get into those facts and the court took a look at what those settlements were in camera, then we would believe that that would be -- that's a strong indication that all of this stuff that he seized upon, that Edwards seized upon --

MR. BREWER: Excuse me, Your Honor. Motion For Summary Judgment is supposed to be something that is in evidence and in record and it's not.

THE COURT: Yeah, I have no plans on

reviewing the size of the settlement amounts. They don't phase me at all. And I -- I don't -- it seems since they agreed to be confidential, I think we should respect that.

MR. KING: And I understand, and since we're not even discussing these, and I may be going further than what your concerns were about the lawyer's involvement in the case and why they wouldn't be sued in a case like this.

THE COURT: What I'm saying is I can understand both sides' argument. But on the one hand, it's interesting that the line of cases here on this immunity issue often bears on the facts of the cases. Meaning, the most repugnant they take -- there's a more liberal approach. The Wolfe case where the Kenny Knachwalter firm abandoned the claims immediately, there's a more conservative approach. And I tend to -- tended -- tended to notice that while I was reviewing the cases, which is understandable, certainly.

But the -- the -- what I said about both sides is, yes, I can see in a situation where the attorneys quickly abandoned the case there's the indication that a claim would not lie. However, where I -- where I have the representation made

without controvert that Epstein was represented throughout the process, so to speak, even after the settlements were effectuated, but represented nonetheless by counsel, I can also see the other side where it could -- it could weaken the argument that Epstein would be at the control so to speak.

MR. KING: Well, it -- it's our position that the mass of evidence which we have, some of which I just outlined, reflects that Mr. Epstein seized upon a convenient situation, the RRA implosion, to use that as a sword against Mr. Edwards. And it became -- it was personal with him, and he knew that the allegations against him by not only his own clients were true. And as you know, ultimately, what happens is the attorneys dismiss the case on the eve of the Motion For Summary Judgment. And --

Mr. Scarola corrects me. I wasn't in in those the earlier stage, but he indicates that two sets of lawyers got out.

THE COURT: That's okay. That's fine.

MR. KING: But in any event, then on the eve of the summary judgment motion we submit that the last set of lawyers gets out because -- they

withdraw those claims or dismiss those claims because they are faced with the knowledge that they couldn't uncover one iota of evidence that Mr. Edwards was guilty of anything. His name never appeared in the public, in any public documents were filed. They took his deposition for days. They have never been able to uncover one piece of evidence that would remotely suggest that he was involved. So the bottom line is -- I really probably have gone further than the Court --

THE COURT: No, not at all.

MR. KING: -- and I apologize for that.

THE COURT: I just want to give you a ten-minute warning now, but --

MR. KING: All right.

THE COURT: Don't these cases, though, teach us that essentially no matter how repugnant the judicial conduct process -- the conduct during the judicial proceedings, I should say, no matter how far repugnant the conduct during the judicial proceedings may be, as long as they are within the judicial proceeding there is this immunity that exists, particularly for an abuse of process claim?

The malicious prosecution claim I am more on the fence. But on, as far as the abuse of process claim is concerned, and there's that balancing that is taken into account that I believe it's talked about primarily in the Levin case about the full disclosure within the lawsuit venue versus someone facing liability because of what may be alleged in a complaint or during a deposition or something along those lines. As long as it's within the judicial proceeding, and, again, no matter how repugnant it may be, is there not this immunity afforded by the appellate courts that would extend at least to the abuse of process claim? And tell me, if not, why not, please.

MR. KING: We acknowledged in the memo that both in the Third and the Fourth -- in the Fourth in the American National Title Case, both applied the doctrine to the abuse of process claim.

The full import of how far that will go because each of those cases again involved lawyers. But the question is: Will that in the future -- because, again, that tort, abuse of process, has been around a long time. But the American National case was 1999. And also the LatAm case, which was a precursor to Wolfe on that

issue, the litigation privilege and the abuse as it applied to the abuse of process, that case was cited by Wolfe.

So you had -- you had some rational prongs that Wolfe could latch onto in terms of the issue of the application of litigation privilege to abuse of process. And we would distinguish it on -- we would distinguish those cases based on the fact that lawyers only were involved.

We would also maintain that that --

THE COURT: I guess, Mr. King, what it comes down to is, shouldn't lawyers know better than the litigants themselves? And, again, if -- I would be a bit more receptive to your argument if I was told Epstein filed these documents pro se. Because he is at least, you know, to a degree an educated individual. He has a background, I believe, in finance. So, you know, there could be those facts that could be developed within his educational purview, within his experience purview, within his own personal vendettas that he may have with Mr. Edwards.

But, again, shouldn't lawyers know better? The lawyers are continuing this plight on behalf their client. Why is Epstein the one who is the

focal point of this abuse of process claim?

MR. KING: And, again, I would go back to the role that lawyers have in walking that ethical line, walking that legal line, walking the line where they have to advance their client's cause as best they can. And when it comes to that point where they recognize that, no, these claims are false, there's no basis for us to proceed, then they get out.

And now, as I'm advised, two firms did that before. The last firm came in and dropped their -- dropped those claims on the eve of summary judgment.

So one, to me, as -- I shouldn't say that. To -- to Mr. Edwards in this particular case we see a clear distinction. And that distinction is you don't go after the lawyers for these claims if you recognize that there is a -- that they have acted within the bounds of arguably of their ethical responsibilities and legal responsibilities to their client. They have to zealously advocate for him. But that doesn't excuse him. That doesn't excuse an individual who over all those years were committing those heinous acts against not only Mr. Edwards' clients, but

many, many others.

THE COURT: But those heinous acts as have you communicated, and I won't take a position one way or the other on the acts, but I'm just picking up on what you just said, but they have nothing to do with this case itself on the claims of abuse of process and malicious prosecution. They just simply don't. I mean, you may suggest to me that they have something to do with them from the standpoint of Epstein's dissatisfaction with the settlement or whatever may have been attributed to that, but they really have nothing to do with these claims.

MR. KING: Well, with the litigation privilege I will acknowledge other than what I have already argued the situation was different wherein, in, for example, Wolfe he had the brief appearance by the lawyer and Judge, it was -- Judge Shepherd, in his concurring opinion, didn't embrace that. What he said was, Look, there's two elements, and malicious prosecution doesn't even exist here. Let's get rid of it.

THE COURT: Right.

MR. KING: I would just suggest that the facts that I have outlined, and which we have in

all of the materials that we submitted to you, all of those facts are -- they -- they do go to the other issues that you aren't addressing here; the factual issues on good faith and the factual issues on bona fide termination.

And so with that reservation, I would suggest that the only other reason why these facts are so significant is because anybody sitting -- a court sitting back and looking at the landscape here would have to ask themselves, look, in light of -- for example, Judge Sasser's opinion, and the reasons why we have malicious prosecution claims and why they would survive is because of something just like this. And I'm getting back to the litigation privilege and malicious prosecution.

I really have ended my comments on that but I just wanted to address your concerns about why all of these facts might impact.

THE COURT: No. Go right ahead.

MR. KING: And those facts impact because what it does is it cries out and it shows you that this is why a malicious prosecution claim should survive the litigation privilege. When you have a torrent of evidence that he's comitted these acts and that he knows that the attorney for those

clients has acted appropriately and at every stage he was involved before he ever got associated -- before Mr. Edwards ever got associated with RRA and he continued them on after he did it.

He does pro bono work for clients, as you know, in the federal case. He knows that. Epstein knows that. And that's why the facts are important to malicious prosecution claims because, as Judge Sasser says, the idea here, the concept here on a malicious prosecution claim is, this is -- this is the kind -- this is why the privilege shouldn't apply, because the vexatious prosecution of a claim is something that the law will recognize.

And everything that we have put into the record about Epstein's involvement shows that this use of that lawsuit was a pretext. And that he had every evil motive in the world to pursue these claims and continue those claims after Mr. Edwards settled those claims -- Mr. Epstein settled those claims.

So my only other comments is to try to address your concerns vis-a-vis the issue of abuse of process. That's more difficult. It's more difficult because we have the Fourth's opinion and

the Third's precursor opinion, so it -- it -- it clearly is problematic.

We our -- our position on it is essentially this: Judge Corrigan in his opinion in the case that I cited says the privilege shouldn't apply either. Then you have what we submit are egregious facts which should -- including a settlement and he continued prosecution afterwards, which we submit it is going to be -- the light's going to go off and say, Whoa, wait a minute, we can't -- we can't count this the application of privilege in the context of these facts. Your concerns are legitimate and well expressed. No matter how egregious the facts, perhaps that won't make a difference to the application of the privilege to -- to an abuse of process claim, perhaps.

But we submit for the reasons that we have identified that the litigation privilege should equally not apply to the abuse of process claim for those reasons.

THE COURT: Malicious prosecution.

MR. KING: Okay. Well, certainly to malicious prosecution. But also your last concern --

THE COURT: Your position is I think it does apply to abuse of process.

MR. BREWER: Right.

MR. KING: But certainly not malicious prosecution for the reasons that are well-articulated by Judge Sasser and others. And with regard to the reasons I've just expressed to the abuse of process claim.

And make sure I didn't miss anything --

THE COURT: Three minutes to wrap up.

MR. SCAROLA: And I'm going to use two of them, if I may, Your Honor.

THE COURT: Any objection?

MR. BREWER: Yes, Your Honor. They're not allowed to split. This is not, you know, a rebuttal on their part.

THE COURT: I agree.

MR. BREWER: So they're not allowed to split it.

MR. SCAROLA: May I have just a moment?

THE COURT: Absolutely. Take your time. But I do believe that protocol would dictate only one attorney speak to the issues.

MR. KING: Right.

THE COURT: Thank you.

I have Judge Sasser's opinion. I have it right here or, I should say, her order as opposed to the opinion.

MR. KING: All right. You have that. And just to wrap up then, Judge, with regard to the comments in Levin about the other -- the availability of other remedies that are -- that would exist against attorneys if the -- you know, if the privilege were not applied to the attorneys as in Levin, there are a myriad that the court has. Much more difficult when it comes to an individual. And I -- I think there was one other comment made. Let me just double-check my notes.

Counsel had referenced the abuse of process claim and whether the facts support the abuse of process claim. We submit from that standpoint they do. We've satisfied all of the elements.

They -- they -- and the last comment I'll make here is their focus was you can't have an abuse of process claim based upon the pursuit of all of these actions that were taken during the course of the proceedings. And we submit that under the circumstances of this case, where this claim was commenced against Mr. Edwards during the course of his prosecution of the underlying claims

and while multiple other claims were being pursued against him, that under those circumstances the abuse of process claim does survive a challenge to whether or not we have satisfied the elements.

The process that's involved in the abuse of process claim is the lawsuit. The subsequent actions that all of the cases talk about are, in our case, the pursuit of all of those efforts during the course of the -- of that case. And they were all done for an ulterior motive. We've satisfied those elements.

I don't have the time to get into all of the facts. I tried to give you the essence of what we had by citing to the statement of undisputed facts, Mr. Edwards' affidavit, the materials relating to the filing of our motion for punitive damages which was granted. We gave you the depositions because, unfortunately, to really grasp the entire background on this, you almost have to read the entire depos. I tried highlighting and pulling them out for you, but I couldn't really do that. So I apologize.

THE COURT: No, that's okay.

MR. KING: But that would end my argument. I appreciate your courtesy.

THE COURT: Thank you and Mr. Brewer for your --

MR. BREWER: A few moments, Your Honor?

THE COURT: Sure.

MR. BREWER: I forgot to ask you if I could address you from the chair here rather than the podium.

THE COURT: That's fine.

No, I wanted to thank Mr. King and Mr. Brewer for their initial arguments, and I appreciate very much the professional.

MR. BREWER: Your Honor, you seemed to be a little bit more troubled with regard to the malicious prosecution aspects here. I'd like to point out to you that in the case, the Wolfe case, specifically they stated "because the law is clear that the litigation privilege applies to abuse of process, we affirm the trial court's order granting judgment on the pleadings in favor of the defendants below as to that cause of action. Although the law is not as clear whether the litigation privilege also applies for the cause of action for malicious prosecution, we conclude that it does and affirm the trial court's order finding that the litigation privilege also applies to a

cause of action for malicious prosecution."

That was actually the issue before them because it had already been determined that the litigation privilege applied to the abuse of process in both the Third and the Fourth District Courts of Appeal. That's admitted by the counterclaim in their motion in opposition.

I wanted to speak about this idea that the worst -- the actions were of Mr. Epstein and/or his attorneys that somehow or another there's a sliding scale. And if you worked longer on the case, or if you put in more pleadings or whatever, that somehow or another that would have an effect.

That's not something that I have seen anyway in the trilogy of cases. In fact, what is said in the trilogy of cases is if the litigation privilege applies, it's an absolute privilege. Absolute.

The Olson vs. Johnson was mentioned to you to say that to indicate that the -- that malicious prosecution can still survive and exist. And, in fact, the Olson case, which was a case in which three ladies accused this guy of stalking, filed a false police report. The guy got arrested. Actually, I think -- I'm not sure if he went to

trial, but he was able to establish that he was six miles away at the time of the alleged stalking. And the ladies just lied to get him in trouble.

The Olson case was addressed in the Wolfe case, and it said, Wait a minute, that is -- a cause of action for malicious prosecution will stand there because that was an action that was taken outside of the judicial process.

THE COURT: And that -- and that's, you know, where, you know, I'll ask Mr. King to briefly address this as well. But, you know, the dilemma the court has here is the language that is reaffirmed in Wolfe and extracted from the Echevarria matter from the Florida Supreme Court. And they quoted and say that Echevarria reaffirmed the proposition -- and I'm using my own words by saying "the proposition" -- that, quote, absolute immunity must be afforded to any act occurring during the course of a judicial proceeding so long as the act has some relation to the proceeding. And they clarify that although not all statements made outside of the formal judicial process are protected by the litigation privilege, an absolute immunity applies to conduct occurring during the

course of the proceedings.

So that seems to tell me that if Epstein is filing a complaint, if Epstein is seeking discovery, if Epstein is making obnoxious allegations against Edwards -- and I'm, again, not taking a position one side or the other, that's why I'm using the word "if" to preface all of my commentary, as long as it has some relation to the proceeding -- it is afforded absolute immunity.

If you're sitting in my shoes, Mr. Brewer, or better yet sitting in Mr. Edwards' shoes, what would be his best argument to defeat your motion on malicious prosecution?

MR. BREWER: I don't know that they have one, Your Honor, in light of Wolfe. Not at this level.

THE COURT: Is there anything that you can fathom as an officer of the Court that they are claiming Epstein did in either the abuse of process or the malicious prosecution claim -- and as I said, I'm more concerned with the malicious prosecution claim -- that Epstein did outside of the judicial proceedings? Is there anything alleged here that he did outside of the judicial proceeding, such as -- I saw in the damages

portion of the argument made by the Edwards side, and I think it may have had some relation to Judge Crow's questions about damages relating to Mr. Edwards -- but I saw that there were some --that -- that Mr. Edwards felt there was some threat to his or -- to him and his family. Has there been any such threats made to your knowledge by Mr. Epstein that would have gone to him or his family?

MR. BREWER: Your Honor, I'm late to the game. I was not a participant or counsel here until, oh, probably three or four months ago. I have done my best to familiarize myself in what has gone on prior, but it's voluminous. And so I can't swear to you that I've read everything or seen everything. I, however, have no knowledge of Mr. Epstein making any threats to -- towards Mr. Edwards.

THE COURT: I'm just using that as an example.

MR. BREWER: Well, I don't have any knowledge of him making threats to Mr. Edwards or to his family.

THE COURT: Anything outside of the judicial proceeding as potentially or allegedly

obnoxious? And as Mr. King brought out earlier the allegations being horrifying, egregious, no matter how you might identify those allegations that were quickly withdrawn, anything that you're aware of that went on outside of the judicial process that is being alleged here?

MR. BREWER: Not that is being alleged here, Your Honor, no.

THE COURT: Mr. King, anything that's being alleged here that goes outside of the broad spectrum that I have read into the record that has its genesis in Echevarria and was quoted by the Wolfe Third District Court of Appeal opinion?

MR. KING: There's nothing alleged. Mr. Edwards' testimony, though, was that he was being stalked by an investigator which gave him the additional concern. But that's not specifically alleged as a matter that, you know, that forms the basis for the malicious prosecution or the abuse of process claim. It's not specifically set forth in the pleadings.

THE COURT: How do I get around this Echevarria language? Again, I recognize what's gone on here, but personal empathy doesn't have any part in a courtroom. It just doesn't and

shouldn't. I ruled in your favor and I've ruled against you. I've ruled in Mr. Goldberger's favor; I've ruled against him. I've ruled in favor of Mr. Edwards' claims and contentions; I've ruled against him.

But I'm just having difficulty coming away from the reaffirmation of the Florida Supreme Court's blanket statement here that absent extra judicial activity, everything that is occurring during the course of a judicial proceeding, so long as the act has some relation to the proceeding, is subject to absolute immunity.

MR. KING: If I may?

THE COURT: Absolutely.

MR. KING: Levin -- neither Levin nor Echevarria dealt with the malicious prosecution claim, which is really what I'm going to focus on now.

THE COURT: But now I'm dealing with -- and, again, forgive me for interrupting, but just to make clear the precedential value that I have to ascribe to Wolfe, and as you indicated, the Fourth in its case seems to, at least from the abuse of process part of the matter, align itself with that same side. The Third District Court of

Appeal is an appellate court that I must follow unless there's a specific ruling to the contrary by the Fourth District Court of Appeal. And the Third is crystal clear in its analysis.

Whether you or I agree with it is not for me to say. But its analysis is abundantly clear and it, again, reaffirms the Supreme Court language that talks about where we're within the judicial proceeding, as repugnant as it may be, as long as it bears relation, some relation, just let this be the rather broad language utilized by the Supreme Court of Florida, absent extrajudicial process -- extrajudicial actions, better stated, I'm left with this legal analysis while cogent, it's clear, while short it's clear.

MR. KING: But that is why all of the positions that I have articulated that would suggest that Levin nor Echevarria would apply to a malicious prosecution claim because it is distinctly different from the nature of -- just as Judge Sasser says, "It's not something that is going on during the course of proceedings. It's the proceeding itself."

Now that's what Wolfe -- Wolfe takes the position otherwise. It says, Well, that -- that

clearly falls within the privilege.

THE COURT: And Wolfe is the binding precedent. With all due respect to my suite mate, she's not. And, you know, as a fellow circuit court judge, again, her opinion is meticulous and well-written, but it flies in the face of precedential value here, and that is the Wolfe case that ties the bow, so to speak, around the malicious prosecution case.

Where there may have been before something to hang one's hat on, the probable cause issue, as I described before, clearly a factual issue. Whether the case ended in a bona fide termination in favor of Mr. Edwards, subject certainly to factual review. But that -- but the elements are taken away from us, in my view, from a trial court's decision-making and we're left with the global analysis that was rendered by the Third District Court Of Appeal.

And the bow is tied to include malicious prosecution cases as long as those actions, as alleged and conceded by you, and I appreciate incredibly the concession, but as conceded that all of the allegations contained in the operative Fourth Amended Complaint relate to the judicial

proceeding in some form.

MR. KING: If I may, Judge, just a final conclusionary remark?

THE COURT: Absolutely. Please.

MR. KING: I would harken back to the impact of Olson, which even though it does not deal with a post-civil complaint issue such as you have here, the language of the opinion is the litigation privilege does not apply to malicious prosecution. There is -- we submit that that sets forth at least a conflict on that issue that allows you to then peruse all of the issues that I discussed.

THE COURT: Let me look at that Olson case specifically, please.

MR. BREWER: I have a copy here if you would like, Your Honor.

THE COURT: No. You have both done an excellent job in tabbing all of these materials, and I want to again compliment both sides on their presentations and their performance as well as well presentations. It's extremely gratifying, especially when I've had I think 14 hearings in addition to the 8:45s today to see the kind of advocacy that I'm seeing here at this hearing.

But I will take a quick look at that Tab 16 that I have. Thank you.

The Olson case that is cited in, and I've read somewhat quickly, but I believe I've picked up the genesis. And the import of the opinion deals with prelitigation statements made by an individual who is accusing Olson of stalking. And the court distinguished that claim privilege from a defamation case that was addressed in a case called Fridovich vs. Fridovich, 598 So2d. 65, Florida Supreme Court case 1992, in which the Supreme Court was presented with a certified question of whether a person who makes statements to law enforcement about another individual prior to the instigation of judicial proceedings.

And that is important here I think in our review of the case since those statements that were made allegedly by the accuser in Olson were made prior to the instigation of judicial proceedings and whether those statements were protected by an absolute privilege for liability against defamation, and the court held that defamatory statements voluntarily made by private individuals to the police or to the State's Attorney's Office before institution of criminal

charges are presumptively qualifiedly privileged. And such voluntary statements are treated differently than statements made under the State Attorney's investigatory subpoena, which are encompassed within a judicial proceeding and thus are absolutely privileged.

So there is that distinguishing characteristic here as well. And, again, the issue was met head on by Wolfe. It was not discussed in the Olson case, respectfully, that I can gather here. So based on the Third District Court's decisions in Wolfe quoting in large part from the Florida Supreme Court's decision in Echevarria, whereas here all of the allegations made in both the abuse of process claim and the malicious prosecution claim, as conceded by the Edwards side, are acts occurring during the course of a judicial proceeding and bear some relation to the proceeding, the Court has no other alternative than to grant the motion on both counts.

MR. BREWER: Your Honor, I have prepared an order which I think fairly closely -- it does not have in it about the conceding the points, but it does grant the motion based upon the cases that you have just indicated.

THE COURT: I would ask you to kindly go ahead and order the transcript and track the language that I have tried to utilize here distinguishing Olson, as well in following the Supreme Court's directive in Echevarria and the Third District Court of Appeal dictates in the Wolfe case.

MR. BREWER: Yes, Your Honor.

THE COURT: That's the cornerstone of the Court's decision.

Again, thank you all very, very much for your input and your professionalism and your arguments. No one could have done a better job on both sides. So thank you very much.

MR. BREWER: Thank you, Your Honor.

THE COURT: Thank you, Madam Court Reporter.

THE COURT REPORTER: Thank you, Your Honor.

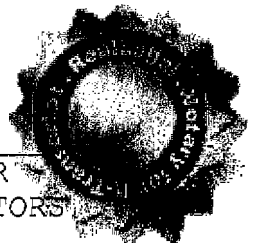
(Thereupon, the proceedings were concluded at 4:23 p.m.)

COURT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

I, Robyn Maxwell, Registered Professional Court Reporter, State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 29th day of January, 2014.



ROBYN MAXWELL, RPR, FPR, CLR
REALTIME SYSTEMS ADMINISTRATOR

D

FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRADLEY J. EDWARDS,

Appellant,

v.

JEFFREY EPSTEIN,

Appellee.
_____/

CASE NO.: 4D14-2282

L.T. Case No.: 502009CA040800

ANSWER BRIEF OF APPELLEE JEFFREY EPSTEIN

TONJA HADDAD COLEMAN, ESQ.
Florida Bar No.: 176737
TONJA HADDAD, PA
315 SE 7th Street
Suite 301
Fort Lauderdale, Florida 33301
(954) 467-1223
(954) 337-3716 (facsimile)
Tonja@Tonjahaddad.com

JOHN BERANEK
Fla. Bar No.: 0005419
AUSLEY & MCMULLEN, P.A.
123 South Calhoun Street
P.O. Box 391 (zip 32302)
Tallahassee, FL 32301
Telephone: (850) 224-9115
Facsimile: (850) 222-7560
jberanek@ausley.com

Exhibit B

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PRELIMINARY STATEMENT

This matter arises from the Appellant, Bradley Edwards's appeal of the trial court's final Order granting Appellee's Motion for Summary Judgment. In this brief, the parties will be referred to as they appear before this Court or by the party's proper name. References to the Record will be made by the use of (T. ____), which is the transcript of the Summary Judgment Hearing, and (R. ____), which is the record proper. The denotation to the record will be followed by the page number where the item to which Appellee is referring may be found. References to the Appellant's Brief will be denoted by (Brief p.__) and followed by the page number to which Appellee is citing. Emphasis will be that of Appellee unless otherwise noted.

STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully requests that this Court permit oral argument in this matter. The issue presented by this appeal; whether the litigation privilege absolutely bars a claim for malicious prosecution when all of the actions upon which the Plaintiff relies in support of his lawsuit occurred during the course of litigation and relate directly to the litigation, is such that oral argument would be of crucial importance on this issue.

STANDARD OF REVIEW

In reviewing an order granting final summary judgment by the trial court, this Court must apply the *de novo* standard of review. *DelMonico v. Traynor*, 116 So. 3d 1205 (Fla. 2013)*; Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); *LaFrance v. U.S. Bank National Association,* 141 So. 3d 754 (Fla. 4th DCA 2014). The trial court's finding that the litigation privilege applies to malicious prosecution claims, as well as its finding that the litigation privilege was applicable specifically to Edwards's claims for malicious prosecution and abuse of process against Epstein, constituted issues of law. *DelMonico,* 116 So. 3d at 1211 (stating the determination of whether the litigation privilege extends to the alleged tortious conduct is "a pure question of law."); *Wolfe v. Foreman*, 128 So. 3d 67, 68 (Fla. 3d DCA 2013) (affirming the determination that the litigation

privilege applied to plaintiff's malicious prosecution case on a motion for judgment on the pleadings); *LatAm Invests., LLC v. Holland & Knight, LLP*, 88 So. 3d 240, 243 (Fla. 3d DCA 2011) (affirming the finding that the litigation privilege applied to plaintiff's abuse of process claim on a motion to dismiss), *rev. denied*, 81 So. 3d 414 (Fla. 2012).

STATEMENT OF THE CASE AND FACTS

In December 2009, Appellee, Jeffrey Epstein, filed suit against Scott Rothstein ("Rothstein") and Appellant, Bradley J. Edwards, based upon Epstein's justifiable belief at the time of filing his Complaint that these two individuals, and other unknown partners of theirs at Rothstein, Rosenfeldt, Adler, engaged in serious misconduct involving a widely publicized illegal Ponzi scheme operated through their law firm. Rothstein himself admitted to, and was convicted for, this Ponzi scheme, part of which featured the use of civil cases that had been filed against Epstein by Appellant, Rothstein's law partner.

In response to Epstein's original lawsuit, Edwards filed a Counterclaim, and after a series of dismissals and four (4) revisions, Edwards stated two causes of action against Epstein; Abuse of Process and Malicious Prosecution. Epstein denied liability as to those claims and asserted various affirmative defenses thereto, including the immunity afforded to Epstein for both causes of action under the

litigation privilege. In September 2013, Epstein filed his Motion for Summary Judgment, asserting therein, among other arguments, that both causes of action were barred by the litigation privilege. The trial court, after allowing the parties to fully brief the issues and present an exhaustive and extensive oral argument, granted Summary Judgment in favor of Appellee, relying upon the facts as presented by the parties, the binding case *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013), and all of the Florida Supreme Court cases cited thereby.

Both in his Motion for Summary Judgment and at oral argument on the Motion Appellee argued, and Edwards conceded, that Edwards's cause of action for Malicious Prosecution was based solely upon acts that occurred during the course of the litigation. (R. 1203). Edwards's Fourth Amended Counterclaim and his discovery responses to questions directly germane to his causes of action incontrovertibly revealed that both of Edwards's causes of action were barred by the litigation privilege, as all of the actions purported to give rise to Edwards's causes of action occurred during the course of, and were related to, the litigation.

The trial court, applying the litigation privilege to Appellant's causes of action, correctly determined that the litigation privilege absolutely barred both causes of action. As stated in *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013), and the binding Florida Supreme Court cases cited therein, Florida's

litigation privilege provides to all persons involved in judicial proceedings a privilege from civil liability for actions taken in relation to those proceedings, including in an action for abuse of process or malicious prosecution. *Id.* In reliance upon these cases and the facts presented, the trial court granted Summary Judgment in Epstein's favor.

SUMMARY OF THE ARGUMENT

The solitary issue before this Court is whether the litigation privilege applies to a cause of action for malicious prosecution when all acts upon which Appellant relies in support of his cause of action occurred during the course of litigation and related directly to the litigation. Under well-established Florida Supreme Court precedent, the litigation privilege applies to all causes of action. *See Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007); *Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Ins. Co.,* 639 So. 2d 606 (Fla. 1994). Additionally, the Third District Court of Appeal in *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013), concluded that the litigation privilege applies to a cause of action for malicious prosecution. Appellant seeks reversal of the final Summary Judgment as to his Malicious Prosecution claim, erroneously arguing that the litigation privilege does not apply to a cause of action for malicious prosecution, and that *Wolfe* is in conflict with pre-existing law on this issue. *See*

Brief, *p.* 6. Appellant does, however, concede that Summary Judgment was proper as to his Abuse of Process claim, *see* Brief, p. 10, n.2, and that there are no disputed issues of fact presented. Brief, p. 10.

Appellee submits that the trial court's Order granting his Motion for Summary Judgment was proper, as the binding decisions by the Florida Supreme Court in *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007) and *Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Ins. Co.,* 639 So. 2d 606 (Fla. 1994), the decision by the Third District Court of Appeal in *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013), and the recent *per curiam* affirmance by the First District Court of Appeal in *Steinberg v. Steinberg*, 152 So. 3d 572 (Fla. 1st DCA 2014), all mandate the trial court's ruling. Edwards has not identified a single Florida case decided after either the *Wolfe* decision or the Florida Supreme Court cases upon which the *Wolfe* court relied in rendering its ruling that establishes that the trial court erred. Accordingly, Summary Judgment was proper.

ARGUMENT

THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT, AS THE LITIGATION PRIVILEGE IS A BAR TO APPELLANT'S CLAIM BASED ON MALICIOUS PROSECUTION.

The trial court properly ruled that Summary Judgment was warranted in this case. The undisputed facts, as presented both through Appellee's Motion for Summary Judgment and at oral argument on his Motion, coupled with the law germane to the issues in this matter, established that the litigation privilege absolutely barred both of Edwards's causes of action, mandating that Summary Judgment be granted[1]. *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013); *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007); *Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Ins. Co.,* 639 So. 2d 606 (Fla. 1994). In his Brief, Edwards wholly disregards the incontrovertible fact that his own pleadings and discovery responses undeniably establish that all of the actions about which he complains in his lawsuit occurred *solely* during the

[1] In addition, Appellee argued in his Summary Judgment motion that Appellant could not satisfy all of the elements of a Malicious Prosecution claim, including that the suit by Appellee against Appellant resulted in a bona-fide termination in favor of Appellant. Appellee took a voluntary dismissal without prejudice, which does not constitute a bona-fide termination, one of the six essential elements of a malicious prosecution claim. *See Valdes v. GAB Robins*, 924 So. 2d 862 (Fla. 3d DCA 2006). Appellant neither addresses nor submits argument as to Appellee's assertion, so this is not addressed in this Answer Brief. Rather, Appellee reasserts all argument as delineated in his original Motion for Summary Judgment and relies thereupon.

course of, and related directly to, the litigation, rendering them absolutely protected by the litigation privilege. As unequivocally stated in the decision of *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013), and the Florida Supreme Court cases cited therein, Florida's litigation privilege provides to all persons involved in judicial proceedings an absolute privilege from civil liability for actions taken in relation to those proceedings, including in an action for abuse of process or malicious prosecution. *Id*. The Florida Supreme Court explained the following policy reasons for the litigation privilege:

> In balancing policy considerations, we find that absolute immunity must be afforded **to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding**.

Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994) (emphasis added). Undeniably, a malicious prosecution claim is considered "other tortious behavior" as described by the Florida Supreme Court in *Levin*.

Curiously, Appellant mischaracterizes the *Wolfe* court's application of the litigation privilege to a malicious prosecution claim as novel, stating in the first paragraph of his Summary of Argument that "there is apparently no other decision in the country that reaches the conclusion that the majority did in *Wolfe*." *See*

Brief, p.8. However, in the case of *Steinberg v. Steinberg,* 152 So. 3d 572 (Fla. 1st DCA 2014), after considering the appellant's identical challenges to *Wolfe*, the First District Court of Appeal issued a *per curiam* affirmance of the trial court's application of the litigation privilege to defeat a malicious prosecution claim. Appellant was undoubtedly aware of the *Steinberg* decision, as it was Appellant's counsel who not only represented the Appellant in *Steinberg*, but also filed his own initial brief from the *Steinberg* case in the instant case as a Supplementary Submission in Support of Edwards' Motion for Reconsideration of the Trial Court's announced intention of granting Summary Judgment, and in that submission adopted "all legal arguments contained within the attached appellate brief." (R. 798). Thus Edwards made the *Steinberg* argument a part of this case.

Further, this Court's recent opinion in *McCullough v. Kubiak*, 4D13-4048 (Feb. 18, 2015) is instructive. In *McCullough*, this Court approved the trial court's dismissal of causes of action for both defamation and negligence based upon the litigation privilege. Id. In so doing, this Court examined the litigation privilege and conducted an analysis of the seminal cases upon which Appellee relies in support of his assertion that the trial court's ruling was proper; *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994) and *Echevarria, McCalla, Raymer, Barrett &*

Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007), and correctly recognized and applied the litigation privilege. *Id.*

This Court continued its analysis, distinguishing *DelMonico v. Traynor*, 116 So. 3d 1205 (Fla. 2013), a case upon which Appellant relies in support of his argument that the trial court erred. This Court emphasized the "narrow scenario" that existed in *DelMonico* (i.e., out of court statements to potential witnesses where neither all parties nor the court were present), and stated that it did not exist in *McCollough*; out of court statements to potential witnesses where neither all parties nor the court were present. *Id.* at 1209. That "narrow scenario" is likewise absent in the instant case, and as such this Court should affirm the trial court's Order.[2]

Edwards's Brief endeavors to argue that *Wolfe* conflicts with pre-existing case law on this issue, providing a history of the litigation privilege and citing to cases that purportedly state that the litigation privilege is inapposite to a cause of action for malicious prosecution. However, all of the cases cited were, incontrovertibly, decided before the Wolfe decision, and most of them before *Levin* and *Echevarria*. See Brief, pp. 11-26. *Wolfe* is directly on point with the facts and law presented in the case at hand, and conducts a detailed analysis of the seminal

[2] *Rivernider v. Meyer*, Case Number 4D14-819 is another trial court decision applying the litigation privilege to a malicious prosecution claim. This decision is on appeal to this Court and is set for Oral Argument on April 28, 2015.

Florida Supreme Court cases germane to the issues. In *Wolfe*, the Third District Court of Appeal affirmed the trial court's order granting a motion for judgment on the pleadings in an abuse of process and malicious prosecution action, finding that the litigation privilege applied to, and barred, both causes of action. *Id.* (emphasis added). The court's focus was on whether the acts alleged "occurr[ed] during the course of a judicial proceeding" and had "some relation to the proceeding." *Id.* at 68 (citing *Levin*, 639 So. 2d at 608). Likewise, in conducting its analysis of the cause of action for malicious prosecution, which, just as with the instant case, was based on the filing of a complaint, the Wolfe court stated that it is:

> guided and restrained by the broad language and application of the privilege articulated by the Florida Supreme Court in *Levin* and *Echevarria*. In *Levin*, the Florida Supreme Court held that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding." *Levin*, 639 So. 2d at 608. In *Echevarria*, the Court reiterated its broad application of privilege "applies in all causes of action, statutory as well as common law." *Echevarria*, 950 So. 2d at 380-81.

Id. at 68. The *Wolfe* court continued, unequivocally stating that:

> It is difficult to imagine any act that would fit more firmly within the parameters of *Levin* and *Echevarria* than the actual filing of a complaint. The filing of a complaint, which initiates the judicial proceedings, obviously "occurs during the course of a judicial proceeding" and "relates to the proceeding . . .
>
> Because the Florida Supreme Court has clearly and unambiguously stated, not once, but twice, that the litigation privilege applies to *all*

> causes of actions, and specifically articulated that its rationale for applying the privilege so broadly **was to permit the participants to be "free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct," we are obligated to conclude that the act complained of here -- the filing of the complaint – is protected by the litigation privilege**.

Wolfe v. Foreman, 128 So. 3d 67, 68 (Fla. 3d DCA 2013) (emphasis added). Additionally, the *Wolfe* decision was recently cited with approval and relied upon in *Jackson v. Attorney's Title Insurance Fund*, 132 So. 3d 1191 (Fla. 3d DCA 2014) and *American Federated Title Corp. v. Greenberg Trauig, P.A.,* 125 So. 3d 309 (Fla. 3d DCA 2013) in matters involving the litigation privilege. In the instant case, the trial court was legally bound by the Third District Court of Appeal's decision in *Wolfe*, as the Florida Supreme Court stated unequivocally that a "trial court may not overrule or recede from the controlling decision of" an appellate court. *Pardo v. State*, 596 So. 2d 665 (Fla. 1996).

Just as in *Wolfe*, all of the actions upon which Appellant relied in his lawsuit against Appellee occurred during the course of, and were directly related to, the litigation. At the Summary Judgment hearing, the following colloquy occurred:

> **THE COURT:** Anything outside of the judicial proceeding as potentially or allegedly obnoxious? And as Mr. King brought out earlier the allegations being horrifying, egregious, no matter how you might identify those allegations that were quickly withdrawn, anything that you're aware of that went on outside of the judicial process that is being alleged here?

> MR. BREWER: Not that is being alleged here, Your Honor, no.
>
> THE COURT: Mr. King, anything that's being alleged here that goes outside of the broad spectrum that I have read into the record that has its genesis in Echevarria and was quoted by the Wolfe Third District Court of Appeal opinion?
>
> MR. KING: There's nothing alleged.

(T. 53-54). Accordingly, as explicitly stated in Edwards's own pleadings and discovery responses, and as conceded by Edwards's counsel at oral argument, the events giving rise to Edwards's purported claims against Epstein occurred *solely* in the course of, and were related to, the litigation, just as occurred in the *Wolfe* case, mandating Summary Judgment. *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013); *American Nat. Title & Escrow of Florida, Inc. v. Guarantee Title & Trust, Co.*, 748 So. 2d 1054, 1056 (Fla. 4th DCA 1999). *See also Montejo v. Martin Memorial Medical Center, Inc.*, 935 So. 2d 1266, 1269 (Fla. 4th DCA 2006); *Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992) (stating that the litigation privilege "arises immediately upon the doing of any act required or permitted by law in the due course of the judicial proceedings or as necessarily preliminary thereto.").

Moreover, the Federal courts, in applying Florida's litigation privilege, have recognized that it has been "expansively interpreted" by Florida courts. In

Microbilt Corporation v. Chex Systems, Inc., 2013 WL 6628619 (Dec. 16, 2013), the Bankruptcy Court, applying Florida law, avowed:

> The rule of absolute immunity extends to the parties, judges, witnesses, and counsel involved and related to the judicial proceedings. *DelMonico v. Traynor*, 50 So.3d 4, 7 (Fla. Dist. Ct. App. 2010).
>
> The Florida Supreme Court found that absolute litigation immunity was designed to allow a party to 'prosecut[e] or defend[] a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.' *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380, 384 (Fla. 2007); see also *Levin*, 639 So.2d at 608 ('[A]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding […], so long as that conduct has some relations to the proceeding.'). To this end, Florida courts have expansively interpreted the 'relates to' requirement. See *Rolex Watch U.S.A. Inc. v. Rainbow Jewelry, Inc.*, 2012 WL 4138028 (S.D. Fla. Sept. 19, 2012) ('[t]he decision to file a lawsuit clearly relates to a judicial proceeding'); *DelMonico v. Traynor*, 116 So.3d 1205, 1217, 1219 (Fla. 2013) (privilege applies when statements or actions occur 'either in front of a judicial officer or in pleading or documents filed with the court or quasi-judicial body').

Id. at *2. *See also Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1276 (11th Cir. 2004).

In its Order on Appellee's Motion for Summary Judgment, the trial court also correctly determined that "the cases cited by Edwards [in his opposition to Summary Judgment] involved malicious prosecution claims stemming from actions filed by the party themselves [sic], not counsel. In the instant case, it was conceded that all filings were done by an attorney in good standing with the

Florida Bar, rather than by an individual party." *See Trial Court Order granting Summary Judgment*. (R. 1202-1205). The law is clear that the *Wolfe* holding protects both the firm that filed suit and the individual plaintiff, as it unequivocally states that "the Florida Supreme Court has clearly and unambiguously stated, not once, but twice, that the litigation privilege applies to all causes of actions, and specifically articulated that its rationale for applying the privilege so broadly was to permit the participants to be 'free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.'" *Wolfe v. Foreman*, 28 So. 3d 67 (Fla. 3d DCA 2013). *See also Levin*, 639 So. 2d at 608 ("[t]he immunity afforded to statements made during the course of a judicial proceeding extends not only to the parties, but to judges, witnesses and counsel as well.") In fact, in *R.H. Ciccone Properties, Inc. v. JP Morgan Chase Bank, N.A.*, 141 So. 3d 590 (Fla. 4th DCA 2014), this Court correctly recognized that "'[t]he purpose of the litigation privilege is to 'free [participants in litigation] to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.'" *Id*. at 593 (quoting Levin, 639 So. 2d at 608).

Appellant correctly acknowledges that in *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007) the Florida Supreme Court

not only reaffirmed the Levin decision but also expanded it to include "any act occurring during the course of judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious conduct … so long as the act has some relation to the proceeding," finding that the policy considerations were the "perceived necessity for candid and unrestrained communications in judicial proceedings." *Echevarria*, 950 So. 2d at 384; Brief, p. 15. *Echevarria* unequivocally recognized that "*Levin* plainly establishes that '[t]he rationale behind the immunity afforded to a defamatory statement is equally applicable to other misconduct occurring during the course of a judicial proceeding," and that "the nature of the underlying dispute simply does not matter." *Id*. at 384. The *Echevarria* court concluded by avowing that "[t]he litigation privilege applies **across the board** to actions in Florida." *Id.* at 384 (emphasis added).

Lacking any relevant precedent to refute the broad expansion of the litigation privilege expressly demanded by *Echevarria* or the application of the litigation privilege to malicious prosecution claims as required by *Wolfe*, Appellant asks this Court to ignore *Echevarria* and *Wolfe,* urging that application of the litigation privilege to a malicious prosecution claim would completely eviscerate the cause of action for malicious prosecution. However, that very same argument was flatly rejected in both *Wolfe* and *Steinberg.* The *Wolfe* decision, as well as the

Levin and *Echevarria* decisions, merely hold that "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding." *Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Ins. Co.,* 639 So. 2d 606, 608 (Fla. 1994). As a result, if a party seeks to bring a cause of action involving acts that neither occurred during, nor had relation to, the judicial proceeding, a cause of action sounding in malicious prosecution may still be viable. *See Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992); *Olson v. Johnson*, 961 So. 2d 356 (Fla. 2d DCA 2007).

Moreover, the Florida Supreme Court judiciously pointed out in *Levin* that "other tortious conduct during litigation" is still subject to available remedies even though it may be privileged. The Supreme Court held that misconduct by counsel or parties **during litigation** is "left to the discipline of the courts, the Bar association, and the state." *Id.* at 608 (emphasis added). As such, contrary to Appellant's assertion, there is neither an absolute bar to all malicious prosecution actions nor an evisceration of adequate legal remedies created by the *Wolfe* case and its progeny. Rather, these cases only extend a well-established privilege "to any act occurring during the course of a judicial proceeding, regardless of whether

the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding." *Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Ins. Co.,* 639 So. 2d 606, 608 (Fla. 1994). *See also Echevarria*, 950 So. 2d at 384; *Wolfe v. Foreman*, 28 So. 3d 67, 68 (Fla. 3d DCA 2013). Consequently, based on the undeniable holdings in *Wolfe* and the cases cited therein, Epstein's actions were absolutely protected by the litigation privilege and Summary Judgment was properly granted.

Additionally, Appellant attempts to support his position by referencing the most recent Florida Supreme Court decision applying litigation privilege, *DelMonico v. Traynor*, 116 So. 3d 1205 (Fla. 2013), which held that statements made outside of the formal judicial process are not protected by the absolute litigation privilege, but rather enjoy a qualified privilege. *Id.* at 1217. The *DelMonico* Court's ruling, however, does not limit the *Levin* and *Echevarria* rulings. Instead, it is specific to the extremely confined facts in that matter, which were described by the Florida Supreme Court as a "narrow scenario;" referring to out of court statements to potential witnesses where neither both parties nor the court were present. *Id.* at 1209. Further, the *Delmonico* decision clarified that the existence of judicial oversight in a proceeding is an important reason behind the

requirement to apply the privilege to cover acts that occur during the course of, and are related to, the judicial proceeding, stating: "when weighing whether to apply the absolute privilege to that factual scenario, the Court considered that the 'safeguards' arising from the 'comprehensive control exercised by the trial judge whose action is reviewable on appeal' and the availability of other remedies through which the trial court could mitigate the harm. . ." *Id.* at 1215 (citing Fridovich, 598 So. 2d at 69).

Accordingly, the *DelMonico* decision affirmatively recognized a litigation privilege where, as in the instant case, there is judicial oversight, but distinguished the "narrow scenario" under which the litigation privilege would not be applied. Inasmuch as that "narrow scenario" is wholly absent in the case at bench, *DelMonico* is factually distinguishable and inapposite to the instant case, and as such its narrow holding has no bearing on, and should not be considered by, this Court.

Similarly, Appellant cites *Wright v. Yurko*, 446 So. 2d 1162 (Fla. 5th DCA 1984) in support of his assertion that the litigation privilege is inapplicable to a malicious prosecution claim. However, such reliance thereupon is misplaced. First, Appellant's characterization of *Levin* as impliedly approving the survival of a malicious prosecution claim in the *Wright* case is completely unfounded. In *Levin*,

in support of its holding to apply the litigation privilege to a tortious interference claim, the Florida Supreme Court analyzed *Wright* and cited thereto solely for two propositions: "that the torts of perjury, slander, defamation and similar proceedings that are based on statements made in connection with a judicial proceeding are not actionable;" and that "[r]emedies for perjury, slander, and the like committed during judicial proceedings are left to the discipline of the courts, the bar association, and the state," and as such "other tortious conduct occurring during litigation is equally susceptible to that same discipline." *Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Ins. Co.,* 639 So. 2d 606, 608 (Fla. 1994) (citing Wright, 446 So. 2d at 1164). Accordingly, *Levin* neither held nor cited to *Wright* for the proposition that the litigation privilege was inapplicable to a malicious prosecution claim.

Second, regardless of what Appellant requests this Court to infer about *Wright* as a result of its citation in *Levin,* the Florida Supreme Court subsequently made it abundantly clear in *Echevarria* that "the nature of the underlying dispute simply does not matter," and mandated that the litigation privilege be broadly applied "across the board to actions in Florida." *Echevarria*, 950 So. 2d at 384. Accordingly, no matter how the underlying cause of action may be framed, the express guidance from both *Levin* and *Echevarria* is that the litigation privilege

would be applied to immunize any and all conduct occurring during the course of judicial proceedings so long as it occurred in, and had some relation to, the proceeding. *Id.* at 384. Finally, *Wright* is factually distinguishable, because unlike in the instant case, *Wright* included a cause of action against the attorney who filed the alleged malicious prosecution, not the represented Plaintiff. *Wright,* 446 So. 2d at 1163. Consequently, this Court should give no consideration to this case.

Likewise, Appellant's reliance on *Graham-Eckes Palm Beach Academy v. Johnson*, 573 So. 2d 1007 (Fla. 4th DCA 1991), is equally as misplaced. *Graham-Eckes* is a *per curiam* affirmance in which the Fourth District Court stated, in its single concluding sentence: "[w]hile appellant's argument is persuasive, we hold that its proper cause of action would have been one for malicious prosecution and affirm on the authority of *Procacci v. Zacco*, 402 So. 2d 425 (Fla. 4th DCA 1981)." *Id.* at 1008. As with *Wright, it is undeniable that Graham-Eckes* was decided before *Echevarria, Levin*, and *Wolfe*. Further, *Procacci v. Zacco*, 402 So. 2d 425 (Fla. 4th DCA 1981), the case upon which the *Graham-Eckes* court relied in issuing its decision, immunized from suit the "malicious publication" of false statements because they were made during the course of a judicial proceeding. As to those false statements, this Court avowed: "Appellants contend that a proper notice of lis pendens, based on a recorded instrument and filed pursuant to Florida

law, is a publication much like a pleading or other statement made in the course of a judicial proceeding and therefore, they argue, it enjoys the same immunity. We agree." *Id*. at 427.

Appellant's reliance on *Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992) is also erroneous, as in *Fridovich* the Florida Supreme Court specifically concluded that only a qualified privilege is applicable when private individuals voluntarily make defamatory statements "to the police or the state's attorney **prior to** the institution of criminal charges." 598 So. 2d at 69 (emphasis added). *See also Olson v. Johnson*, 961 So. 2d 356 (Fla. 2d DCA 2007) (litigation privilege is inapplicable because basis of lawsuit arose out of statements made to a police officer prior to the initiation of a criminal proceeding). In stark contrast to both the *Fridovich* and *Olson* cases, where the conduct occurred prior to any judicial proceedings, the actions upon which the Appellant relies as the basis of his malicious prosecution claim in the instant case were made in and were integral to the judicial proceedings, rendering *Fridovich* and *Olson* inapposite. Further, Appellant's citation to dicta from a footnote in *SCI Funeral Services of Florida, Inc. v. Henry,* 839 So. 2d 702 (Fla. 3d DCA 2002) is equally inapplicable because it is a Third District Court of Appeal case that did not involve a claim for malicious prosecution and was decided before the Third District Court of Appeal decided

Wolfe, in which it expressly held that the litigation privilege is applicable to a claim for malicious prosecution.

Finally, Appellant erroneously submits and analyzes cases from other jurisdictions in further support of his assertion that the litigation privilege does not bar a malicious prosecution claim. Appellant's argument is meritless, as it is incontrovertible that reliance upon these cases is misguided; other jurisdictions are not controlling upon this Court, especially when there is binding Florida precedent directly applicable hereto. Additionally, the Florida Litigation Privilege is a court created doctrine, and as such, case law from other jurisdictions is of no import and has no bearing on this matter. Moreover, binding Florida precedent does not, contrary to Appellant's assertion, bar a malicious prosecution claim, but rather affords an absolute privilege to acts that occur within, and have a relation to, a judicial proceeding. *Wolfe,* 28 So. 3d at 68; *Levin*, 639 So. 2d at 608; *Echevarria*, 950 So. 2d at 384. The Florida Supreme Court, the First District Court of Appeal, and the Third District Court of Appeal have all undeniably extended the litigation privilege to circumstances such as those present in the case at bench; where all of the acts upon which a party relies in support of a malicious prosecution claim occur within the litigation. Consequently, Summary Judgment was proper.

CONCLUSION

In reliance upon the argument submitted above and the case law cited herein, Appellee submits that the trial court's Order granting Appellee's Motion for Summary Judgment should be affirmed.

CERTIFICATE OF TYPE SIZE AND STYLE

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I HEREBY CERTIFY that a copy was electronically served to the following on February 25, 2015:

William B. King
Searcy Denny Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
wbk@searcylaw.com

Philip M. Burlington
Burlington & Rockenbach, P.A.
Courthouse Commons/Suite 350
444 W. Railroad Avenue
West Palm Beach, FL 33401
pmb@FLAppellateLaw.com
kbt@FLAppellateLaw.com

Bradley J. Edwards
Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L.
425 N. Andrews Ave., Ste. 2
Ft. Lauderdale, FL 33301
brad@pathtojustice.com

Fred Haddad
Fred Haddad, P.A.
1 Financial Plaza, Ste. 2612
Ft. Lauderdale, FL 33301
haddadfm@aol.com

Mark Nurik
Law Offices of Mark S. Nurik
1 E. Broward Blvd., Ste. 700
Ft. Lauderdale, FL 33301
marc@nuriklaw.com

Jack Goldberger
Atterbury, Goldberger & Weiss, P.A.
250 S. Australian Ave., Ste. 1400
West Palm Beach, FL 33401
jgoldberger@agwpa.com

W. Chester Brewer, Jr.
W. Chester Brewer, Jr. P.A.
250 S. Australian Ave., Ste. 1400
West Palm Beach, FL 33401
wcblaw@aol.com
wcbdiane@yahoo.com

/s/ John Beranek
JOHN BERANEK
Fla. Bar No.: 0005419
AUSLEY & MCMULLEN, P.A.
123 South Calhoun Street
P.O. Box 391 (zip 32302)
Tallahassee, FL 32301
Telephone: (850) 224-9115
Facsimile: (850) 222-7560
jberanek@ausley.com
csullivan@ausley.com (secondary)

/s/ Tonja Haddad Coleman
Tonja Haddad Coleman, Esq.
Florida Bar No.: 176737
Tonja Haddad, PA
5315 SE 7th Street
Suite 301
Fort Lauderdale, Florida 33301
954.467.1223
954.337.3716 (facsimile)
Tonja@Tonjahaddad.com
Jayme@Tonjahaddad.com