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

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff,

vs.

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

Defendant,
_____/

SUPPLEMENTARY SUBMISSION IN SUPPORT OF EDWARDS' MOTION FOR RECONSIDERATION

Counter-Plaintiff, Bradley Edwards, hereby submits the attached appellate brief in further support of his pending motion for reconsideration of the Court's announced intention to grant summary judgment in favor of the Counter-Defendant, Jeffrey Epstein. Counter-Plaintiff adopts all legal arguments contained within the attached appellate brief, which brief relates directly to the issue of whether the litigation privilege may properly be applied to bar claims for malicious prosecution.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 9th day of May, 2014.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIRST DISTRICT

CASE NO. 1D13-5966

MICHAEL L. STEINBERG,

Appellant,

-vs-

MIRIAM F. STEINBERG,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

On appeal from the Eighth Judicial Circuit in and for Alachua County

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PREFACE

This is an appeal from a Final Judgment of the Circuit Court following a non-jury trial. The parties are referred to by their proper names, as they appeared below, or as otherwise designated. The following designations will be used:

(R) – Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

Plaintiff, Michael L. Steinberg (hereafter "Michael") filed a Complaint against his former wife, Miriam F. Steinberg (hereafter "Miriam"), initially alleging two counts of malicious prosecution for claims she alleged against him in their dissolution action (R1:1-9). The operative complaint for purposes of this appeal is the Amended Complaint which specifically alleged that Miriam had initiated a civil action against Michael by filing a Counter-Petition in the dissolution action which included as Count III a claim for interspousal tort which was later amended and redesignated a "Continuing Domestic Violence Claim" (R1:147-48, 169, 174).

In the "Continuing Domestic Violence Claim" Miriam alleged that Michael had a "long term history of abusive behavior toward Ms. Steinberg and their son when he was a young child" and that he had committed various assaults, batteries, sexual assaults and batteries; and had engaged in verbally abusive behavior, harassment and other improper conduct (R1:148, 175). In that count Miriam claimed that she had suffered various injuries as a result of Michael's alleged misconduct and that she would need future medical, psychological, and other treatment in therapy as a result (R1:148, 175-76). Miriam also sought a domestic violence injunction against Michael, without notice to him, based on those allegations (R1:148, 171).

In his malicious prosecution claim (Count I of his Amended Complaint) Michael stated that the factual allegations underlying Miriam's Continuing Domestic Violence Claims were false and that she knew them to be false (R1:147-52). The Amended Complaint alleged that Miriam's claim resulted in a bona fide termination in Michael's favor (R1:151). Specifically, in the Final Judgment of Dissolution of Marriage the trial court determined that there was insufficient evidence to demonstrate that "continuing domestic violence" occurred and that the husband "shall go hence without day" as to Count III of Miriam's Counter-Petition (R1:151).

Michael also alleged in Count I of the Amended Complaint that Miriam had filed the Continuing Domestic Violence Claim without probable cause since she knew that the facts alleged therein were false (R1:151). Michael also specifically alleged that Miriam acted with malice because she lacked reasonable cause to bring the claim based on her firsthand knowledge of its falsity, and that it was done with great indifference to his rights and in an effort to gain an advantage in the dissolution litigation (R1:151-52).

Miriam responded to the Amended Complaint with a Motion to Dismiss (R3:461-72). The trial court entered an order denying that motion (R3:500-01). Miriam then filed her Answer to the Amended Complaint denying any wrongful

conduct and raising numerous affirmative defenses including the litigation privilege (R528-45)

Subsequently, Miriam filed a Motion for Partial Summary Judgment as to Counts II, III and IV of the Amended Complaint arguing, inter alia, litigation privilege (R3:578-600). However, that motion did not seek a summary judgment as to Count I, the malicious prosecution claim, and did not allege that the litigation privilege applied to that cause of action.

After briefing and argument, the trial court entered an Order granting Miriam's Motion for Partial Summary Judgment as to Counts I, II, III and IV, concluding that the litigation of privilege applied to them (R9:1642-44). That Order cited the (then) recent decision of the Third District, Wolfe v. Foreman, 128 So.3d 67 (Fla. 3d DCA 2013), which held that the litigation privilege barred an action for malicious prosecution (R9:1642). However, since Miriam had not moved for summary judgment on Count I, the order did not address or dispose of that count.

Thereafter, Miriam filed a Motion for Final Summary Judgment as to the malicious prosecution claim relying on Wolfe, supra, and arguing for the first time that litigation privilege was an absolute bar to a malicious prosecution case (R9:1678-92). She later filed a Notice of Supplemental Authority in support of that motion attaching the mandate in Wolfe, and citing a subsequent Third DCA

decision which applied Wolfe, American Federated Title Corp. v. Greenberg Traurig, P.A., 125 So.2d 309 (Fla. 3d DCA 2013) (R9:1700-10).

Michael filed a Motion for Leave to file a Response to Miriam's Notice of Supplemental Authority, with a Response noting cases from other district courts in Florida that conflict with Wolfe (R9:1711-17). Michael argued that there is no absolute immunity based on litigation privilege as to the tort of malicious prosecution (R9:1713-14).

A hearing was held on Miriam's Motion for Summary Judgment as to Count I, and later the court entered an order granting that motion (R9:1718-20). A Final Judgment was subsequently entered and Michael has filed this appeal seeking review of it (R9:1745-49).

SUMMARY OF ARGUMENT

The trial court erred in applying the Third District's opinion in Wolfe to justify summary judgment against the Plaintiff in this malicious prosecution action. There is ample authority in Florida that litigation privilege is not an absolute bar to a malicious prosecution claim, and the Wolfe decision is berrational. This Court has not specifically addressed this issue, but should follow the lead of all the other district courts in Florida, other than the Third District, and hold that the litigation privilege does not bar a claim for malicious prosecution. That holding would be consistent with the common law, prior decisions of the Florida Supreme Court, and the overwhelming weight of authority throughout the country.

Therefore, for the reasons stated above, this Court should reverse the Summary Judgment entered by the Circuit Court and remand the case for further proceedings.

ARGUMENT

POINT-ON-APPEAL

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT AND APPLYING THE LITIGATION PRIVILEGE AS AN ABSOLUTE BAR TO A MALICIOUS PROSECUTION CLAIM.

Standard of Review

Orders granting summary judgment are reviewed under the de novo standard of review. Ramsey v. Home Depot U.S.A., Inc., 124 So.3d 415, 416 (Fla. 1st DCA 2013). Additionally, where the material facts are not disputed, the determination whether a privilege arises is a question of law which is reviewed de novo. Del Monico v. Traynor, 116 So.3d 1205, 1211 (Fla. 2013).

Argument

The trial court erred in granting Summary Judgment in favor of Miriam based on application of the litigation privilege. The trial court relied primarily on the Third District's decision in Wolfe v. Foreman, 128 So.3d 67 (Fla. 3d DCA 2013), which held that litigation privilege barred malicious prosecution claims. However, Wolfe conflicts with decisions from other district courts in Florida, as well as overwhelming authority from other jurisdictions, and is inconsistent with the development of the litigation privilege and malicious prosecution in the

common law. It does not appear any other jurisdiction in the United States applies an absolute litigation privilege to malicious prosecution claims; in fact, that cause of action has coexisted in the common law for hundreds of years without conflict. As of the filing of this brief, this Court has not directly addressed this particular issue.

However, consideration of the overwhelming weight of authority and the pertinent policy considerations should persuade this Court that the Wolfe decision was wrongly decided, and that the litigation privilege as developed by the Florida Supreme Court does not justify the result in this case. Therefore, this Court should reverse the Summary Judgment.

The Litigation Privilege in Florida

The Florida Supreme Court first addressed the scope and application of the litigation privilege in Myers v. Hodges, 44 So.357 (Fla. 1907). In that case, Hodges had filed suit against a corporation in which Myers was the president. Hodges' Bill of Equity contained statements relating to Myers personally, including that he was "a tricky, dishonorable, unscrupulous and conscienceless man;" … and that he had stated he would do "everything in his power to beat [Hodges] out of the money owing to him, short of swearing to a lie" (44 So. at 358). While that language was stricken from the Bill of Equity by the trial court, Myers sued Hodges after the conclusion of that suit for libel based on those slanderous statements. The trial

court ultimately directed a verdict for Hodges on the libel claim, and the Florida Supreme Court affirmed, based on what is now termed the litigation privilege.[2]

In Myers, the Supreme Court first addressed the common law in England on this issue, but rejected its rule of absolute privilege as to any statements made in judicial proceedings. Instead the Court adopted the rule developed in the American common law that an absolute privilege would only apply to statements which were made in judicial proceedings relevant to the subject matter of the actions. The Court stated (44 So. at 361):

> We think the ends of justice will be effectually accomplished by not extending the privilege so far as to make it an absolute exemption from liability for defamatory words wholly and entirely outside of, and having no connection with, the matter of inquiry.

The Court in Myers did note, however, that much latitude should be granted in determining whether statements are pertinent to the proceedings; and that if the statements were not pertinent, a qualified privilege arose that could only be overcome by showing that the defendant made the challenged statements with express malice.

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[2] The Myers decision did not use the term "litigation privilege." That phrase appeared in the certified question from the Eleventh Circuit Court of Appeals in Levin, Middlebrooks, Mabie, Thomas, Mayes and Mitchell, P.A. v. United State Fire Ins. Co., 639 So.2d 606 (Fla. 1994). Some jurisdictions use different terminology such as "judicial privilege" or just refer to it generally as an absolute privilege, e.s. Goldstein v. Serio, 496 So.2d 412, 414 (La. App. 1986). Appellant will refer to it as the "litigation privilege" throughout this brief.

The policy consideration noted by the Myer's decision included that it was in the interest of the public that "great freedom should be allowed in complaints and allegations" in court proceedings (44 So. at 361). The Court also noted that trial courts could protect parties by expunging irrelevant defamatory allegations, and utilize its contempt power against the guilty party. Id. The Myers decision remains the seminal case on the litigation privilege in Florida. It demonstrates that the litigation privilege arises from the common law, and that it is justified only by the policy considerations which underly it.

The first significant clarification of the litigation privilege after Myers occurred in Fridovich v. Fridovich, 598 So.2d 65 (Fla. 1992). In that case, the Court held that defamatory statements voluntarily made by a private individual to police or prosecuting authorities prior to the institution of criminal charges were not absolutely privileged, but only entitled to a qualified privilege which could be overcome by a showing that the statements were made with express malice.

Subsequently, in Levin, Middlebrooks, Mabie, Thomas, Mayes and Mitchell, P.A. v. United State Fire Ins. Co., 639 So.2d 606 (Fla. 1994), the Court held that absolute immunity would be afforded to an act involving tortious interference with the business relationship that occurred during the course of judicial proceeding, so long as the act had some relevance to that proceeding. In that case, the Levin firm represented a client in litigation against an insurance

company. The insurance company subpoenaed one of that firm's attorneys to be a witness at trial, resulting in the disqualification of that firm as counsel for the plaintiff. However, the insurance company did not call that attorney as a witness at the trial. After the case was concluded adverse to the insurance company, the law firm sued the insurance company for intentional interference with a business relationship for issuing the subpoena and obtaining disqualification of the law firm.

The Court in Levin held:

> In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the court 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. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the court of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants 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.

In Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So.2d 380 (Fla. 2007), the lower court held that the litigation privilege, being a creature of the common law, did not apply in cases where the cause of action was created by statute. The Florida Supreme Court quashed that decision ruling that the litigation privilege applies in judicial proceedings, whether the underlying case involved a

common law tort or a statutory cause of action. The Court held that "the nature of the underlying dispute simply does not matter" since the policy considerations justifying the privilege still applies, which is the "perceived necessity for candid and unrestrained communications in judicial proceedings" (950 So.2d at 384).

Recently, in Delmonico v. Trayner, 116 So.3d 205 (Fla. 2013), the Court held that the litigation privilege did not grant absolute immunity for an attorney's conduct in making defamatory, ex parte, out of court statements to potential nonparty witnesses, even though that conduct arose from his representation of his client in litigation. In discussing the litigation privilege, the Court in Delmonico stated:

> This Court's recognition of the privilege derived from a balancing of two competing interests - the public interest in allowing litigants and counsel to freely and zealously advocate for their causes in court versus protecting the rights of individuals, including the right of an individual to maintain his or her reputation and not be subjected to slander or malicious conduct.

The Court in Delmonico concluded that since judicial oversight and other protections applicable in judicial proceedings were unavailable, or far less effective, for conduct occurring during an out of court informal investigation, that conduct was only entitled to a qualified privilege. That qualified privilege would apply if the statements at issue were relevant to the subject matter of the lawsuit;

however, it could be overcome if the plaintiff proved that they were made with express malice (116 So.3d at 12-18-19).

Malicious Prosecution Claims in Florida

While initially acknowledged in Tidwell v. Witherspoon, 21 Fla. 359 (Fla. 1885), the tort of malicious prosecution was first discussed in-depth by the Florida Supreme Court in Tatum Bros. Real Estate & Investment Co. v. Watson, 109 So. 623 (Fla. 1926). There, the Court described malicious prosecution as "a very ancient action" and defined its elements as follows (109 So. at 626):

> An action for maliciously putting the law in motion lies in all cases where there is a concurrence of the following elements; 1) The commencement or continuance of an original criminal or civil judicial proceeding. 2) Its legal causation by the present defendant against plaintiff who was defendant in the original proceedings. 3) Its bona fide termination in favor of the present plaintiff. 4) The absence of probable cause for such proceeding. 5) The presence of malice therein. 6) Damage conforming to legal standards resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action.

Those elements are still the requirements for a prima facie malicious prosecution action. See Alamo-Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352, 1355 (Fla. 1994).

As stated in Tatum Bros, supra, malicious prosecution was an action ex delicto at the common law (109 So. at 626). Its genesis was English common law which, despite providing for the losing party to pay fees and costs to the prevailing party, nonetheless recognized a need for a remedy when special damages beyond

those expenses had been suffered by the prevailing party, see Engel v. CBS, Inc, 182 F.3d 124, 128 (2d Cir. 1999) (and cases cited therein).[3]

Based on the English common law, malicious prosecution was subsequently recognized as a cause of action in American courts, e.g. Tatum Bros., supra, with the relevant policy considerations described by Prosser, as follows:

> The law supports the use of litigation as a social means for resolving disputes, and it encourages honest citizens to bring criminals to justice. Consequently the accuser must be given a large degree of freedom to make mistakes and misjudgments without being subjected to liability. On the other hand, no one should be permitted to subject a fellow citizen to prosecution for an improper purpose and without an honest belief that the accused may be found guilty.

Prosser and Keeton on the Law of Torts 119, p. 871 (5th Ed. 1984).

The competing policy consideration underlying malicious prosecution claims were addressed in the elements of the prima facie case. The individual's interest in freedom from unjustifiable litigation and the social interest in not chilling access to the courts were balanced by the onerous requirement that the plaintiff prove an absence of probable cause and express malice. Id. As noted by Justice Scalia in Kalina v. Fletcher, 522 U.S. 118, 133 (1997) (Scalia, J., concurring) "[T]here was a kind of qualified immunity built into the elements of

[3] For a brief summary of the developments in English law from the successful claimant's obligation to pay costs and fees to recognition of the malicious prosecution action dating back to the Norman conquest, see Friedman v. Dozorc, 312 NW 2d 585, 595 n.20 (Mich. 1981). Just a thought.

the tort." Justice Scalia addressed that balance in the context of the Kalina case as follows:

> At common law, therefore, Kalina would have been protected by something resembling qualified immunity if she were sued for malicious prosecution. The tortious act in such a case would have been her decision to bring criminal charges against Fletcher, and liability would attach only if Fletcher could prove that the prosecution was malicious, without probable cause, and ultimately unsuccessful. Kalina's false statements as a witness in support of the warrant application would not have been an independent actionable tort (although they might have been evidence of malice or initiation in the malicious prosecution suit), because of the absolute privilege protecting such testimony from suits for defamation.

The Litigation Privilege is Not Applied to Malicious Prosecution Claims in Florida Prior to Wolfe

In Fisher v. Payne, 113 So.378 (Fla. 1927), the Florida Supreme Court addressed a case in which the litigation privilege was asserted in the context of a malicious prosecution action. There, Fisher and her husband filed an action for libel, false imprisonment, and malicious prosecution against three defendants arising out of the institution of a lunacy inquisition against her. The three defendants were the three members of the examining committee appointed by the court to assess Fisher, and they concluded that she was insane. The trial court then adjudged Fisher to be insane and had her transported to a state hospital for maintenance and restraint. Approximately a year later, the circuit court rendered a decree restoring Fisher to judicial sanity.

After she was restored to sanity, Fisher and her husband filed suit against the three members of the examining committee. The trial court entered judgment for the defendants on all three counts and the plaintiffs appealed.

In Fisher, the Florida Supreme Court first addressed the plaintiffs' libel claim, and in short order determined that it was banned by the litigation privilege adopted in Myers, supra. However, the Court in Fisher did **not** apply that privilege to the malicious prosecution claim, but rather evaluated the (common law) pleadings and determined them insufficient to demonstrate a prima facie case.[4] Specifically, the Court found the declaration did not allege that any of the defendants had instituted the lunacy proceedings against Fisher. The plaintiffs' pleading acknowledged that the defendants were appointed to the examining committee by the court after the action had been initiated, and there was no allegation that the defendants had anything to do with the initiation of the action. As a result, that required element of the tort had not been alleged. Id. 113 So. at 381.

In Fisher, the Court also noted that the plaintiffs had failed to allege the essential element that the lunacy proceedings were commenced without probable cause. Id. If the Court in Fisher believed that the litigation privilege established in Myers applied as a bar to the malicious prosecution claim, there would have been

[4] The Court in Fisher also disposed of the false imprisonment claim on the ground that it was not adequately plead (113 So. at 380).

no need to address whether or not plaintiffs' allegations sufficiently stated the elements of that tort. Obviously, consistent with English common law, the Florida Supreme Court recognized that the litigation privilege and the cause of action for malicious prosecution should coexist without conflict.

Subsequent to Fisher and prior to Wolfe, there were numerous district court decisions in Florida addressing whether the litigation privilege barred a claim for malicious prosecution.

In Wright v. Yurko, 446 So.2d 1162 (Fla. 5th DCA 1984), the Fifth District consolidated two actions in which a doctor sued people who had initiated or participated in an unsuccessful medical malpractice action against him. In one suit, he sued Yurko, the attorney that represented the plaintiffs in the medical malpractice action; and in a second suit he sued the plaintiffs (Dormans) and Barnett Green, the expert witness who testified for them. Wright alleged claims for perjury, libel, slander, defamation and malicious prosecution. The trial court had dismissed the complaint against the Dormans and Green, and granted summary judgment in favor of Yurko. Wright appealed both rulings and they were consolidated on appeal.

In Wright, the Fifth District first addressed the dismissal of the claims against the Dormans and Green. The court affirmed the dismissal of the claims for perjury, libel, slander, defamation and conspiracy to commit those torts based on

the litigation privilege (446 So.2d at 1164-65). The court then stated (446 So.2d at 1165) :

> The only private remedy in this context allowed or recognized is the ancient cause of action of malicious prosecution. [Footnote deleted.]

The Fifth District proceeded to analyze Wright's complaint and determined that it sufficiently alleged the elements of malicious prosecution claims; and concluded that the dismissal order should be reversed.[5] Thus, while the Fifth District in Wright concluded that the litigation privilege barred every other claim in Wright's complaint against the Dormans and Green, it did **not** bar the malicious prosecution claim.

In Graham-Eckes Palm Beach Academy v. Johnson, 573 So.2d 1007 (Fla. 4th DCA 1991), the court affirmed a final judgment denying relief on claims for intentional inference with a contract for sale of land and slander of title. The court stated (573 So.2d at 1008):

> Appellant contends that the absolute privilege normally accorded to pleadings should not apply where the complaint is wholly frivolous and filed to interfere with the performance of a contract for the sale of property. **While appellant's argument is persuasive, we hold that its proper cause of action would have been one**

[5] As to Wright's suit against Yurko, the Fifth District upheld the summary judgment against Wright on the basis that Yurko had filed an affidavit demonstrating probable cause for the filing of the suit and the doctor had not filed any counter affidavits or other sworn testimony in opposition thereto (446 So.2d at 1165-67).

> **for malicious prosecution** and affirm on the authority of Procacci v. Zacco, 402 So.2d 425 (Fla. 4th DCA 1981)

Thus, the Fourth District ruled that the litigation privilege applied to the slander of title and interference with a contract claims, but that the privilege would **not** have barred a malicious prosecution claim.

In Olson v. Johnson, 961 So.2d 356 (Fla. 2d DCA 2007), the Second District also concluded that a malicious prosecution action was not barred by the litigation privilege. In that case, Johnson was in a custody battle with a man named Olson, and she and two of her friends signed affidavits alleging that he was stalking her. Those affidavits provided the basis for a criminal charge to be brought against Olson. However, Olson was acquitted and then sued the three women for malicious prosecution. The trial court granted summary judgment to Johnson, and the Second District reversed, concluding, inter alia, that Olson's claim was not barred by the litigation privilege. The Second District, in an opinion authorized by then-Judge Canady, stated:

> Johnson's reliance on Fridovich is unwarranted. In relying on Fridovich, Johnson confuses the law of defamation-with which Fridovich deals-with the law of malicious prosecution-which is at issue in the instant case. Olson has made no claim based on defamation, and the fact that defamatory statements may have been made in the course of the conduct which Olson alleges as the basis for his claim does not transform that claim into a defamation claim that is subject to an assertion of the absolute privilege or qualified privilege discussed in Fridovich.

> There is no equivalent privilege available to a complaining witness such as Johnson who is named as a defendant in a malicious prosecution action. Such a defendant must defend against a malicious prosecution claim by disputing an element or elements of the cause of action alleged or by raising an applicable affirmative defense.

That rationale was consistent with prior Florida law and essentially tracks Justice Scalia's analysis of the common law in Kalina, quoted supra, p. 13.

Thus, prior to Wolfe the Fifth, Fourth and Second Districts had ruled that the litigation privilege did not apply to malicious prosecution claims.

There are other references in Florida district court decisions which demonstrate that prior to Wolfe the litigation privilege was not considered to be an absolute bar to a malicious prosecution action. For example, in Rushing v. Bosse, 652 So.2d 869, 875 (Fla. 4th DCA 1995), the court noted that the complaint stated, inter alia, a cause of action for malicious prosecution on behalf of a child who was subject to an adoption proceeding. The trial court had dismissed that count as to two attorneys who had been named as defendants.

The Fourth District, in an opinion written by then-Judge Pariente, reversed that ruling, stating (65 So.2d at 875):

> The fact that Chilton and Bosse are attorneys does not immunize them from a malicious prosecution action if the evidence establishes that they instituted a claim which a reasonable lawyer would not regard as tenable or unreasonably neglected to investigate the facts and law in

> making a determination to proceed, provided that as long as the other elements of a malicious prosecution are also proven.

Additionally, in SCI Funeral Services of Florida, Inc. v. Henry, 839 So.2d 702, 706, n.4 (Fla. 3d DCA 2002), the Third District stated, albeit in dicta:

> As the Levin court cited Wright v. Yurko, 446 So.2d 1162 (Fla. 5th DCA 1984), with approval, presumably the cause of action for malicious prosecution continues to exist and would not be barred by the litigation privilege. See Wright, 446 So.2d at 1165.

See also, Johnson v. Sackett, 793 So.2d 20, 25 (Fla. 2d DCA 2001) (HRS case worker was **not** entitled to absolute immunity under the common law from malicious prosecution action, although she was entitled to the qualified privilege in §768.28(9)(a), Fla. Stat.).

Finally, in North Star Capital Acquisitions, LLC v. King, 611 F.Supp 2d 1324 (M.D. Fla. 2009), the federal district court addressed whether the litigation privilege protected arguably misleading or deceptive documents which had been served on defendants with the complaint at the initiation of the lawsuit. The district judge ultimately concluded that the Florida Supreme Court would **not** extend the litigation privilege to that conduct, and in his discussions stated (611 F.Supp. 2d. at 1330):

> The privilege applies to conduct that occurs during settlement negotiation. See, Jackson v. BellSouth Telecommunications, 372 F.3d 1250, 1277 (11th Cir. 2004). However, not every event bearing any relation to

> litigation is protected by the privilege because, as noted by counterclaim plaintiffs, "if the litigation privilege applied to all actions preliminary to or during judicial proceedings, an abuse of process claim would never exist, nor would a claim for malicious prosecution." See SCI Funeral Services of Fla., Inc. v. Henry, 839 So.2d 702, 706 n.4 (Fla. 3rd DCA 2002) (noting that the Florida Supreme Court has implied that malicious prosecution claims have survived the expansion of the litigation privilege). [Footnote deleted.]

Prior to Wolfe, there was no case law in Florida holding that the litigation privilege barred a malicious prosecution claim.

Other Jurisdictions

The pre-Wolfe Florida case law discussed above uniformly held that the litigation privilege did not bar an action for malicious prosecution. That case law was consistent with the overwhelming weight of authority throughout the country. As recently noted by the court in The Estate of Mayer v. Lax, Inc., 998 NE 2d. 238, 250 (Ind. App. 2013):

> A vast number of other jurisdictions also hold that even where an absolute [litigation] privilege bars an action for defamation based on statements made during a judicial proceeding, it does not bar an action for malicious prosecution. See Hogen v. Valley Hosp., 147 Cal.App.3d 119, 195 Cal.Rptr. 5, 7 (1983); Goldstein v. Serio, 496 So.2d 412, 414–15 (La.Ct.App.1986), writ denied; Keys v. Chrysler Credit Corp., 303 Md. 397, 494 A.2d 200, 204 (1985); McKinney v. Okoye, 282 Neb. 880, 806 N.W.2d 571, 579 (2011); Rainier's Dairies v. Raritan Val. Farms, 19 N.J. 552, 117 A.2d 889, 895

> (1955); Mantia v. Hanson, 190 Or.App. 412, 79 P.3d 404, 408–09 (2003); Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464, 468 (Ct.App.1990). We see no reason to depart from this wealth of authority and, thus, hold that the absolute privilege for communications made during a judicial proceeding does not bar Lax and Lasco's cause of action for malicious prosecution arising from such communications.

Those are not the only jurisdictions which hold that the litigation privilege does not bar a malicious prosecution claim. See Indus. Power & Lighting Corp. v. W. Modular Corp., 623 P.2d 291, 298 (Alaska 1981), Sierra Madre Dev., Inc. v. Via Entrada Townhouses Ass'n, 514 P.2d 503, 507 (Ariz. App. 1973), Simms v. Seaman, 69 A.3d 880, 890 (Conn. 2013), Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc., 774 A.2d 332, 346 (D.C. 2001), Loigman v. Township Committee, 889 A.2d 426, 436 n.4 (N.J. 2006), Willis & Linnen Co., L.P.A. v. Linnen, 837 N.E.2d 1263, 1265-66 (Ohio App. 9 Dist. 2005), and Clark v. Druckman, 624 S.E.2d 864, 872 (W. Va. 2005).

The general acceptance of that holding is further demonstrated by the codification of the litigation privilege in Restatement (Second) Torts §587, which describes the privilege, consistent with Florida law, as follows:

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he

> participates, if the matter has some relation to the proceeding.

However, in Comment(a) 2d. §587, the Restatement 2d. Torts specifically notes that the privilege does **not** eliminate a claim from malicious prosecution:

> The privilege stated in this Section is based upon the public interest in according to all men the utmost freedom of access to the courts of justice for the settlement of their private disputes. Like the privilege of an attorney, it is absolute. It protects a party to a private litigation or a private prosecutor in a criminal prosecution from liability for defamation irrespective of his purpose in publishing the defamatory matter, of his belief in its truth or even his knowledge of its falsity. **One against whom civil or criminal proceedings are initiated may recover in an action for the wrongful initiation of the proceedings, under the rules stated in §§ 674 to 680, if the proceedings have terminated in his favor and were initiated without probable cause and for an improper purpose.**

The Wolfe Decision

Despite the lengthy history of the coexistence of the litigation privilege and the cause of action for malicious prosecution, and the extensive case law cited above, the Third District in Wolfe held that the absolute immunity afforded by the litigation privilege barred an action for malicious prosecution.

In Wolfe, a malicious prosecution claim[6] was brought against Florida attorneys who had been retained by their client's New York counsel to file a

[6] The plaintiffs in Wolfe also sued the defendants for abuse of process, and the Third District held that the litigation privilege barred that claim, based on its earlier

complaint in federal court in Miami. The complaint between the same parties addressed a dispute that had been the subject of prior litigation and a settlement agreement. However, neither the client nor his New York counsel fully informed the Miami lawyers of that prior litigation and the settlement agreement. After filing the complaint and being provided with those materials, the Miami lawyers immediately notified the client that they could not ethically pursue his claims and they withdrew with court authorization. Thereafter, the complaint was dismissed and a final judgment in favor of the defendants was entered.

After the conclusion of the federal litigation, the plaintiffs in Wolfe filed a malicious prosecution action against the Miami lawyers. The trial court granted a judgment on the pleadings, concluding that the litigation privilege granted them absolute immunity, and the Third District affirmed that determination.

In Wolfe, the Third District relied on its prior decision in LatAm Investments, supra, and other authority to hold that the litigation privilege applied to the abuse of process claim. With respect to the malicious prosecution claim, the

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decision in LatAm Investments, LLC v. Holland & Knight, LLP., 88 So.3d 240 (Fla. 3d DCA 2011). Abuse of process is not a claim in the case sub judice. It should be noted that in Estate of Mayer, supra, after noting the "vast number" of cases rejecting the application of the litigation privilege to malicious prosecution claims stated (998 N.E.2d at 250):

> The case law regarding absolute privilege and abuse of process claims is not as overwhelmingly uniform.

Third District acknowledged that "the law is not as clear" whether the privilege barred that claim. Wolfe, 128 So.3d at 68.

In its legal analysis, the Third District noted the establishment of the litigation privilege in Myers, supra, and quoted language from Levin, supra, and Echevarria, supra, that absolute immunity must be afford to "any act occurring during the course of a judicial proceeding" (128 So.3d at 69). The Third District concluded that the filing of a complaint was clearly an act that would fall within the parameters of that language and, therefore, it must be subject to the litigation privilege. The opinion also notes that while tortious conduct such as malicious prosecution may be protected under the litigation privilege, there was still a remedy available in "the discipline of the courts, the bar association, and the state" (128 So.3d at 71, quoting Levin, supra, 639 So.2d at 608-09).

In Wolfe, Judge Sheperd filed a specifically concurring opinion in which he joined in the affirmance, but for different reasons. Judge Sheperd concluded that the malicious prosecution claim was fatally defective because two essential elements were missing-malice and absence of probable cause (128 So.3d at 71-72).

It is important to note what the majority opinion in Wolfe did not address. The majority did not analyze, or even mention, the fact that the litigation privilege and malicious prosecution claims had coexisted in the common law for hundreds of years without any conflict. Additionally, the majority did not address any of the

Florida case law discussed supra, in which the litigation privilege was **not** applied to malicious prosecution claims. In fact, the majority in Wolfe did not even discuss the dicta in its prior decision in SCI Funeral, supra, to the effect that the Supreme Court's citation (with approval) to Wright, supra, in the Levin decision indicated that a malicious prosecution claim would not be barred by the litigation privilege (839 So.2d at 706, n.4).

The only Florida case discussed above that the majority addressed in Wolfe, was the Second District's decision in Olson, supra. The majority opinion in Wolfe relied upon that case for the proposition that application of the litigation privilege would not eliminate the malicious prosecution cause of action. The majority stated that the tort would still apply to acts committed prior to the filing of the complaint, if they qualified as a legal cause of the initiation of the underlying proceedings. Putting aside that extreme limitation on malicious prosecution claims, that analysis ignores that Olson rejected the claim of absolute privilege on the basis that it confused the law of defamation with the law of malicious prosecution (961 So.2d at 360-61). Thus, Olson is not support for the majority decision in Wolfe.

Finally, it is also significant that the majority in Wolfe did not discuss the law of any other jurisdiction, nor cite any recognized treatise for the proposition that the litigation privilege applied to malicious prosecution claims. There does not appear to be any such authority and, it is respectfully submitted, that is strong

support for the conclusion that Wolfe was erroneously decided and should not be followed by this Court.

This Court Should Not Follow Wolfe

This Court has not directly addressed the issue involved in this case: whether the litigation privilege is an absolute bar to an action for malicious prosecution. This Court should follow the overwhelming weight of authority in Florida and throughout the country, which have upheld the ancient cause of action for malicious prosecution in this context.

An analysis of the Wolfe opinion demonstrates its weaknesses. There, the majority opinion did not address the common law history of the litigation privilege and the cause of action for malicious prosecution. The majority of Wolfe did not cite any authority on point from any jurisdiction that supported its holding. Moreover, while the policy considerations underlying the litigation privilege and the malicious prosecution cause of action are related, the balance struck by the courts through the common law has been carefully evaluated and established, Wolfe does not explain why these policy considerations have now changed so drastically as to justify the elimination of the cause of action for the malicious prosecution.

While the majority in Wolfe suggests that the tort of malicious prosecution would still exist under its rationale, it limited it to those (rare) circumstances where

a party or parties who motivated, but did not actually file, the vexatious action might be held liable. However, under Wolfe's reasoning, the person or entity who actually filed the vexatious action would have absolute immunity because the filing of the complaint was an act done in a judicial proceeding. There is no policy justification for that distinction and, while the Wolfe majority relies on Olson, supra, that was not the rationale of the Second District's decision.

The Wolfe majority opinion is based almost entirely on one clause from the Levin decision (which was subsequently quoted in Echevarria) to the effect that any act occurring during a judicial proceeding is absolutely privileged. However, neither Levin nor Echevarria addressed a malicious prosecution claim in which the initiation of the vexatious litigation is the wrong itself. Neither Levin nor Echevarria involved a situation where the underlying litigation was maliciously initiated, and neither opinion provides a basis to conclude that the Florida Supreme Court would choose to deviate from the overwhelming weight of authority in this country on this issue. The Florida Supreme Court has recognized the common law origins of both the litigation privilege and the malicious prosecution cause of action; legal principles which have coexisted without conflict for hundreds of years. In fact, the Supreme Court applied them, without conflict, in Fisher v. Payne, supra.

While the Supreme Court has obviously accepted the argument that potentially tortious conduct in litigation (which presumably was not filed maliciously) is entitled to absolute immunity, that is not the same as the conclusion that the malicious initiation of litigation should also be immune. As noted in an early edition of Prosser's treatise:

> There is no policy in favor of vexatious suits known to be groundless, which are a real and often a serious injury; and the heavy burden of proof upon the plaintiff, to establish both lack of probable cause and an improper purpose, should afford sufficient protection to the bona fide litigant and adequate safeguard against a series of actions.

Prosser, Torts, 886 (1941), quoted in Rainier's Dairies v. Raritan Valley Farms, 117 A.2d 889, 896 (N.J. 1995).

In Wolfe, which was a case brought against attorneys, the majority also relied on the fact that there were other "remedies" available to the plaintiffs, including "the discipline of the courts, the bar association and the state," quoting Levin, supra, 639 So.2d at 608-09. However, those remedies provide no benefit to Michael under the circumstances of this case.

Here, Michael's ex-wife accused him of the most heinous acts against her and his child. This included assault and battery, sexual assault and battery, and a history of violence and intimidation. Despite the fact that he prevailed against those claims, the presiding court had no ability to restore his reputation or

compensate him for his loss or the damage done to him as a businessman in the community. Indeed, these facts are the quintessential example of why the cause of action of malicious prosecution was originally established in the common law in the first place. The English courts recognized, despite their rule that the losing party pays the fees and costs of the prevailing party, that was insufficient to remedy the harm resulting from vexatious litigation when the damage occurred to one's reputation, property, or business. It is noteworthy that English courts, which recognize a broader litigation privilege than American courts (an absolute immunity for anything said in litigation, regardless of relevance to the subject matter), still reject the application of that privilege to a malicious prosecution claim. In this country, where there is no obligation for the losing party to pay the fees and costs to the prevailing party, at least in a dissolution action such as the case sub judice, and the litigation privileges more narrowly construed, it makes no sense to hold that that privilege eliminates the cause of action for malicious prosecution.

CONCLUSION

For the reasons stated above, the Final Judgment of the Circuit Court should be reversed and the cause remanded for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on May 6, 2014.

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CERTIFICATE OF TYPE SIZE & STYLE

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