

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.

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**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.

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*Epstein v. Rothstein/Edwards*

Case No. 502009CA040800XXXXMB

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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.

 COPY

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

## 1 APPEARANCES:

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1        Thereupon,

2        the following proceedings began at 3:00 p.m.:

3                    **THE COURT:** Good afternoon, everybody.

4                    Thank you so much. Have a seat. Welcome.

5                    **MR. BREWER:** Good afternoon, Your Honor.

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

10                  **MR. BREWER:** No.

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

17                  I think the United States Supreme Court  
18                  heard the Brown vs. Board Of Education and gave  
19                  20 minutes a side. So if that can be done in that  
20                  amount of time, I think we can take care of this.

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

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

11 Okay. So are you Ms. Haddad?

12 MS. HADDAD: I am.

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

18 THE COURT: All right.

19 Mr. Scarola, did you want to say something?

23 THE COURT: Sure. Of course.

1 and that is not the case.

2 **THE COURT:** It was just Rothstein  
3 individually?

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

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

12 **MR. SCAROLA:** No apology necessary, sir.

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

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

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

22 **MR. SCAROLA:** Yes, sir.

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

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

8 Mr. Brewer.

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

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

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

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

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

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

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

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

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

9 The --

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

13 **THE COURT:** This was a federal statutory --

14 **MR. KING:** I --

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

18 **MR. KING:** You're correct.

19 **THE COURT:** In the Epstein matters.

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

22 **THE COURT:** That's okay.

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

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

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

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

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

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

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

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

15 **THE COURT:** Right.

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

18 **THE COURT:** I didn't get it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18                  They -- in the trilogy, and I forget which  
19                  one of the cases it was, but they go even further  
20                  and clarify that the claim "a bad motive" is  
21                  really irrelevant to these causes of action when  
22                  you were talking about the litigation privilege.

23                  The -- let me see, where am I here?

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

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

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

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

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

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

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

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

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

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

1                   it's guised in the litigation privilege, but  
2                   perhaps you're right that it could be met with  
3                   57.105 standards.

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

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

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

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

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

3 But the threshold for establishing probable  
4 cause in a civil action is really rather low.

5 Because it is whether the defendant could have  
6 reasonable -- what the -- what the defendant could  
7 have reasonably believed at the time of asserting  
8 the claim.

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

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

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

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

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

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

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

13                   **MR. EDWARDS:** I remember it like yesterday.

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

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

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

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

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

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

13 **THE COURT:** On that issue?

14 **MR. BREWER:** I will close on that issue.

15 **THE COURT:** Very well.

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

18 **THE COURT:** Sounds like a plan.

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

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

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

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

17 "THE COURT: Okay."

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

13                   That prominent attorney is Mr. Scarola.

14                   **THE COURT:** In an unrelated case?

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

19                   **THE COURT:** Okay. Who --

20                   Off the record for a minute.

21                   (Discussion off the record.)

22                   **THE COURT:** Okay. Mr. King, please.

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

1                   May it please the Court.

2                   **THE COURT:** Please.

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

16                  Pursuant --

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

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

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

15                  **THE COURT:** Okay.

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

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

1                   **MR. KING:** Thank you.

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

5                   **THE COURT:** Thank you.

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

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

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

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

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

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

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

21 THE COURT: No problem.

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

24 THE COURT: Okay.

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

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

3 **THE COURT:** All right. Thanks.

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

9 **THE COURT:** That was a concurring opinion?

10 **MR. KING:** Yes, that was his concurring  
11 opinion.

12 **THE COURT:** Okay.

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

1 privilege.

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

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

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

1                   here --

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

7                   I have also cited the Cruz vs. Angelides,  
8                   the Middle District of -- I'm sorry,  
9                   574 So2d. 278, Second DCA 1991, which also  
10                  suggests that malicious prosecution would not be  
11                  barred by the litigation privilege.

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

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

1           they filed a separate interference claim and the  
2           court barred that on the litigation privilege.

3           But the court stated that when you're dealing with  
4           the malicious prosecution lawsuit, it's  
5           fundamentally different. It involves the filing  
6           of a baseless action against a defendant. And the  
7           purpose of a malicious prosecution action is to  
8           prevent vexatious prosecution or litigation.

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

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

1 of malicious prosecution.

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

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

20 **THE COURT:** Off the record for one second.

21 **MR. KING:** Yes.

22 (Discussion off the record.)

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

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

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

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

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

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

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

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

18                   **THE COURT:** I know that.

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

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

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

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

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

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

25           **THE COURT:** Yeah, I have no plans on

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

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

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

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

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

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

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

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

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

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

12 **THE COURT:** No, not at all.

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

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

16 **MR. KING:** All right.

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



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

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

10 We would also maintain that that --

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

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

1 focal point of this abuse of process claim?

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

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

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

1                   many, many others.

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

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

23                   **THE COURT:** Right.

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

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

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

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

19           **THE COURT:** No. Go right ahead.

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

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

5 He does pro bono work for clients, as you  
6 know, in the federal case. He knows that.

7 Epstein knows that. And that's why the facts are  
8 important to malicious prosecution claims because,  
9 as Judge Sasser says, the idea here, the concept  
10 here on a malicious prosecution claim is, this  
11 is -- this is the kind -- this is why the  
12 privilege shouldn't apply, because the vexatious  
13 prosecution of a claim is something that the law  
14 will recognize.

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

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

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

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

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

22                  **THE COURT:** Malicious prosecution.

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

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

3                   **MR. BREWER:** Right.

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

9                   And make sure I didn't miss anything --

10                  **THE COURT:** Three minutes to wrap up.

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

13                  **THE COURT:** Any objection?

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

17                  **THE COURT:** I agree.

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

20                  **MR. SCAROLA:** May I have just a moment?

21                  **THE COURT:** Absolutely. Take your time.

22                  But I do believe that protocol would dictate only  
23                  one attorney speak to the issues.

24                  **MR. KING:** Right.

25                  **THE COURT:** Thank you.

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

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

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

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

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

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

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

23 **THE COURT:** No, that's okay.

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

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

3                   **MR. BREWER:** A few moments, Your Honor?

4                   **THE COURT:** Sure.

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

8                   **THE COURT:** That's fine.

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

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

1 cause of action for malicious prosecution."

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

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

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

19 The Olson vs. Johnson was mentioned to you  
20 to say that to indicate that -- that malicious  
21 prosecution can still survive and exist. And, in  
22 fact, the Olson case, which was a case in which  
23 three ladies accused this guy of stalking, filed a  
24 false police report. The guy got arrested.

25 Actually, I think -- I'm not sure if he went to

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

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

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

1 course of the proceedings.

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

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

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

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

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

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

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

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

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



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

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

13           **MR. KING:** If I may?

14           **THE COURT:** Absolutely.

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

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

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

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

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

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

1                   clearly falls within the privilege.

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

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

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

1 proceeding in some form.

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

4                   **THE COURT:** Absolutely. Please.

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

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

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

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

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

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

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

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

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

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

8 MR. BREWER: Yes, Your Honor.

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

15 MR. BREWER: Thank you, Your Honor.

16 THE COURT: Thank you, Madam Court  
17 Reporter.

18 THE COURT REPORTER: Thank you, Your Honor.  
19 (Thereupon, the proceedings were concluded  
20 at 4:23 p.m.)

**COURT CERTIFICATE**

2

2  
3  
4 STATE OF FLORIDA )  
5 COUNTY OF PALM BEACH )

6

7

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

13

14

Dated this 29th day of January, 2014.

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ROBYN MAXWELL, RPR, FPR, CLR  
REALTIME SYSTEMS ADMINISTRATORS

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## REALTIME SYSTEMS ADMINISTRATORS

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FOURTH DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

BRADLEY J. EDWARDS,

CASE NO.: 4D14-2282

L.T. Case No.: 502009CA040800

Appellant,

v.

JEFFREY EPSTEIN,

Appellee.

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ANSWER BRIEF OF APPELLEE JEFFREY EPSTEIN

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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* affirmation 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<sup>1</sup>. *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

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<sup>1</sup> 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.<sup>2</sup>

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

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<sup>2</sup> *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* affirmation 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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