

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

CASE NO. 502009CA040800XXXXMB

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

-vs-

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

Defendants/Counter-Plaintiffs.

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

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

RELEVANT PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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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

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.

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

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?

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

23 **THE COURT:** Sure. Of course.

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

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.

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

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

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

8 Mr. Brewer.

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

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 proceeding.

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."

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

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

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

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

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

17 "THE COURT: Okay."

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

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

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 --

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

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 Services 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 the 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 Knachwaller 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

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

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

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

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

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

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

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

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

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

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

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.

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

8 **MR. BREWER:** Yes, Your Honor.

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

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.)

21

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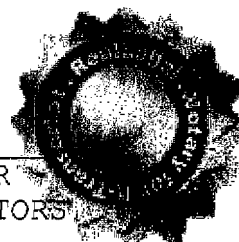
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STATE OF FLORIDA)
COUNTY OF PALM BEACH)

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

Dated this 29th day of January, 2014.


ROBYN MAXWELL, RPR, FPR, CLR
REALTIME SYSTEMS ADMINISTRATORS



A				
abandoned (4)	accused (1)	43:17 44:23	43:19 61:2	13:4
33:13 35:2	50:23	49:6 51:12	airplane (1)	answered (1)
36:17,23	accuser (1)	addressed (3)	34:11	32:19
able (2)	59:18	30:18 51:5 59:9	align (1)	answers (2)
38:7 51:1	accusing (1)	addressing (1)	55:24	13:20 35:7
absent (2)	59:7	43:3	allegations (9)	anybody (1)
55:8 56:12	acknowledge (...)	adequately (1)	19:17 32:18	43:8
absolute (11)	42:15	3:15	35:12 37:14	anyway (1)
13:12 14:5	acknowledged...	adhere (1)	52:5 54:2,3	50:15
21:20 32:5	39:15	30:24	57:24 60:14	apiece (1)
50:17,18 51:18	Acquisition (1)	Administrator...	alleged (18)	3:13
51:24 52:9	28:22	1:25	7:3,19,23 8:17	apologies (1)
55:12 59:21	act (3)	ADMINISTR...	9:6 11:16	5:10
absolutely (6)	51:19,21 55:11	62:19	13:15 22:10	apologize (2)
14:4 21:22	acted (2)	admitted (2)	33:12 39:8	38:13 48:22
46:21 55:14	41:19 44:1	18:14 50:6	51:2 52:24	apology (1)
58:4 60:6	action (25)	adopt (1)	54:6,7,10,14	5:12
abundantly (1)	4:4 9:14 11:19	26:14	54:18 57:22	apparently (1)
56:6	11:23 12:4,10	advance (1)	allegedly (2)	10:7
abuse (40)	12:11 13:3	41:5	53:25 59:18	Appeal (9)
5:8 9:8,14,16	14:7,21 15:3	advised (1)	allowed (2)	13:1 15:15,16
12:23 13:19	15:17 16:3,6,7	41:10	46:15,18	50:6 54:13
15:12 16:18	16:8,17 18:4	advocacy (1)	allows (1)	56:1,3 57:19
24:3,23 29:5	30:6,7 49:20	58:25	58:12	61:6
33:18,18 34:7	49:23 50:1	advocate (1)	alternative (1)	Appeals (2)
38:24 39:2,13	51:7,8	41:22	60:19	10:1,2
39:18,22 40:1	actionable (1)	affidavit (1)	amended (2)	appearance (2)
40:2,7 41:1	33:3	48:15	9:13 57:25	31:15 42:18
42:6 44:23	actions (12)	affirm (2)	amendments (1)	APPEARAN...
45:16,20 46:2	13:11 16:7,8,22	49:18,24	9:12	2:1
46:8 47:14,15	21:21 29:21	affirmative (2)	American (2)	appeared (2)
47:20 48:3,5	33:6 47:21	9:20 32:19	39:17,24	18:21 38:5
49:17 50:4	48:7 50:9	afforded (4)	amount (3)	appearing (1)
52:19 54:20	56:13 57:21	16:16 39:12	3:20 4:1 34:4	6:10
55:24 60:15	activity (1)	51:19 52:9	amounts (1)	appellate (2)
abusing (1)	55:9	aforesaid (1)	36:1	39:12 56:1
34:9	acts (5)	1:23	analysis (4)	applicable (1)
accept (1)	41:25 42:2,4	afternoon (2)	56:4,6,14 57:18	30:12
30:19	43:24 60:17	3:3,5	analyzed (1)	application (3)
account (1)	addition (1)	ago (2)	13:6	40:6 45:12,16
39:4	58:24	4:10 53:12	ancient (1)	applied (5)
accumulated (1)	additional (1)	agree (3)	30:17	31:4 39:17 40:2
34:5	54:17	24:20 46:17	and/or (1)	47:9 50:4
accurate (2)	additionally (2)	56:5	50:9	applies (9)
5:15 25:22	19:18 24:12	agreed (1)	Angelides (1)	12:15,23 14:5
	address (7)	36:3	29:7	21:22 49:17,22
	26:4 27:1 28:8	ahead (2)	answer (1)	49:25 50:17

51:25	49:14	27:22 41:2	begins (1)	bounds (1)
apply (15)	asserting (1)	43:9,14 58:5	20:21	41:19
11:23 12:5,7,16	18:7	background (2)	behalf (11)	bow (2)
12:20 13:3	assertion (1)	40:18 48:19	2:3,17 4:13,16	57:8,20
15:9 26:7	29:17	bad (2)	6:10,13 7:23	Bradley (2)
29:19 44:12	associated (2)	14:1,20	8:16 9:11	1:7 2:17
45:5,20 46:2	44:2,3	balancing (1)	19:15 40:24	Brewer (48)
56:18 58:9	attempt (1)	39:4	believe (14)	2:3,6 3:5,10
appreciate (4)	11:21	bandied (1)	4:9,21 7:5 9:8	4:16 6:8,9,10
6:7 48:25 49:11	attempts (2)	7:13	16:1 17:14	7:3,17 8:7,23
57:22	11:21 18:21	bar (5)	19:7 24:9 33:3	10:21 11:8
approach (3)	ATTERBUR...	16:21 22:7	35:19 39:5	16:5,13 17:4
15:21 36:15,18	2:8	25:23 28:19	40:18 46:22	17:19 19:14
appropriately ...	attorney (10)	30:22	59:4	20:8,11,12,14
44:1	16:22 18:17	BARNHART ...	believed (1)	20:16,19 22:15
arguably (1)	20:17,21 21:5	2:18	18:7	23:19,20,23
41:19	21:8,18 22:13	barred (5)	beneficial (1)	32:12 35:22
argue (1)	43:25 46:23	15:3 25:13 29:5	19:21	46:3,14,18
35:5	attorneys (13)	29:11 30:2	best (3)	49:1,3,5,10,12
argued (1)	7:20 21:1 31:4,5	bars (1)	41:6 52:12	52:10,14 53:10
42:16	31:14,18 32:22	25:8	53:13	53:21 54:7
arguing (3)	34:1 36:23	based (4)	better (5)	58:16 60:21
4:13,16 22:16	37:17 47:8,9	40:8 47:20	40:12,23 52:11	61:8,15
argument (9)	50:10	60:11,24	56:13 61:13	brief (7)
15:5 19:25	Attorney's (2)	baseless (1)	Bill (1)	16:2 24:17 31:7
32:12 36:11	59:25 60:4	30:6	19:6	31:8,14 32:13
37:6 40:14	attributed (1)	Basic (1)	binder (1)	42:17
48:24 52:12	42:11	21:18	3:7	briefly (3)
53:1	Australian (2)	basically (1)	binding (1)	10:10 18:9
arguments (5)	2:4,8	23:13	57:2	51:12
3:12 29:15,16	authorized (1)	basis (3)	bit (2)	broad (2)
49:10 61:13	62:10	21:24 41:8	40:14 49:13	54:10 56:11
arrest (1)	availability (1)	54:19	blanket (1)	broader (1)
26:3	47:7	Beach (8)	55:8	31:9
arrested (1)	available (2)	1:1,16,17 2:5,9	Board (1)	brought (8)
50:24	18:10 22:3	2:18,19 62:5	3:18	4:5 5:17 7:19
articulate (1)	Avenue (2)	bear (3)	Boca (1)	12:25 18:18
27:15	2:4,8	23:11 26:19	27:7	19:6 32:21
articulated (2)	aware (2)	60:18	bona (5)	54:1
29:13 56:17	30:15 54:5	bears (2)	23:8 24:11,18	Broward (1)
ascribe (1)		36:13 56:10	43:5 57:13	19:7
55:22	B	bed (1)	bono (2)	Brown (1)
asked (1)	B (2)	14:3	8:16 44:5	3:18
10:16	2:21 3:25	began (1)	bottom (2)	
aspect (1)	back (10)	3:2	29:2 38:9	C
20:3	11:14 13:5,6	beginning (1)	Boulevard (1)	call (3)
aspects (1)	14:11 17:7	31:19	2:18	10:5,5 29:25

called (1) 59:10	14:19 15:1,2 18:18 23:21,25	charges (1) 60:1	33:14 35:2,11 36:17 38:1,1	coming (1) 55:6
camera (1) 35:18	24:2 26:10 36:12,14,20	Chester (3) 2:3,6 6:10	41:7,12,17 42:6,13 43:12	comitted (1) 43:24
Capital (1) 28:21	38:17 39:20 40:8 48:7	circuit (4) 1:1,1,18 57:4	44:8,19,19,20 44:21 47:25	commenced (1) 47:24
care (1) 3:20	50:15,16 57:21 60:24	circumstances... 47:23 48:2	48:1 55:4	comment (2) 47:13,18
carries (1) 20:3	cause (18) 1:22 16:17	citation (2) 11:1 27:20	clarification (1) 6:7	commentary (1) 52:8
carry (1) 31:11	17:13,17,21,24 18:1,4 20:3,6	cite (1) 32:7	clarify (3) 4:21 14:20	commented (2) 28:18 29:3
case (90) 1:2 3:8 4:3 5:1	23:4 24:10 41:6 49:20,22	cited (9) 25:9 26:11	clear (10) 16:2 24:21	comments (3) 43:16 44:22
6:1,15 7:16 8:5	50:1 51:7	27:21 28:20	41:16 49:16,21	47:6
8:11 10:4,8	57:11	29:7 31:23	55:21 56:4,6	commit (1) 33:9
11:9,11,11,12	causes (6) 9:14 11:22 12:4	40:3 45:5 59:3	56:15,15	committing (1) 41:24
11:24 12:1,2	13:3 14:21	citing (1) 48:14	clearly (3) 45:2 57:1,12	communicate... 42:3
12:18,25 13:1	15:3	civil (3) 12:20 18:4 26:5	client (4) 14:2 33:25	compelling (2) 29:18 31:14
13:4,9,13 14:3	caveat (1) 10:25	claim (45) 4:25 5:5,23 9:18	40:25 41:21	complained (1) 12:10
14:5,12,12,24	ceded (1) 23:23	14:20 17:15	clients (6) 31:11 34:8	complaining (1) 25:25
16:15 19:19	century (1) 30:25	18:8 24:7,22	37:15 41:25	complaint (19) 9:10 13:14,23
22:14,15,15	certainly (4) 36:20 45:23	24:23 25:9,24	44:1,5	14:9,9,10 15:8
23:22 24:2,5	46:4 57:14	26:2 28:20	client's (1) 41:5	15:11 17:11
25:10 26:1,3	CERTIFICA... 62:1	29:20 30:1,23	close (5) 11:11 20:9,12	19:6,15,17
26:14 27:19	certified (1) 59:12	32:21 36:24	20:14,16	22:18 26:5
28:25 31:4,6	certify (1) 62:9	38:25 39:1,3	close (1) 60:22	33:7 39:8 52:3
31:13,23 33:13	cert's (1) 28:17	39:14,18 41:1	CLR (2) 1:24 62:18	57:25 58:7
33:16,17,23	chair (1) 49:6	43:22 44:10,13	cogent (3) 26:12 29:12	complaints (1) 25:25
34:21,25 35:1	challenge (1) 48:3	45:17,20 46:8	56:14	complete (1) 62:12
36:8,9,16,23	changed (1) 11:2	47:15,16,20,24	cold (1) 4:17	completely (1) 35:9
37:17 39:6,17	characteristic ... 60:8	48:3,6 52:20	COLEMAN (1) 2:15	compliment (1) 58:20
39:24,25 40:2	charged (1) 33:8	52:22 54:20	come (1) 28:4	conceded (3) 57:22,23 60:16
41:15 42:6		55:17 56:19	comes (3) 40:12 41:6	conceding (1) 60:23
44:6 45:4		59:8 60:15,16	47:11	
47:23 48:8,9		claimed (2) 13:19 15:4		
49:15,15 50:12		claiming (2) 23:24 52:19		
50:22,22 51:5		claims (31) 3:24 4:1 5:8,17		
51:6 55:23		6:3,4 7:19		
57:8,9,13		15:23 24:4		
58:14 59:3,9,9		25:13 27:25		
59:11,17 60:10				
61:7				
cases (28) 4:8 7:21,24 8:12				
8:24 11:10,16				
12:16 13:7				

concept (1) 44:9	55:4	counterclaim ... 6:14 9:11,12,13 9:19 13:15 50:7	34:18 35:17,25 36:10 37:22 38:11,12,14,17 40:11 42:2,23 43:9,19 45:22 46:1,10,13,17 46:21,25 47:10 48:23 49:1,4,8 51:10,13,15 52:17,18 53:19 53:24 54:9,13 54:22 55:14,19 55:25 56:1,3,7 56:12 57:2,5 57:19 58:4,14 58:18 59:8,11 59:12,22 60:19 61:1,6,9,16,16 61:18 62:1,9	4:2 20:20,24 Crow's (1) 53:3 Cruz (1) 29:7 crystal (1) 56:4 current (2) 9:24 10:4 currently (3) 6:15,18 25:7 cut (2) 31:19 32:3
concern (3) 16:4 45:25 54:17	context (2) 32:11 45:12	counts (4) 9:7,9 23:24 60:20		
concerned (2) 39:3 52:21	continued (2) 44:4 45:8	County (5) 1:1,16 19:8,8 62:5		
concerns (4) 36:7 43:17 44:23 45:13	continues (1) 35:11	course (18) 3:21 4:23 8:23 11:17 21:21,25 27:13 29:16,22 35:3 47:22,25 48:9 51:20 52:1 55:10 56:22 60:17		
concession (1) 57:23	continuing (2) 15:24 40:24	court (163) 1:1 3:3,6,11,17 4:13,18,23 5:2 5:10,13,20,23 6:1,6,20 7:1,12 7:22,23 8:3,6 8:13,15,19,22 9:25,25 10:1,3 10:9,15,18 11:6 12:2,6,18 13:1,5 14:6 15:15,15,16,19 16:2,6,11,19 16:25 17:8,17 17:25 18:2 19:9,23 20:10 20:13,15,18 21:3,6,13,17 22:3,6,14,19 22:22 23:1,2,7 23:17 24:15,20 25:4,5 26:16 26:17,21,24 27:3,9,12,23 28:6,14,16,24 29:17 30:2,3 30:15,18,20,24 31:20,24 32:9 32:12 33:1,21		
concise (1) 26:25	contradistinct... 25:16 28:7,10	contrary (1) 56:2	courtesy (1) 48:25	
conclude (1) 49:23	control (2) 22:4 37:6	control (2) 22:4 37:6	Courthouse (1) 1:16	
concluded (2) 8:1 61:19	controvert (1) 37:1	convenient (1) 37:11	courtroom (2) 1:17 54:25	
conclusion (2) 4:9 28:5	convention (1) 37:11	Cope (3) 27:7,14,19	courts (4) 11:20 28:18 39:12 50:6	
conclusionary... 58:3	Cope's (1) 28:3	copies (2) 21:14,15	court's (13) 22:4 23:3 24:13 27:20 28:10 49:18,24 55:8 57:17 60:12,13 61:5,10	
concurring (6) 25:19 27:7,9,10 28:3 42:19	copy (1) 58:16	cornerstone (1) 61:9	cover (1) 24:5	
conduct (5) 6:4 38:19,19,21 51:25	correct (3) 5:18 8:18,20	correct (3) 5:18 8:18,20	covered (2) 23:20,24	
confidential (1) 36:3	correction (1) 10:13	correctly (1) 11:12	cries (1) 43:21	
conflict (2) 25:7 58:11	corrects (1) 37:19	Corrigan (3) 28:21 29:2 45:4	crimes (2) 33:9,11	
confused (1) 23:18	counsel (8) 3:8 6:22 21:15 29:24,25 37:4 47:14 53:11	counsel (8) 3:8 6:22 21:15 29:24,25 37:4 47:14 53:11	criminal (1) 59:25	
confusing (1) 10:20	count (1) 45:11	count (1) 45:11	cripple (1) 22:7	
conservative (1) 36:18			Crow (3)	
conspiracy (1) 33:9				
contained (1) 57:24				
contains (1) 10:24				
contempt (2) 16:20 22:5				
contentions (1)				
				D
				Dade (1) 19:8
				damages (3) 48:17 52:25 53:3
				dare (1) 28:12
				DATE (1) 1:15
				Dated (1) 62:14
				dates (1) 11:14
				day (5) 10:13 17:25 19:11,12 62:14
				days (1) 38:7
				DCA (3) 27:18,22 29:9
				DCA's (2) 25:11 27:16
				deal (4) 3:15 11:13 21:9 58:7
				dealing (3) 25:4 30:3 55:19
				deals (3) 21:6,10 59:6
				dealt (2) 25:25 55:16
				decided (1)

28:24	desiring (1)	discussed (4)	Dixie (1)	18:12,17 19:12
decision (11)	33:21	28:25 32:5	1:16	19:13 22:16,24
26:19,22 27:7	despite (2)	58:13 60:10	doctrine (2)	32:18 33:2,8
27:16,22 28:21	32:24 35:10	discusses (1)	28:11 39:18	34:5,8,14
28:23 31:24	detail (1)	31:25	documents (2)	35:21 37:13
32:6 60:13	23:6	discussing (1)	38:6 40:15	38:4 40:22
61:10	determination...	36:6	doing (3)	41:15,25 44:3
decisions (2)	17:18,22 18:2	Discussion (2)	8:16 34:23,23	44:19 47:24
21:24 60:12	23:8 24:11	22:21 31:22	Donald (1)	48:15 52:5,11
decision-maki...	determination...	dismiss (2)	1:18	53:1,4,5,18,22
57:17	17:23	37:17 38:1	double-check ...	54:15 55:4
defamation (4)	determine (2)	dismissal (1)	47:13	57:14 60:17
11:15,16 59:9	11:22 21:13	5:17	dropped (2)	effect (1)
59:22	determined (3)	dismissed (3)	41:11,12	50:13
defamatory (1)	12:14 13:9 50:3	5:14 6:1,5	due (1)	effectuated (1)
59:23	determining (1)	disposed (1)	57:3	37:3
defeat (1)	12:10	23:22	E	efforts (1)
52:12	developed (1)	disputes (1)		48:8
defendant (3)	40:19	23:12	earlier (3)	egregious (3)
18:5,6 30:6	dictate (1)	disqualify (1)	34:13 37:20	45:7,14 54:2
defendants (4)	46:22	29:24	54:1	either (4)
1:8 5:11,13	dictates (1)	dissatisfaction...	early (1)	23:14 28:17
49:20	61:6	42:10	32:4	45:6 52:19
defended (1)	difference (1)	distance (1)	easier (1)	elements (7)
5:6	45:15	15:25	10:6	24:6,22 42:21
defenses (1)	different (8)	distinction (2)	Echevarria (17)	47:17 48:4,11
9:20	7:14,20,21	41:16,16	11:11 12:17	57:15
degree (1)	11:20 30:5	distinctly (1)	13:6 14:12	embrace (1)
40:17	35:9 42:16	56:20	21:10 23:21,25	42:20
Delmonico (1)	56:20	distinguish (3)	25:12 28:24	empathy (1)
21:11	differently (1)	15:20 40:7,8	51:15,16 54:12	54:24
demonstrated ...	60:3	distinguishabl...	54:23 55:16	emphasis (1)
17:13	difficult (3)	31:3	56:18 60:14	32:23
denied (1)	44:24,25 47:11	distinguished ...	61:5	encompassed ...
11:4	difficulty (2)	59:8	educated (1)	60:5
DENNEY (1)	32:20 55:6	distinguishing...	40:17	ended (2)
2:18	dilemma (1)	60:7 61:4	Education (1)	43:16 57:13
depos (1)	51:13	district (15)	3:18	enforcement (1)
48:20	directive (1)	9:25 10:1 13:1	educational (1)	59:14
deposition (4)	61:5	15:14,15 28:13	40:20	entire (3)
8:4 22:10 38:6	disclosure (1)	28:14 29:8	Edwards (55)	33:5 48:19,20
39:9	39:6	50:5 54:13	1:7 2:17 4:6 5:6	entities (2)
depositions (3)	discovery (7)	55:25 56:3	5:8,18 6:2,15	4:6,25
14:14 18:23	8:24 13:21	57:19 60:11	6:22 7:6 8:3,15	entitled (1)
48:18	14:14 18:21	61:6	9:6,11,18,19	22:17
described (1)	22:1 34:14	division (2)	10:6,7 13:22	Epstein (38)
57:12	52:4	3:25 4:10	14:2 15:6,21	1:4 3:24 4:5,14

6:11,13 7:4,19 8:19 9:3 13:24 15:7 17:13 18:10,19 19:19 32:16,22,25 34:2,2,22 35:8 37:1,6,10 40:15,25 44:7 44:20 50:9 52:2,3,4,19,22 53:8,17 Epstein's (8) 5:23 6:4 9:18 18:24 22:18 33:6 42:10 44:16 equally (1) 45:20 escalating (1) 19:1 especially (2) 32:23 58:23 espoused (2) 9:24 15:14 ESQUIRE (5) 2:6,10,15,20,21 essence (1) 48:13 essentially (6) 12:20 13:5 16:11 32:25 38:18 45:3 establish (1) 51:1 established (1) 21:20 establishing (1) 18:3 ethical (3) 31:11 41:3,20 eve (4) 5:18 37:17,24 41:12 event (2) 19:14 37:23 everybody (1) 3:3	evidence (7) 19:20 34:4 35:24 37:9 38:3,8 43:24 evil (1) 44:18 evolution (1) 33:16 exactly (1) 13:13 example (4) 33:25 42:17 43:11 53:20 excellent (1) 58:19 excuse (4) 15:6 35:22 41:23,23 exist (3) 42:22 47:8 50:21 exists (3) 23:7 25:7 38:24 experience (1) 40:21 explanation (1) 19:4 exposed (1) 31:15 expressed (2) 45:14 46:7 expressly (2) 29:15 30:10 extend (1) 39:13 extension (1) 10:14 extent (1) 4:6 extortion (1) 33:11 extort (1) 14:2 extra (1) 55:8 extracted (1) 51:14	extrajudicial (2) 56:12,13 extremely (1) 58:22 <hr/> F <hr/> face (2) 34:25 57:6 faced (2) 13:1 38:2 facing (2) 34:17 39:7 fact (11) 10:1 13:20 17:20,21 24:1 24:10,19 35:10 40:9 50:15,22 factor (2) 32:7,8 facts (21) 23:5,10 26:3 31:6,13 35:6 35:17 36:13 40:19 42:25 43:2,7,18,20 44:7 45:7,13 45:14 47:15 48:13,15 factual (6) 20:4 23:12 43:4 43:4 57:12,15 fail (1) 17:12 fairly (1) 60:22 faith (1) 43:4 falls (1) 57:1 false (2) 41:8 50:24 familiar (2) 11:15 19:9 familiarity (1) 4:1 familiarize (1) 53:13	family (3) 53:6,9,23 far (6) 11:22 12:3 26:4 38:21 39:2,19 fathom (1) 52:18 favor (5) 49:19 55:1,3,4 57:14 federal (5) 7:22 8:5,13 34:6 44:6 feel (1) 20:2 fellow (1) 57:4 felt (1) 53:5 fence (1) 39:2 fide (5) 23:8 24:11,18 43:5 57:13 Fifth (1) 27:22 figure (1) 26:18 file (4) 15:7 17:15,15 17:16 filed (18) 6:13,14 7:22 9:5 9:11 13:14,17 15:8,10 17:13 19:14 22:11,12 26:5 30:1 38:6 40:15 50:23 filing (10) 13:22 14:1,8,9 22:2,7 30:5,12 48:16 52:3 final (3) 11:1,5 58:2 finance (1) 40:18 find (1)	19:16 finding (2) 17:24 49:24 fine (3) 34:24 37:22 49:8 firm (7) 18:13,15,19 19:5 32:14 36:16 41:11 firms (1) 41:10 first (2) 6:9 18:12 five (1) 19:23 FL (5) 1:17 2:5,9,14,19 Fla (1) 28:23 flies (1) 57:6 flight (1) 18:22 flights (1) 18:24 Florida (17) 1:1 9:24 12:2,18 15:16 16:6,21 18:16 22:6 30:17 51:15 55:7 56:12 59:11 60:13 62:4,9 focal (1) 41:1 focus (4) 5:7 25:2 47:19 55:17 follow (2) 28:15 56:1 following (4) 1:23 3:2 29:18 61:4 footnote (1) 28:4 foregoing (1)
--	--	---	---	---

62:11	further (3)	46:11 55:17	hand (1)	holds (2)
forever (2)	14:19 36:7	56:22	36:12	25:12,16
16:12,14	38:10	GOLDBERG...	handle (1)	Honor (27)
forget (1)	future (1)	2:8,10	24:24	3:5 4:20,24 5:25
14:18	39:22	Goldberger's ...	handled (3)	6:10,16 7:10
forgive (1)	F.Supp.2d (1)	55:2	3:24 4:8 16:24	7:17 15:13
55:20	28:22	good (3)	hang (1)	17:5 21:14,19
forgot (1)		3:3,5 43:4	57:11	22:23,24 35:22
49:5	G	government (2)	happened (3)	46:12,14 49:3
form (1)	game (1)	34:6,6	8:7 10:19 33:22	49:12 52:15
58:1	53:11	grant (4)	happens (3)	53:10 54:8
formal (1)	gather (1)	20:5 24:8 60:20	26:4 33:16	58:17 60:21
51:23	60:11	60:24	37:16	61:8,15,18
format (1)	general (1)	granted (1)	happy (1)	hope (1)
11:2	33:10	48:17	21:5	35:7
forms (1)	genesis (2)	granting (1)	harken (1)	horrific (1)
54:19	54:12 59:5	49:19	58:5	33:8
Fort (1)	getting (2)	grasp (1)	hat (1)	horrifying (1)
2:14	17:5 43:14	48:19	57:11	54:2
forth (3)	girls (1)	gratifying (1)	head (2)	hour (1)
25:22 54:21	34:9	58:22	12:25 60:9	3:13
58:11	give (3)	greater (1)	headed (1)	hours (1)
found (2)	21:3 38:14	32:2	11:9	3:9
12:19 15:2	48:13	grievances (1)	hear (1)	huge (1)
four (1)	given (1)	22:7	4:17	34:4
53:12	31:9	group (2)	heard (2)	I
fourth (9)	global (3)	19:15 27:8	1:22 3:18	Idaho (1)
9:13 10:1 15:15	15:21 23:20	guess (3)	hearing (3)	31:24
39:16,16 50:5	57:18	11:24 32:9	1:12 5:19 58:25	idea (2)
55:23 56:3	globally (1)	40:11	hearings (1)	44:9 50:8
57:25	24:4	guiding (1)	58:23	identified (2)
Fourth's (1)	go (16)	33:1	heinous (2)	32:1 45:19
44:25	7:11 14:19	guilty (1)	41:24 42:2	identify (2)
FPR (2)	16:11,13 17:7	38:4	held (1)	23:6 54:3
1:24 62:18	18:9 19:17	guised (1)	59:22	ignores (2)
fraud (3)	26:4 31:5	17:1	Henry (1)	27:6,15
33:9,10,10	39:19 41:2,17	guy (2)	27:17	immediately (1)
Fridovich (2)	43:2,19 45:10	50:23,24	highlighted (2)	36:17
59:10,10	61:1	guys (1)	21:14,15	immunity (11)
front (2)	goes (3)	19:25	highlighting (1)	31:9 32:3,5,5
12:18 18:15	21:8 35:3 54:10	H	48:21	36:13 38:23
full (3)	going (15)	Haddad (7)	Highway (1)	39:12 51:19,25
27:16 39:6,19	3:11 6:20 8:5	2:12,15 4:11,12	1:16	52:9 55:12
fundamentall...	14:11 19:4	4:15 5:25 20:1	history (6)	impact (4)
30:5	23:4 28:15	Hafele (1)	6:21 7:18 10:21	35:14 43:18,20
Funeral (1)	33:5 34:22	1:18	10:23 18:16	58:6
27:16	36:7 45:9,10		33:5	

impeachment ... 7:10	27:5	3:24 5:11,13	Jeffrey (2) 1:4 6:11	juncture (1) 5:24
implicitly (3) 27:22,24 30:21	influence (1) 33:1	7:21 17:20	jgoldberger@... 2:11	jurisdiction (1) 28:17
imploded (1) 19:5	information (2) 8:1 13:24	29:21 31:5	job (2) 58:19 61:13	jury (3) 17:22,22,23
implosion (1) 37:12	inherent (1) 22:4	33:12 38:9	Johnson (6) 25:10,21,25	<hr/> K <hr/>
import (2) 39:19 59:5	initial (4) 5:17 24:17 33:7	39:20 40:9	26:22 29:14	Kenny (2) 32:14 36:16
important (2) 44:8 59:16	49:10	44:2 48:5	50:19	key (1) 25:3
importantly (1) 28:9	initiation (1) 13:17	involvement (4) 31:7 32:13 36:8	JR (2) 2:3,6	kind (3) 13:7 44:11
improper (2) 22:1,2	input (1) 61:12	44:16	JSX@scarcyl... 2:20	58:24
inappropriate... 16:22	inside (1) 34:22	involves (1) 30:5	judge (33) 1:18 4:2,15 8:10	kindly (2) 3:12 61:1
include (1) 57:20	insofar (1) 17:11	irrelevant (1) 14:21	10:13 17:22	King (55) 2:21 8:10,14,18
including (2) 12:7 45:7	instigation (2) 59:15,19	issuance (1) 11:3	20:20,24 25:3	8:20 10:10,12
incredibly (1) 57:23	institution (1) 59:25	issue (30) 10:7 12:3 13:2	25:18 26:9,11	10:16,19 22:22
independent (1) 4:4	interesting (2) 27:4 36:12	13:14 18:1	26:17,20 27:7	22:23,23 23:3
indicate (3) 32:13,15 50:20	interference (3) 12:1,9 30:1	20:6,13,14	27:14,19 28:3	23:17 24:13,16
indicated (7) 8:4 29:12 30:21	interrogatorie... 13:20 14:15	23:4,7,14,20	28:21 29:2,14	25:1,6 26:19
30:21 32:11	interrupt (1) 10:3	24:11,12,17	42:18,19 43:11	26:22,25 27:4
55:22 60:25	interrupting (1) 55:20	25:3,8 28:15	44:9 45:4 46:6	27:10,13 31:21
indicates (3) 8:15 10:24	interruption (1) 8:21	31:25 35:15	47:1,5 53:3	31:23 32:18
indication (2) 35:20 36:24	interview (3) 6:23 7:4,7	36:13 40:1,5	56:21 57:5	33:4 34:19
indications (1) 34:12	intimidate (1) 14:1	44:23 50:2	58:2	36:5 37:8,23
individual (5) 40:17 41:23	investigations ... 8:2	57:11,12 58:7	judges (1) 26:13	38:13,16 39:15
47:12 59:7,14	investigator (1) 54:16	58:11 60:9	judgment (11) 5:19 6:13 14:25	40:11 41:2
individually (4) 1:7,7 5:3,5	investigatory (...) 60:4	issued (1) 10:24	15:1 23:15	42:14,24 43:20
individuals (1) 59:24	investors (3) 19:15,22 27:8	issues (13) 12:22 19:20	24:25 35:23	45:23 46:4,24
inexplicable (1)	involved (13)	20:4 21:12,13	37:18,24 41:13	47:4 48:24
		26:4 35:4,15	49:19	49:9 51:11
		43:3,4,5 46:23	judicial (31) 1:1 11:17 12:12	54:1,9,14
		58:12	12:21 13:11,18	55:13,15 56:16
			13:18 14:8,13	58:2,5
			15:18 16:9	Knachwalter (...) 32:14 36:16
			38:19,20,21,23	knew (3) 5:10 18:10
			39:10 51:9,20	37:14
			51:23 52:23,24	know (31) 3:23 4:7,8 6:24
			53:25 54:5	7:14,15 11:7
			55:9,10 56:9	16:13,21 19:7
			57:25 59:15,19	
			60:5,18	
		<hr/> J <hr/>		
		J (2) 1:7 2:17		
		Jack (3) 2:10,20 22:24		
		January (2) 1:15 62:14		

19:24,25 27:13 34:1,2,18,21 37:16 40:12,16 40:18,23 44:6 46:15 47:8 51:11,11,12 52:14 54:18 57:4 knowledge (5) 4:3 38:2 53:8,16 53:22 known (1) 13:25 knows (3) 43:25 44:6,7 Krig (1) 28:22	30:25 44:13 49:16,21 59:14 lawsuit (5) 9:5 30:4 39:6 44:17 48:6 lawyer (1) 42:18 lawyers (19) 31:7,8 32:1 33:12,22 34:15 34:21,24 35:1 35:9 37:21,25 39:21 40:9,12 40:23,24 41:3 41:17 lawyer's (1) 36:8 lead (1) 18:17 leading (1) 26:2 learned (2) 8:25 9:3 left (3) 4:10 56:14 57:17 legal (6) 17:18,18 31:11 41:4,20 56:14 legitimate (1) 45:13 length (1) 15:22 let's (2) 11:8 42:22 level (1) 52:16 Levin (23) 11:10,25,25 12:6,19 13:6 14:12 16:15 20:22,22 23:21 23:25 25:11 27:20 28:24 29:21,23 39:5 47:6,10 55:15 55:15 56:18	liability (3) 32:4 39:7 59:21 liberal (1) 36:15 Libow (2) 26:23 29:14 lie (1) 36:24 lied (1) 51:3 light (3) 23:3 43:10 52:15 lightly (1) 30:19 light's (1) 45:10 likewise (3) 23:12 24:18 28:18 line (7) 29:2 34:24 36:12 38:9 41:4,4,5 lines (2) 31:17 39:9 litigant (1) 16:23 litigants (3) 16:16 22:8 40:13 litigation (54) 9:22,23 11:13 11:18,23 12:23 13:2 14:4,17 14:22 15:2,9 16:9 17:1 18:20 19:21 21:6,9,10,19 21:22,25 22:5 22:9,17 25:2,8 25:14 26:7 27:25 28:19 29:3,5,11 30:2 30:8,9,11,22 31:3,9 40:1,6 42:14 43:15,23	45:19 49:17,22 49:25 50:4,16 51:24 58:9 little (1) 49:13 LLC (1) 28:22 LM (2) 6:3 9:6 long (9) 14:15 38:22 39:10,23 51:20 52:8 55:11 56:10 57:21 longer (3) 23:13,14 50:11 look (5) 35:17 42:20 43:10 58:14 59:1 looked (1) 11:20 looking (1) 43:9 low (1) 18:4 lure (1) 19:22	27:24 28:19 29:4,10,19 30:4,7,11,13 30:16,23 31:1 35:4 39:1 42:7 42:21 43:12,15 43:22 44:8,10 45:22,24 46:4 49:14,23 50:1 50:20 51:7 52:13,20,21 54:19 55:16 56:19 57:9,20 58:9 60:16 mandate (2) 10:24 11:3 manifests (1) 18:23 mass (1) 37:9 mate (1) 57:3 material (1) 32:17 materials (4) 3:7 43:1 48:16 58:19 matter (15) 3:16,23 4:21 7:9 18:1 20:4 21:23 38:18,20 39:11 45:14 51:15 54:3,18 55:24 matters (1) 8:19 Maxwell (3) 1:24 62:8,18 mean (2) 35:7 42:8 Meaning (1) 36:14 memo (1) 39:15 memorandum... 27:21 mentioned (1)
<hr/> L <hr/>				
ladies (2) 50:23 51:3 lady (1) 6:23 Lakes (1) 2:18 landscape (1) 43:9 language (6) 51:13 54:23 56:8,11 58:8 61:3 large (2) 60:12 62:9 largest (1) 18:16 LatAm (1) 39:25 latch (1) 40:5 late (2) 19:3 53:10 latest (1) 8:3 Lauderdale (1) 2:14 law (8) 18:1 20:5 21:13				
				<hr/> M <hr/>
				Mabie (1) 11:25 machinations ... 33:6 Madam (1) 61:16 maintain (1) 40:10 making (3) 52:4 53:17,22 malicious (56) 5:9 9:8,15,17 12:24 13:15 15:25 16:18 17:11 24:4,6 24:22 25:9,12 25:24 26:2,8

50:19 merely (2) 33:17,18 met (4) 4:2 17:2 20:2 60:9 meticulous (1) 57:5 Middle (2) 20:22 29:8 Middlebrook ... 20:22 miles (1) 51:2 mind (3) 16:12 34:2,3 minute (3) 22:20 45:11 51:6 minutes (2) 3:19 46:10 misconduct (1) 21:25 misstating (1) 5:11 moment (2) 28:25 46:20 moments (4) 3:14 25:18 27:2 49:3 Monday (1) 1:15 months (1) 53:12 motion (15) 6:12 14:24 15:1 17:10 22:11 24:8 29:24 35:22 37:18,24 48:16 50:7 52:12 60:20,24 motions (2) 5:7 22:2 motive (3) 14:20 44:18 48:10 movant (1)	3:13 move (1) 20:7 multiple (1) 48:1 muster (1) 24:24 myriad (1) 47:10 M.D (1) 28:23 <hr/> N N (1) 1:16 name (3) 6:23 7:13 38:4 names (1) 18:25 National (2) 39:17,24 nature (1) 56:20 near (1) 4:9 necessarily (1) 34:1 necessary (1) 5:12 need (1) 31:5 neither (3) 7:7 29:4 55:15 never (3) 5:5 38:5,7 non (1) 20:6 North (1) 28:21 note (3) 20:8 27:17,19 noted (1) 29:17 notes (2) 47:13 62:12 notice (2) 10:12 36:19	noticed (2) 22:10,11 November (2) 9:4 19:3 November/De... 9:4 18:11 number (6) 5:11 7:18,20,21 9:2,20 numerous (1) 18:20 <hr/> O objection (1) 46:13 obligated (1) 22:8 obligations (1) 31:10 obnoxious (2) 52:4 54:1 occasions (1) 7:14 occur (1) 21:21 occurred (1) 11:16 occurring (4) 51:19,25 55:9 60:17 Office (1) 59:25 officer (1) 52:18 oh (1) 53:12 okay (16) 4:11 6:6 7:17 8:22 10:19 11:6 20:10 21:17 22:19,22 24:15 26:24 27:12 37:22 45:23 48:23 old (2) 34:9,10 Olson (15)	25:10,21,24 26:6 29:17 50:19,22 51:5 58:6,14 59:3,7 59:18 60:10 61:4 once (2) 21:20 26:5 one's (1) 57:11 one-half (1) 3:12 operative (1) 57:24 opinion (21) 25:11,19 26:9 26:11 27:9,11 27:18 28:3 29:13,14 42:19 43:11 44:25 45:1,4 47:1,3 54:13 57:5 58:8 59:5 opinions (1) 27:14 opportunity (5) 3:6 6:25 23:6 32:2,3 opposed (4) 24:23 29:16 32:22 47:2 opposing (1) 21:15 opposition (1) 50:7 order (5) 47:2 49:18,24 60:22 61:2 orgies (1) 34:11 original (4) 9:18 15:8,11 35:1 outlined (3) 34:3 37:10 42:25 outside (7)	51:9,23 52:22 52:24 53:24 54:5,10 overturn (1) 30:25 <hr/> P PA (2) 2:8,12 package (1) 6:21 page (1) 10:14 Palm (8) 1:1,16,17 2:5,9 2:18,19 62:5 panel (1) 27:19 panel's (2) 27:16 28:4 papers (3) 5:21 34:4,13 part (5) 35:4 46:16 54:25 55:24 60:12 participant (1) 53:11 participants (1) 14:16 particular (2) 35:15 41:15 particularly (2) 16:15 38:24 partner (1) 18:13 pending (1) 15:23 people (1) 18:23 performance (1) 58:21 period (3) 8:8 19:1 33:3 perjury (4) 16:23,25 33:9 33:10
--	--	--	--	---

person (1) 59:13	60:23	presentation (1) 9:2	17:12,17,21,24 18:1,3 20:3,6 23:4 24:10 57:11	49:18 50:5 51:9,23 52:20 54:6,20 55:24 56:13 60:15
personal (3) 37:13 40:21 54:24	police (2) 50:24 59:24	presentations ... 58:21,22	probably (3) 4:7 38:10 53:12	professional (2) 49:11 62:8
persuasive (1) 25:22	policy (1) 21:23	presented (1) 59:12	problem (2) 10:22 26:21	professionalis... 61:12
peruse (1) 58:12	Ponzi (2) 18:16 19:22	presumptively... 60:1	problematic (1) 45:2	prominent (3) 18:25 20:17 22:13
phase (1) 36:2	portion (1) 53:1	pretext (1) 44:17	procedural (2) 6:20 7:18	prongs (1) 40:4
picked (1) 59:4	position (12) 23:13 25:6,21 28:11 32:10 35:9 37:8 42:3 45:3 46:1 52:6 56:25	prevent (1) 30:8	proceed (1) 41:8	pronouncing (1) 11:12
picking (1) 42:4	positions (1) 56:17	primarily (1) 39:5	proceeded (1) 7:24	properly (1) 17:15
piece (1) 38:8	post-civil (1) 58:7	prior (4) 27:6 53:14 59:14,19	proceeding (19) 11:17 12:12 15:18 33:2 38:23 39:10 51:20,21 52:9 52:25 53:25 55:10,12 56:9 56:23 58:1 60:5,18,19	proposed (1) 6:17
place (3) 1:16,22 8:25	Potash (1) 27:8	private (1) 59:23	privilege (62) 9:22,23 11:13 11:18,23 12:4 12:5,23 13:3 13:12 14:4,17 14:22 15:3,9 16:10 17:1 21:7,9,11,12 21:19,20,22 22:17 25:3,8 25:14 26:7 28:1,19 29:3,6 29:11 30:2,9 30:12,22 31:3 31:10 40:1,6 42:15 43:15,23 44:12 45:5,12 45:16,19 47:9 49:17,22,25 50:4,17,17 51:24 57:1 58:9 59:8,21	proposition (7) 21:11 25:23 26:6 28:14 30:20 51:17,18
Plaintiff (2) 1:5 2:3	potentially (2) 19:21 53:25	privilege (62) 9:22,23 11:13 11:18,23 12:4 12:5,23 13:3 13:12 14:4,17 14:22 15:3,9 16:10 17:1 21:7,9,11,12 21:19,20,22 22:17 25:3,8 25:14 26:7 28:1,19 29:3,6 29:11 30:2,9 30:12,22 31:3 31:10 40:1,6 42:15 43:15,23 44:12 45:5,12 45:16,19 47:9 49:17,22,25 50:4,17,17 51:24 57:1 58:9 59:8,21	proceeding (19) 11:17 12:12 15:18 33:2 38:23 39:10 51:20,21 52:9 52:25 53:25 55:10,12 56:9 56:23 58:1 60:5,18,19	propositions (1) 26:13
plan (1) 20:18	power (1) 22:4	private (1) 59:23	proceedings (...) 1:13,23 3:2 12:21 16:20 29:22 35:10 38:20,22 47:22 52:1,23 56:22 59:15,20 61:19 62:11	prosecute (1) 15:24
planes (1) 18:24	powers (1) 22:5	privilege (62) 9:22,23 11:13 11:18,23 12:4 12:5,23 13:3 13:12 14:4,17 14:22 15:3,9 16:10 17:1 21:7,9,11,12 21:19,20,22 22:17 25:3,8 25:14 26:7 28:1,19 29:3,6 29:11 30:2,9 30:12,22 31:3 31:10 40:1,6 42:15 43:15,23 44:12 45:5,12 45:16,19 47:9 49:17,22,25 50:4,17,17 51:24 57:1 58:9 59:8,21	process (50) 5:8 9:9,14,16 12:24 13:12,18 13:19 14:8,14 15:12 16:18 24:4,23 29:5 31:16 33:18,19 37:2 38:19,24 39:3,13,18,23 40:2,7 41:1 42:7 44:24 45:17,20 46:2 46:8 47:14,16 47:20 48:3,5,6	prosecution (60) 5:9 9:15,17 12:24 13:16 15:25 16:2,18 17:12 24:4,6 24:22 25:9,13 25:24 26:2,8 27:24 28:20 29:4,10,20 30:4,7,8,11,13 30:16,23 31:1 35:4 39:1 42:7 42:21 43:12,15 43:22 44:8,10 44:13 45:8,22 45:24 46:5 47:25 49:14,23 50:1,21 51:7 52:13,20,22 54:19 55:16
plans (1) 35:25	precedent (3) 27:6 28:8 57:3	privileged (4) 13:10 14:10 60:1,6	proceeding (19) 11:17 12:12 15:18 33:2 38:23 39:10 51:20,21 52:9 52:25 53:25 55:10,12 56:9 56:23 58:1 60:5,18,19	prosecute (1) 15:24
pleading (1) 13:18	precedential (3) 10:9 55:21 57:7	pro (3) 8:16 40:16 44:5	proceedings (...) 1:13,23 3:2 12:21 16:20 29:22 35:10 38:20,22 47:22 52:1,23 56:22 59:15,20 61:19 62:11	prosecution (60) 5:9 9:15,17 12:24 13:16 15:25 16:2,18 17:12 24:4,6 24:22 25:9,13 25:24 26:2,8 27:24 28:20 29:4,10,20 30:4,7,8,11,13 30:16,23 31:1 35:4 39:1 42:7 42:21 43:12,15 43:22 44:8,10 44:13 45:8,22 45:24 46:5 47:25 49:14,23 50:1,21 51:7 52:13,20,22 54:19 55:16
pleadings (5) 13:16 14:25 49:19 50:12 54:21	preceding (2) 12:12 16:9	probable (11)	proceedings (...) 1:13,23 3:2 12:21 16:20 29:22 35:10 38:20,22 47:22 52:1,23 56:22 59:15,20 61:19 62:11	prosecute (1) 15:24
please (7) 20:7 22:22 23:1 23:2 39:14 58:4,15	preclude (1) 30:10		proceedings (...) 1:13,23 3:2 12:21 16:20 29:22 35:10 38:20,22 47:22 52:1,23 56:22 59:15,20 61:19 62:11	prosecution (60) 5:9 9:15,17 12:24 13:16 15:25 16:2,18 17:12 24:4,6 24:22 25:9,13 25:24 26:2,8 27:24 28:20 29:4,10,20 30:4,7,8,11,13 30:16,23 31:1 35:4 39:1 42:7 42:21 43:12,15 43:22 44:8,10 44:13 45:8,22 45:24 46:5 47:25 49:14,23 50:1,21 51:7 52:13,20,22 54:19 55:16
plight (1) 40:24	precursor (2) 39:25 45:1		proceedings (...) 1:13,23 3:2 12:21 16:20 29:22 35:10 38:20,22 47:22 52:1,23 56:22 59:15,20 61:19 62:11	prosecute (1) 15:24
podium (1) 49:7	preface (1) 52:7		proceedings (...) 1:13,23 3:2 12:21 16:20 29:22 35:10 38:20,22 47:22 52:1,23 56:22 59:15,20 61:19 62:11	prosecution (60) 5:9 9:15,17 12:24 13:16 15:25 16:2,18 17:12 24:4,6 24:22 25:9,13 25:24 26:2,8 27:24 28:20 29:4,10,20 30:4,7,8,11,13 30:16,23 31:1 35:4 39:1 42:7 42:21 43:12,15 43:22 44:8,10 44:13 45:8,22 45:24 46:5 47:25 49:14,23 50:1,21 51:7 52:13,20,22 54:19 55:16
point (10) 17:9 21:18 24:3 24:16 25:17 27:1 32:13 41:1,7 49:15	prejudice (2) 5:15 6:2		proceedings (...) 1:13,23 3:2 12:21 16:20 29:22 35:10 38:20,22 47:22 52:1,23 56:22 59:15,20 61:19 62:11	prosecute (1) 15:24
points (1)	preliminary (1) 23:18		proceedings (...) 1:13,23 3:2 12:21 16:20 29:22 35:10 38:20,22 47:22 52:1,23 56:22 59:15,20 61:19 62:11	prosecution (60) 5:9 9:15,17 12:24 13:16 15:25 16:2,18 17:12 24:4,6 24:22 25:9,13 25:24 26:2,8 27:24 28:20 29:4,10,20 30:4,7,8,11,13 30:16,23 31:1 35:4 39:1 42:7 42:21 43:12,15 43:22 44:8,10 44:13 45:8,22 45:24 46:5 47:25 49:14,23 50:1,21 51:7 52:13,20,22 54:19 55:16
	prelitigation (1) 59:6		proceedings (...) 1:13,23 3:2 12:21 16:20 29:22 35:10 38:20,22 47:22 52:1,23 56:22 59:15,20 61:19 62:11	prosecute (1) 15:24
	prepared (2) 23:10 60:21		proceedings (...) 1:13,23 3:2 12:21 16:20 29:22 35:10 38:20,22 47:22 52:1,23 56:22 59:15,20 61:19 62:11	prosecution (60) 5:9 9:15,17 12:24 13:16 15:25 16:2,18 17:12 24:4,6 24:22 25:9,13 25:24 26:2,8 27:24 28:20 29:4,10,20 30:4,7,8,11,13 30:16,23 31:1 35:4 39:1 42:7 42:21 43:12,15 43:22 44:8,10 44:13 45:8,22 45:24 46:5 47:25 49:14,23 50:1,21 51:7 52:13,20,22 54:19 55:16

56:19 57:9,21 58:10 60:16 protected (5) 11:18 14:16,17 51:24 59:21 protecting (1) 33:22 protections (3) 16:15,17 17:6 protocol (1) 46:22 protracted (1) 16:3 provided (2) 6:21 21:14 providing (1) 21:15 public (3) 21:23 38:5,5 published (1) 11:1 pulling (1) 48:21 punitive (1) 48:17 purely (1) 17:18 purpose (4) 7:9 14:1 30:7,9 purposes (1) 23:14 Pursuant (1) 23:16 pursue (4) 19:19 34:21 35:12 44:18 pursued (2) 34:14 48:1 pursuit (2) 47:20 48:8 purview (2) 40:20,21 put (5) 14:3 15:13 31:18 44:15 50:12 puts (1)	23:20 P.A (2) 2:3,18 p.m (4) 1:15,15 3:2 61:20 <hr/> Q qualified (1) 32:5 qualifiedly (1) 60:1 question (6) 8:11 12:13 32:15 35:7 39:21 59:13 questions (4) 17:20,21 24:10 53:3 quick (1) 59:1 quickly (3) 36:23 54:4 59:4 quite (2) 8:8 32:23 quote (2) 11:16 51:18 quoted (2) 51:16 54:12 quoting (3) 16:5 20:17 60:12 <hr/> R raised (7) 9:21,21 10:7 17:10 23:9 24:16 29:15 ran (1) 10:22 rational (1) 40:4 Razorback (2) 19:16,18 read (12) 3:6 6:25 7:10,12 20:24 28:2,2,3	48:20 53:15 54:11 59:4 reading (1) 10:23 ready (1) 17:5 reaffirmation ... 55:7 reaffirmed (2) 51:14,16 reaffirms (1) 56:7 realize (2) 3:21 33:24 really (10) 5:6 11:9 14:21 18:4 38:10 42:12 43:16 48:18,22 55:17 Realtime (2) 1:25 62:19 reason (4) 15:7 17:14 24:5 43:7 reasonable (1) 18:6 reasonably (1) 18:7 reasons (9) 24:9 29:19 32:1 34:19 43:12 45:18,21 46:5 46:7 rebuttal (2) 3:14 46:16 receptive (2) 19:25 40:14 recognize (5) 33:22 41:7,18 44:14 54:23 recognized (1) 30:16 recognizes (2) 27:23,24 recognizing (1) 30:25 reconcile (1)	32:21 record (9) 22:20,21 31:20 31:22 32:15 35:24 44:16 54:11 62:12 refer (1) 19:16 reference (3) 7:1 34:12,13 referenced (2) 4:25 47:14 referencing (1) 8:12 referred (1) 13:5 reflects (1) 37:10 regard (7) 6:14 21:12 22:17 24:14 46:7 47:5 49:13 regards (1) 25:7 Registered (1) 62:8 rehearing (2) 10:8 11:4 rejects (1) 26:12 relate (1) 57:25 related (8) 13:11 14:8,11 14:13,15 16:8 24:10 32:25 relates (1) 9:17 relating (2) 48:16 53:3 relation (9) 12:11 15:17 51:21 52:8 53:2 55:11 56:10,10 60:18 relationship (1)	7:16 relative (1) 24:3 relief (1) 20:5 rely (1) 25:19 remark (1) 58:3 remedies (2) 22:3 47:7 remember (5) 5:20 19:11,11 19:13 29:23 remotely (1) 38:8 rendered (1) 57:18 repeatedly (1) 34:8 report (2) 50:24 62:10 reported (1) 1:23 Reporter (3) 61:17,18 62:9 representatio... 19:19 36:25 represented (3) 32:17 37:1,3 repugnant (5) 36:14 38:18,21 39:11 56:9 reservation (1) 43:6 respect (2) 36:4 57:3 respectfully (1) 60:10 respective (1) 3:8 respond (3) 16:4,5 22:8 response (5) 8:10 9:10,19 33:4,19 responsibilitie...
--	---	--	--	--

31:12 41:20,21 resulted (1) 26:1 review (3) 35:13 57:15 59:17 reviewing (2) 36:1,19 revoked (1) 29:15 rid (1) 42:22 right (13) 4:18 10:15 11:7 17:2 27:3 31:19 38:16 42:23 43:19 46:3,24 47:2,4 Roberts (4) 6:24 7:2,3,13 Robyn (3) 1:24 62:8,18 role (1) 41:3 Rothstein (12) 1:7 4:5,25 5:2,5 5:24 9:5 18:13 18:15,19 19:5 19:18 RPR (2) 1:24 62:18 RRA (2) 37:11 44:3 RRA's (1) 19:19 rule (1) 20:4 ruled (6) 55:1,1,2,3,3,5 ruling (4) 23:3 24:14 28:16 56:2 rulings (1) 30:24 <hr/> S <hr/> Sasser (5)	10:13 26:17 44:9 46:6 56:21 Sasser's (5) 26:9,11 29:14 43:11 47:1 satisfied (3) 47:17 48:4,11 save (1) 3:14 saw (4) 7:1,13 52:25 53:4 saying (3) 20:21 36:10 51:18 says (6) 20:24 21:1 44:9 45:5 56:21,25 scale (1) 50:11 Scarola (17) 2:18,20 4:19,20 4:24 5:4,12,16 5:22 6:3 7:5 9:10 22:13,24 37:19 46:11,20 scheme (1) 19:22 schemes (1) 18:16 Scherer (1) 19:6 SCI (3) 27:16,19 28:4 scope (1) 21:21 SCOTT (1) 1:7 se (2) 2:13 40:16 SEARCY (1) 2:18 seat (1) 3:4 seated (1) 22:25	second (3) 25:11 29:9 31:20 securities (1) 33:10 see (5) 14:23 36:22 37:4 41:16 58:24 seeing (1) 58:25 seeking (1) 52:3 seen (2) 50:14 53:16 seize (1) 32:3 seized (3) 35:20,21 37:11 seminal (1) 11:24 sent (1) 3:7 separate (3) 4:4 22:9 30:1 separately (1) 24:24 Servcies (1) 27:17 set (5) 6:15,16,18 37:25 54:21 sets (3) 25:21 37:21 58:10 settled (2) 44:20,20 settlement (4) 15:23 36:1 42:11 45:8 settlements (4) 32:24 35:14,18 37:3 settles (1) 35:11 Shepherd (2) 25:18 42:19	SHIPLEY (1) 2:18 shoes (2) 52:10,11 short (1) 56:15 showed (1) 34:7 shows (3) 31:25 43:21 44:16 side (11) 3:19 10:6,7 13:22 15:21,25 37:5 52:6 53:1 55:25 60:17 sides (5) 15:6 36:11,22 58:20 61:14 signed (1) 7:8 significance (1) 4:22 significant (2) 3:25 43:8 signifies (1) 11:4 simply (2) 23:6 42:8 sir (6) 5:12,18,22 6:9 21:1,9 sitting (4) 43:8,9 52:10,11 situation (6) 29:23 33:19 34:16 36:22 37:11 42:16 six (2) 19:23 51:2 size (2) 35:13 36:1 sliding (1) 50:11 somebody (1) 22:9 somewhat (3)	31:13 34:3 59:4 sorry (2) 8:20 29:8 sort (1) 33:20 sorts (1) 33:8 Sounds (1) 20:18 South (2) 2:4,8 So2d (5) 25:10 27:8,17 29:9 59:10 speak (6) 10:10 37:2,7 46:23 50:8 57:8 speaks (2) 9:13 35:3 specially (1) 6:16 specific (3) 24:19 33:11 56:2 specifically (5) 30:19 49:16 54:18,21 58:15 spectrum (1) 54:11 split (3) 3:13 46:15,19 stage (3) 35:10 37:20 44:1 stalked (1) 54:16 stalking (3) 50:23 51:3 59:7 stand (2) 28:13 51:8 standard (4) 11:15 12:9 15:14,17 standards (1) 17:3 standing (2)
---	---	--	--	--

24:21 28:6 standpoint (3) 35:8 42:10 47:16 stands (4) 21:11 25:15 28:9 35:8 Star (1) 28:21 state (8) 3:24 7:22 9:24 16:24 34:6 60:3 62:4,9 stated (6) 14:6 29:4 30:3 30:10 49:16 56:13 statement (4) 6:22 24:1 48:14 55:8 statements (9) 23:19 51:22 59:6,13,17,20 59:23 60:2,3 states (3) 3:17 14:5 26:6 State's (1) 59:24 status (1) 10:4 Statute (1) 22:6 statutory (3) 8:13 12:16,17 stenographic (1) 62:12 stenographica... 1:23 62:10 step (2) 34:25 35:1 stood (1) 10:13 stop (1) 23:17 strange (1) 19:2 Street (1)	2:13 strong (1) 35:19 strongly (1) 32:24 stuff (1) 35:20 subject (4) 27:25 29:13 55:12 57:14 submission (1) 23:9 submit (11) 26:10 31:2 33:15,25 37:24 45:6,9,18 47:16,22 58:10 submitted (3) 10:12 23:10 43:1 subpoena (1) 60:4 subsequent (2) 15:23 48:6 sued (2) 34:16 36:9 suggest (6) 26:15 38:8 42:8 42:24 43:7 56:18 suggested (2) 31:8 33:20 suggesting (1) 15:22 suggests (1) 29:10 suing (1) 11:25 suit (2) 15:24 30:12 suite (4) 2:4,9,13 57:3 summary (9) 5:19 6:13 15:1 23:15 24:24 35:23 37:18,24 41:13	support (1) 47:15 supposed (1) 35:23 Supreme (24) 3:17 9:25 12:2 12:18 15:16 16:6 17:7 27:20,23 28:6 28:10,16 30:18 30:20,23 31:24 51:15 55:7 56:7,12 59:11 59:12 60:13 61:5 sure (7) 4:23 8:11 20:1 21:1 46:9 49:4 50:25 survive (5) 30:14 43:13,23 48:3 50:21 swear (1) 53:15 sword (1) 37:12 sworn (1) 7:7 system (1) 22:8 Systems (2) 1:25 62:19 <hr/> T <hr/> Tab (3) 20:22,23 59:1 tabbing (1) 58:19 table (2) 22:25 24:7 tailor (1) 3:12 take (7) 3:9,20 18:23 36:15 42:3 46:21 59:1 taken (9)	1:15 7:5 11:19 16:22 29:21 39:4 47:21 51:9 57:16 takes (2) 17:23 56:24 talk (4) 6:19 9:16,23 48:7 talked (1) 39:5 talking (7) 14:22 16:7,14 17:6 22:1 26:18 35:16 talks (2) 34:20 56:8 Taylor (3) 31:23 32:8 34:20 teach (1) 38:18 tell (4) 7:15 17:8 39:14 52:2 tend (1) 36:18 tended (2) 36:18,19 ten-minute (1) 38:15 termination (3) 24:18 43:5 57:13 terms (2) 32:10 40:5 testimony (1) 54:15 thank (16) 3:4 6:6 11:6 20:10 22:23 25:1,5 46:25 49:1,9 59:2 61:11,14,15,16 61:18 Thanks (1) 27:3	theory (1) 25:20 thing (2) 6:19 10:3 things (4) 9:2 10:6 18:25 19:4 think (21) 3:8,14,17,20,22 11:14 14:6,7 15:19 16:25 20:1,5 35:2 36:4 46:1 47:12 50:25 53:2 58:23 59:16 60:22 Third (14) 9:25 13:1 15:14 27:16,18 28:12 39:16 50:5 54:13 55:25 56:4 57:18 60:11 61:6 Third's (1) 45:1 thought (1) 31:16 thousand (1) 20:24 threat (1) 53:6 threats (3) 53:7,17,22 three (4) 18:18 46:10 50:23 53:12 three-week (2) 6:17,17 threshold (1) 18:3 tied (1) 57:20 ties (1) 57:8 time (19) 1:15,22 3:13,20 4:9 8:8 11:3
---	---	--	--	--

15:20,22 18:7 18:11,17 19:1 33:3 34:8 39:23 46:21 48:12 51:2 times (2) 20:25 32:17 timing (1) 15:22 Title (1) 39:17 today (6) 6:12 9:16,22 23:9 25:4 58:24 told (2) 33:24 40:15 TONJA (2) 2:12,15 tonja@tonjah... 2:15 torrent (1) 43:24 tort (5) 30:10,13,17,25 39:22 tortious (2) 12:1,8 torts (2) 12:7,15 tortured (1) 33:5 touch (1) 17:9 track (1) 61:2 transcript (4) 1:12 7:6 61:2 62:11 treated (1) 60:2 trial (6) 6:17 7:9 49:18 49:24 51:1 57:16 tried (3) 48:13,20 61:3	trilogy (6) 11:10 13:8 14:18 23:21 50:15,16 trouble (1) 51:4 troubled (1) 49:13 true (2) 37:15 62:11 try (1) 44:22 trying (4) 15:19 18:22 26:17 32:20 turn (1) 10:17 two (11) 3:9 4:10 8:16 9:13 13:3 24:8 26:13 37:20 41:10 42:20 46:11	unequivocal (1) 26:6 unfortunately ... 48:18 United (1) 3:17 unrelated (3) 18:21 19:20 22:14 untrue (3) 13:23,24,25 unusual (1) 8:24 unwise (1) 34:20 use (4) 10:25 37:12 44:17 46:11 utilize (1) 61:3 utilized (1) 56:11	view (3) 24:3,25 57:16 violations (2) 12:16,17 Virginia (2) 6:24 7:13 vis-a-vis (1) 44:23 volumes (1) 35:3 voluminous (1) 53:14 voluntarily (2) 5:14 59:23 voluntary (2) 5:16 60:2 vs (17) 1:6 3:18 20:22 20:22 25:10,21 25:25 26:23 27:8,17,21 28:2,22 29:7 29:14 50:19 59:10	Wbk@searcyl... 2:21 wcblaw@aol.c... 2:6 weaken (1) 37:5 WEISS (1) 2:8 Welcome (1) 3:4 well-articulate... 46:6 well-reasoned ... 26:12 well-respected... 27:14 well-written (1) 57:6 went (6) 9:12 12:2 13:5 32:24 50:25 54:5 West (4) 1:17 2:5,9,19 Westlaw (3) 10:23,25 26:23 Westlaw's (1) 10:20 we're (7) 9:15 11:9 34:17 35:15 36:6 56:8 57:17 we've (5) 12:14 13:14 23:10 47:17 48:10 whatsoever (2) 3:22 4:3 Whoa (1) 45:10 William (2) 2:21 22:23 withdraw (1) 38:1 withdrawn (1) 54:4 withdrew (1)
	U	V	W	
	ulterior (1) 48:10 ultimately (3) 29:25 35:5 37:16 uncover (2) 38:3,7 underlying (2) 19:20 47:25 understand (4) 24:13 32:9 36:5 36:11 understandab... 36:20 understands (1) 10:21 undertake (1) 28:15 undertook (1) 33:7 undisputed (3) 18:12,14 48:15	value (3) 10:9 55:21 57:7 various (1) 33:6 vel (1) 20:6 vendettas (1) 40:22 venue (1) 39:7 versus (1) 39:7 vexatious (2) 30:8 44:12 viable (1) 5:24 victim (1) 7:4 victims (5) 6:4 7:19,23 8:17 9:7 victim's (2) 8:5,11		

33:13	35:25	39:24	4	9
witness (1)	year (1)	2	4 (2)	9C (1)
26:1	6:18	20 (2)	20:22 27:17	1:17
Wolfe (49)	years (6)	3:19 16:7	4:23 (2)	954.467.1223 (1)
10:4,8 11:8,12	4:10 11:20	2000 (1)	1:15 61:20	2:14
12:25,25 13:4	12:19 34:9,10	27:18	40 (1)	961 (1)
13:5,9 14:3,5,6	41:24	2007 (1)	16:8	25:10
14:24 15:20	yesterday (1)	25:11	4068409 (1)	
16:1,1 23:22	19:13	2009 (5)	26:23	
23:25 24:2	young (2)	9:4,4 18:11 19:3	5	
25:15 26:13	6:23 34:10	28:23	502009CA040...	
27:5,5 28:6,9	Yurko (2)	2012 (2)	1:2	
29:16,19 31:2	27:21 28:2	26:23,23	561.655.4777 (1)	
32:8,11 33:21	Z	2014 (2)	2:5	
36:16 39:25	zealously (1)	1:15 62:14	561.659.8300 (1)	
40:3,5 42:17	41:22	205 (1)	2:10	
49:15 51:5,14	1	1:16	561.686.6300 (1)	
52:15 54:13	12 (1)	2139 (1)	2:19	
55:22 56:24,24	34:10	2:18	57.105 (3)	
57:2,7 60:9,12	13 (1)	250 (2)	17:3,4 22:6	
61:7	12:19	2:4,8	574 (1)	
word (1)	1324 (1)	27 (1)	29:9	
52:7	28:22	1:15	598 (1)	
words (2)	14 (3)	273 (1)	59:10	
24:7 51:17	12:19 34:9	27:8	6	
work (1)	58:23	278 (1)	6th (1)	
44:5	1400 (2)	29:9	6:18	
worked (1)	2:4,9	29th (1)	611 (1)	
50:11	15 (1)	62:14	28:22	
world (1)	34:9	3	65 (1)	
44:18	15th (1)	3:00 (2)	59:10	
worst (1)	1:1	1:15 3:2	7	
50:9	16 (1)	301 (1)	7th (1)	
wouldn't (1)	59:1	2:13	2:13	
36:9	18 (1)	315 (1)	702 (1)	
wrap (2)	20:23	2:13	27:17	
46:10 47:5	1917 (1)	33301 (1)	8	
Wright (2)	11:14	2:14	8:45s (1)	
27:20 28:2	1984 (1)	33401 (3)	58:24	
written (1)	27:22	1:17 2:5,9	835 (1)	
5:20	1991 (1)	33409 (1)	27:8	
wrongful (1)	29:9	2:19	839 (1)	
26:2	1992 (1)	356 (1)	27:17	
Y	59:11	25:10		
Yeah (3)	1999 (1)			
10:12 19:9				

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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TABLE OF CONTENTS

TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT REGARDING ORAL ARGUMENT	2
STANDARD OF REVIEW	2
STATEMENT OF THE CASE AND FACTS	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT, AS THE LITIGATION PRIVILEGE IS A BAR TO APPELLANT’S CLAIM BASED ON MALICIOUS PROSECUTION.....	7
CONCLUSION	24
CERTIFICATE OF TYPE SIZE AND STYLE	24
CERTIFICATE OF SERVICE	24

TABLE OF CITATIONS

Cases

<i>American Federated Title Corp. v. Greenberg Trauig, P.A.</i> , 125 So. 3d 309 (Fla. 3d DCA 2013)	12
<i>American Nat. Title & Escrow of Florida, Inc. v. Guarantee Title & Trust, Co.</i> , 748 So. 2d 1054 (Fla. 4th DCA 1999)	13
<i>DelMonico v. Traynor</i> , 116 So. 3d 1205 (Fla. 2013)	2, 10, 18, 19
<i>Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole</i> , 950 So. 2d 380 (Fla. 2007)	passim
<i>Fridovich v. Fridovich</i> , 598 So. 2d 65 (Fla. 1992)	13, 17, 22
<i>Graham-Eckes Palm Beach Academy v. Johnson</i> , 573 So. 2d 1007 (Fla. 4th DCA 1991)	21
<i>Jackson v. Attorney's Title Insurance Fund</i> , 132 So. 3d 1191 (Fla. 3d DCA 2014)	12
<i>Jackson v. BellSouth Telecomms.</i> , 372 F.3d 1250 (11th Cir. 2004)	14
<i>LaFrance v. U.S. Bank National Association</i> , 141 So. 3d 754 (Fla. 4th DCA 2014)	2
<i>LatAm Invests., LLC v. Holland & Knight, LLP</i> , 88 So. 3d 240 (Fla. 3d DCA 2011)	3
<i>Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Ins. Co.</i> , 639 So. 2d 606 (Fla. 1994)	passim
<i>McCullough v. Kubiak</i> , 4D13-4048 (Feb. 18, 2015)	9, 10
<i>Microbilt Corporation v. Chex Systems, Inc.</i> , 2013 WL 6628619 (Dec. 16, 2013)	14
<i>Montejo v. Martin Memorial Medical Center, Inc.</i> , 935 So. 2d 1266 (Fla. 4th DCA 2006)	13

<i>Olson v. Johnson</i> , 961 So. 2d 356 (Fla. 2d DCA 2007)	17, 22
<i>Pardo v. State</i> , 596 So. 2d 665 (Fla. 1996).....	12
<i>Procacci v. Zacco</i> , 402 So. 2d 425 (Fla. 4th DCA 1981)	21
<i>R.H. Ciccone Properties, Inc. v. JP Morgan Chase Bank, N.A.</i> , 141 So. 3d 590 (Fla. 4th DCA 2014)	15
<i>Rivernider v. Meyer</i> , Case Number 4D14-819.....	10
<i>SCI Funeral Services of Florida, Inc. v. Henry</i> , 839 So. 2d 702 (Fla. 3d DCA 2002)	22
<i>Steinberg v. Steinberg</i> , 152 So. 3d 572 (Fla. 1st DCA 2014)	6, 9
<i>Valdes v. GAB Robins</i> , 924 So. 2d 862 (Fla. 3d DCA 2006)	7
<i>Volusia County v. Aberdeen at Ormond Beach, L.P.</i> , 760 So. 2d 126 (Fla. 2000).....	2
<i>Wolfe v. Foreman</i> , 128 So. 3d 67 (Fla. 3d DCA 2013)	passim
<i>Wright v. Yurko</i> , 446 So. 2d 1162 (Fla. 5th DCA 1984)	19, 20, 21

PRELIMINARY STATEMENT

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

STATEMENT REGARDING ORAL ARGUMENT

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

STANDARD OF REVIEW

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

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

STATEMENT OF THE CASE AND FACTS

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

ARGUMENT

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

The trial court properly ruled that Summary Judgment was warranted in this case. The undisputed facts, as presented both through Appellee's Motion for Summary Judgment and at oral argument on his Motion, coupled with the law germane to the issues in this matter, established that the litigation privilege absolutely barred both of Edwards's causes of action, mandating that Summary Judgment be granted¹. *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013); *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007); *Levin, Middlebrooks, Moves & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994). In his Brief, Edwards wholly disregards the incontrovertible fact that his own pleadings and discovery responses undeniably establish that all of the actions about which he complains in his lawsuit occurred *solely* during the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is difficult to imagine any act that would fit more firmly within the parameters of *Levin* and *Echevarria* than the actual filing of a complaint. The filing of a complaint, which initiates the judicial proceedings, obviously "occurs during the course of a judicial proceeding" and "relates to the proceeding . . .

Because the Florida Supreme Court has clearly and unambiguously stated, not once, but twice, that the litigation privilege applies to *all*

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

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

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

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

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

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

MR. KING: There's nothing alleged.

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

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

Microbilt Corporation v. Chex Systems, Inc., 2013 WL 6628619 (Dec. 16, 2013),

the Bankruptcy Court, applying Florida law, avowed:

The rule of absolute immunity extends to the parties, judges, witnesses, and counsel involved and related to the judicial proceedings. *DelMonico v. Traynor*, 50 So.3d 4, 7 (Fla. Dist. Ct. App. 2010).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

CERTIFICATE OF TYPE SIZE AND STYLE

This Brief is typed using Times New Roman 14 point, a font which is not proportionately spaced.

CERTIFICATE OF SERVICE

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

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