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,

Defendants.
_____/

MOTION FOR LEAVE TO AMEND TO ASSERT A CLAIM FOR PUNITIVE DAMAGES

Defendant, Bradley J. Edwards, Esq., by and through his undersigned counsel and pursuant to Rule 1.190(f), Florida Rules of Civil Procedure, hereby moves for leave to amend to assert a claim for punitive damages, and in support thereof relies upon the following evidence in the record and such additional evidence as is herein proffered*:

I. INTRODUCTION

The pleadings, discovery taken to date, and the evidence proffered with this motion show that a reasonable basis exists to support the recovery of punitive damages against the Counter-Defendant, Jeffrey Epstein. Not only is there an absence of competent evidence to demonstrate that Edwards participated in any fraud against Epstein, the evidence uncontrovertibly demonstrates the propriety of every aspect of Edwards's involvement in the prosecution of legitimate claims against Epstein and the fact that the sole basis for the assertion of the spurious claims filed against Edwards was an attempt to intimidate Edwards into abandoning

the legitimate claims Edwards was prosecuting against Epstein on behalf of victims of Epstein's pattern of criminal sexual abuse of minors. Epstein sexually abused three clients of Edwards — L.M., E.W., and Jane Doe — and Edwards properly and successfully represented them in a civil action against Epstein. Nothing in Edwards's capable and competent representation of his clients could serve as the basis for a civil lawsuit against him. Allegations about Edwards's participation in or knowledge of the use of the civil actions against Epstein in a "Ponzi Scheme" were not supported by any competent evidence and could never be supported by competent evidence as they are entirely false and Epstein never had any reason to believe otherwise. The dismissal of the unsupported, unsupportable and sensational allegations that Edwards was a knowing participant in a massive criminal fraud and the subsequent abandonment of those allegations is further confirmation that no reasonable basis ever existed to support any belief in the truth of those allegations.

A. Epstein's Complaint

Epstein's Complaint essentially alleged that Epstein was defrauded by Edwards, acting in concert with L.M. (a minor female who was sexually abused by Epstein) and Scott Rothstein (President of the Rothstein Rosenfeldt Adler law firm ("RRA") where Edwards worked for a short period of time). Epstein appears to have alleged that Edwards joined L.M. and Rothstein in fabricating sexual assault cases against Epstein to "pump" the cases to Ponzi scheme investors. As described by Epstein, investor victims were told by Rothstein that three minor girls who were sexually assaulted by Epstein: LM., E.W., and Jane Doe were to be paid up-front money to prevent those girls from settling their civil cases against Epstein. In Epstein's view, these child sexual assault cases had "minimal value" (Complaint at 42(h)),

and Edwards's refusal to force his clients to accept modest settlement offers was claimed to breach some duty that Edwards owed to Epstein. Interestingly, Epstein never states that he actually made any settlement offers. Even more interesting, all of the allegations of Edwards' knowing involvement in Rothstein's fraud disappeared from Epstein's first Amended Complaint along with the claims for civil remedies for criminal conduct and Florida RICO violations. This is a clear admission that no probable cause existed to support any of those allegations and claims to begin with.

The supposed "proof' of the Complaint's allegations against Edwards includes Edwards's alleged contacts with the media, his attempts to obtain discovery from high-profile persons with whom Epstein socialized, and use of "ridiculously inflammatory" language in arguments in court (Complaint at 42(e)). Remarkably, Epstein has filed such allegations against Edwards despite the fact that Epstein had sexually abused each of Edwards's clients and others while they were minors. Indeed, in recent discovery Epstein has asserted his Fifth Amendment privilege rather than answer questions about the extent of the sexual abuse of his many victims. Even more remarkably, since filing his suit against Edwards, Epstein has now settled the three cases Edwards handled for an amount that Epstein insisted be kept confidential. Without violating the strict confidentiality terms required by Epstein, the cases did not settle for the "minimal value" that Epstein suggested in his Complaint. Because Epstein relied upon the alleged discrepancy between the "minimal value" Epstein ascribed to the claims and the substantial value Edwards sought to recover for his clients, the settlement amounts Epstein voluntarily agreed to pay while these claims against Edwards were pending will be disclosed to the court *in camera*. Of course, those false allegations have also now disappeared from the

most recent Amended Complaint, but the amendment does not erase the fact that the baseless allegations were made.

B. Summary of the Argument

The claims against Bradley J. Edwards, Esq., were patently frivolous for at least two separate reasons.

First, because Epstein has elected to hide behind the shield of his right against self incrimination to preclude his disclosing any relevant information about the criminal activity at the center of his claims, he is barred from prosecuting this case against Edwards. Under the well-established "sword and shield" doctrine, Epstein cannot seek damages from Edwards while at the same time asserting a Fifth Amendment privilege to block relevant discovery. The filing of a case seeking affirmative relief when there was no intention at the time of filing to comply with the discovery obligations arising from such filing is compelling evidence that the case was filed for reasons unrelated to obtaining the relief specified in the Complaint.

Second and most fundamentally, Epstein's lawsuit was never supported by probable cause to believe any of the spurious accusations on which it was based, each and every one of which is directly contradicted by all of the record evidence. From the beginning, Edwards diligently represented three victims of sexual assaults perpetrated by Epstein. As explained in detail below, all of Edwards's litigation decisions were grounded in proper litigation judgment about the need to pursue effective discovery against Epstein, particularly in the face of Epstein's stonewalling tactics. Edwards's successful representation finally forced Epstein to settle and pay appropriate damages. Effective and proper representation of child victims who have

been repeatedly sexually assaulted cannot form the basis of a separate, "satellite" lawsuit, since even improper conduct in the course of the prosecution of a lawsuit may not form the basis of a separate claim by virtue of the absolute bar of the litigation privilege. Filing a claim known to be barred by absolute privilege is further evidence that the claim was filed for reasons other than in a legitimate effort to obtain the relief sought in the Complaint.

The truth is the record is entirely devoid of any evidence to support Epstein's claims and is completely and consistently corroborative of Edwards's sworn assertion of innocence. Put simply, Epstein made allegations that had and have no basis in fact. He included those allegations in a lawsuit that was and is barred by both the sword-shield doctrine and the absolute litigation privilege. His lawsuit was merely a desperate measure by a serial pedophile to prevent being held accountable in compensatory and punitive damages for repeatedly sexually abusing minor females. He was trying also to shut down an investigation effort by Edwards that threatened to expose him to more criminal charges and harsher penalties. Epstein's ulterior motives in filing and prosecuting this lawsuit are blatantly obvious. Epstein's behavior is another clear demonstration that he feels he lives above the law and that because of his wealth he can manipulate the system and pay for lawyers to do his dirty work - even to the extent of having them assert baseless claims against other members of the Florida Bar. Epstein's Complaint against Edwards and LM is nothing short of a far-fetched fictional fairy-tale with absolutely no evidence whatsoever to support his preposterous claims. It was his last ditch effort to escape the public disclosure by Edwards and his clients of the nature, extent, and sordid details of his life as a serial child molester.

ARGUMENT

II. THE PROFERRED FACTS ESTABLISH THAT EDWARDS'S CONDUCT COULD NOT POSSIBLY FORM THE BASIS OF ANY LIABILITY IN FAVOR OF EPSTEIN

This is not a complicated case for punitive damages because there is compelling and unrebutted evidence that each and every one of Epstein's claims against Edwards lacks any merit whatsoever.

A. Edwards Was Simply Not Involved in the Rothstein Ponzi Scheme.

The bulk of Epstein's claims against Edwards hinged on the premise that Edwards was knowingly involved in a Ponzi scheme run by Scott Rothstein. For example, Epstein alleged generally that "Edwards's... actions constitute a fraud upon Epstein as [Rothstein, Rosenfeldt, and Adler], [Scott] Rothstein and the Litigation Team represented themselves to be acting in good faith and with the best interests of their clients in mind at all times when in reality, [Edwards was] . . . acting in furtherance of the investment or Ponzi scheme described herein." Complaint ¶50. Similar broad allegations are scattered willy-nilly throughout the Complaint, although none of the allegations provide any substance as to how Edwards might have assisted the Ponzi scheme. *See, e.g., id.* at ¶¶ 23, 24, 5, 27, 28, 42, 50. In any event, these allegations all fail for one straightforward reason: Edwards was simply not involved in any Ponzi scheme. He has provided sworn testimony and an affidavit in support of that assertion, and there is not (and could never be) any credible contrary evidence.

Edwards has now been deposed at length in this case. As his deposition makes clear, he had no knowledge of any fraudulent activity in which Scott Rothstein was involved. *See, e.g.,* Edwards Depo. at 301-02 (Q: " . . . [W]ere you aware that Scott Rothstein was trying to market Epstein cases . . . ?" A: "No.").

Edwards has supplemented his deposition answers with an Affidavit that declares in no uncertain terms his lack of involvement in any fraud perpetrated by Rothstein. *See, e.g.,* Edwards Affidavit attached to Statement of Undisputed Material Facts as Exhibit "N" at ¶8-10, ¶20, ¶22-23. Indeed, no one could reasonably believe that Edwards was involved in the scheme, as Edwards joined RRA well after Rothstein began his fraud and would have been already deeply in debt. In fact, the evidence of Epstein's crimes is now clear, and Edwards's actions in this case were entirely in keeping with his obligation to provide the highest possible quality of legal representation for his clients to obtain the best result possible.

In view of this clear evidence rebutting all allegations against him, Epstein must at least establish that he had a good faith basis to support his untrue allegations. By choosing to assert his Fifth Amendment privilege to remain silent, he obviously fails to meet that burden. Indeed, when asked at his deposition whether he had any evidence of Edwards's involvement, Epstein declined to answer, purportedly on attorney-client privilege grounds:

> Q. I want to know whether you have any knowledge of evidence that Bradley Edwards personally ever participated in devising a plan through which were sold purported confidential assignments of a structured payout settlement?...
> A. I'd like to answer that question by saying that the newspapers have reported that his firm was engaged in fraudulent structured settlements in order to fleece unsuspecting Florida investors. With respect to my personal knowledge, I'm unfortunately going to, today, but I look forward to at some point being able to disclose it, today I'm going to have to assert the attorney/client privilege.

See Deposition of Jeffrey Epstein, Mar. 17, 2010 (hereinafter "Epstein Depo.") at 67-68.

B. Epstein Did Not Suffer Any Harm from Allegedly Fraudulent Presentations to Investors.

At various points in his Complaint, Epstein seems to have alleged that he can pursue a claim against Edwards because Rothstein defrauded third-party investors. Epstein alleges that various investors were given fraudulent pitches by Rothstein and were bilked out of money as a result. *See, e.g.,* Complaint I 28, 29, 30. Even assuming that the allegations about Rothstein are true (and they certainly are not challenged by this Motion), Edwards is still obviously entitled to assert a claim for punitive damages for the additional reason that Epstein was not harmed by these fraudulent pitches and had no plausible basis to claim that he was. Epstein was obviously not present during these presentations. Indeed, as review of Epstein's Complaint makes clear, he did not even know about the fraud until it became public knowledge through the mass media. *See, e.g.,* Complaint ¶16 ("The details of this fraudulent scheme are being revealed on a daily basis through various media report and court documents.").

To proceed on any cause of action, Epstein is required to prove harm. *See, e.g., Bortell v. White Mountains Ins. Group, Ltd.,* 2 So.3d 1041, 1047 (Fla. 4th DCA 2009); *S & Investments v. Payless Flea Market, Inc.,* 36 So.3d 909, 917 (Fla. 4th DCA 2010). Epstein was not harmed by Rothstein's misrepresentations to other people that he knew nothing about.

C. Epstein's Allegations Against Edwards Were and Are Unfounded and Not Actionable in Any Event.

At various points in his Complaint Epstein inconsistently recognized that Edwards was not involved in any Rothstein Ponzi scheme. Therefore, seemingly as a fallback, Epstein alleged without explanation that Edwards "should have known" about the existence of this concealed

Ponzi scheme. For example, in his Complaint Epstein alleged: "Upon information and belief, Edwards knew *or should have known* Rothstein was utilizing RRA as a front for the massive Ponzi scheme . . . ." Complaint at 26 (emphasis added). Among other problems, this fallback negligence position suffered the fatal flaw that it does not link at all to the five counts in the complaint, all of which alleged *intentional* fraud or conspiracy.

The five counts in the Complaint all allege criminal — i.e., intentional — activity. The five counts are: Count 1 — Florida Civil Remedies for Criminal Practices Act (FCRCPA); Count 2 — Florida RICO; Count 3 — Abuse of Process; Count 4 — Fraud; and Count 5 — Conspiracy to Commit Fraud. To take Count 1 as an example, Epstein alleges that Edwards "engaged in a pattern of criminal activity as defined in §772.102(3) and (4), Fla Stat. (2009)." Epstein then alleges (without any elaboration) that Edwards committed such crimes as fraud, extortion, and perjury — crimes that are listed as actionable under the FCRCPA. *See* Fla. Stat. Ann. §772.102(1)(a). Crimes such as these require proof of criminal intent. Proving the crime of perjury, for example, requires proof that "testimony was in fact false testimony, and that [the defendant] *knew of its falsity and willfully and with deliberation swore to it as true." Rader v. State,* 52 So.2d 105, 108 (Fla. 1951) (emphasis added). Proving the crime of fraud requires proof that the defendant acted with *"intent to defraud." Pizzo v. State,* 455. So.2d 1203, 1207 (Fla. 2006) (emphasis added); *see also Curd v. Mosaic Fertilizer, LLC, 39 So.3d 1216,* 2010 WL 2400384 at *15 (describing fraud, conversion, civil theft, and abuse of process as *"intentional* torts" that require "proof of intent"). Moreover, not only do the underlying crimes require proof of criminal intent, but the FCRCPA itself requires proof that a defendant must have acted "with criminal intent," Fla. Stat. Ann. §772.103(1), or "conspire[d]," §772.103(4), in

order for a cause of action to proceed. Nothing in the statute allows a claim to move forward on a mere allegation of negligence.

Epstein's negligence claim is also deficient because it simply fails to satisfy the requirements for a negligence cause of action:

> "Four elements are necessary to sustain a negligence claim: 1. a duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks. 2. A failure on the [defendant's] part to conform to the standard required: a breach of the duty . . . 3. A reasonably close causal connection between he conduct and the resulting injury. This is what is commonly known as 'legal cause,' or 'proximate cause,' and which includes the notion of cause in fact. 4. Actual loss or damage."

Curd v. Mosaic Fertilizer, LLC, 39 So.3d 1216, 2010 WL 2400384 at *9 (Fla. 2010). Epstein does not allege a particular duty on the part of Edwards that has been breached. Nor does Epstein explain how any breach of the duty might have proximately caused him actual damages.

Finally, for the sake of completeness, it is worth noting briefly that no reasonable basis existed to claim Edwards was negligent in failing to anticipate that a managing partner at his law firm would be involved in an unprecedented Ponzi scheme. Scott Rothstein deceived not only Edwards but also more than 60 other reputable lawyers at a major law firm. *Cf. Sun Sentinel,* Fort Lauderdale, Dec. 11, 2009, 2009 WLNR 25074193 at *1 ("Sure, some outlandish John Grisham murder plot[s] sound far-fetched. But if you asked me a few months ago if Scott Rothstein was fabricating federal court orders and forging a judge's signature on documents to allegedly fleece his friends, as federal prosecutors allege, I would have said that was far-fetched, too."). No reasonable lawyer could have expected that a fellow member of the bar would have been involved in such a plot. Nobody seemed to know of Rothstein's Ponzi

scheme, not even his best friends, or the people he did business with on a daily basis, or even his wife. Many of the attorneys at RRA had been there for years and knew nothing. Edwards was a lawyer at RRA for less than eight months and had very few personal encounters with Rothstein during his time at the firm, yet Epstein claims that he should have known of Rothstein's intricate Ponzi scheme. No doubt for this reason the U.S. Attorney's Office has now listed Edwards as a "victim" of Rothstein's crimes. *See* Statement of Undisputed Facts filed contemporaneously.

Epstein's Complaint does not offer any specific reason why anyone could conclude that Edwards was negligent, and he chose not to offer any explanation of his claim at his deposition.

D. Edwards Was Properly Pursuing the Interests of His Three Clients Who Had Been Sexually Abused by Epstein.

The next claim that Epstein advances is that Edwards somehow improperly enhanced the value of the three civil cases he had filed against Epstein. Edwards represented three young women — L.M., E.W., and Jane Doe — by filing civil suits against Epstein for his sexual abuse of them while they were minors. Epstein purports to find a cause of action for this by alleging that Edwards somehow was involved in "'pumping' these three cases to investors." Complaint at 1151; *see also id.* at ¶1136, 41, 42(f), 42(k) (similar allegations of "pumping" the cases).

As just explained, to the extent that Epstein is alleging that Edwards somehow did something related to the Ponzi scheme, those allegations fail for the simple reason that Edwards was not involved in any such scheme. Edwards, for example, could not have possibly "pumped" the cases to investors when he never participated in any communication with

investors as has now been confirmed under oath not only by Edwards but by every investor deposed by Epstein.

Epstein's "pumping" claims, however, fail for an even more basic reason: Edwards was entitled — indeed ethically obligated as an attorney — to secure the maximum recovery for his clients during the course of his legal representation. As is well known, "[a]s an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Fla. Rules of Prof. Conduct, Preamble. Edwards therefore was required to pursue (unless otherwise instructed by his clients) a maximum recovery against Epstein. Edwards, therefore, cannot be liable for doing something that his ethical duties as an attorney required nor can he be liable for conduct that falls squarely within the absolute protection of the litigation privilege. See the Fla. S. Ct.'s opinion in *Echevarria* attached.

Another reason that Epstein's claims that Edwards was "pumping" cases for investors fails is that Edwards filed all three cases almost a year before he was hired by RRA or even knew of Scott Rothstein. Epstein makes allegations that the complaints contained sensational allegations for the purposes of luring investors; however, language in the complaints remained virtually unchanged from the first filing in 2008 and from the overwhelming evidence the Court can see for itself that all of the facts alleged by Edwards in the complaints were true.

Epstein ultimately paid to settle all three of the cases Edwards filed against him for more money than he paid to settle any of the other claims against him. At Epstein's request, the terms of the settlements were kept confidential, but the Stipulation and Order of Dismissal in each of the cases required Epstein to bear all costs and fees incurred in his defense, thus precluding him from claiming those costs and fees as damages in any action against Edwards.

The sum that he paid to settle all these cases is not filed with this pleading and will be provided to the court for *in camera* review. Epstein chose to make this payment as the result of a federal court ordered mediation process, which he himself sought (over the objection of Jane Doe, Edwards's client in federal court) in an effort to resolve the case. *See* Defendant's Motion for Settlement Conference, or in the Alternative, Motion to Direct Parties back to Mediation, *Doe v. Epstein,* No. 9:08-CV-80893 (S.D. Fla. June 28, 2010) (Marra, J.) (doc. #168) attached hereto as Exhibit "A". Notably, Epstein sought this settlement conference — and ultimately made his payments as a result of that conference - in July 2010, more than seven months after he filed this lawsuit against Edwards. Accordingly, Epstein could not have been the victim of any scheme to "pump" the cases against him, because he never paid to settle the cases until well after Edwards had left RRA and had severed all connection with Scott Rothstein (December 2009), and the scope of the Rothstein fraud was fully exposed.[1]

In addition, if Epstein had thought that there was some improper coercion involved in, for example, Jane Doe's case, his remedy was to raise the matter before Federal District Court Judge Kenneth A. Marra who was presiding over the matter. Far from raising any such claim, Epstein simply chose to settle that case. He is therefore now barred not only by the litigation privilege but also by the doctrine of res judicata from somehow re-litigating what happened in (for example) the Jane Doe case. "The doctrine of res judicata makes a judgment on the merits conclusive 'not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action." *AMEC Civil, LLC v. State Dept. of Transp.*, 41

[1] To further his effort to harass and intimidate Edwards, Epstein also filed a bar complaint with the Florida Bar against Edwards. The Florida Bar has dismissed that complaint. *See* Statement of Undisputed Facts.

So.3d 235, 2010 WL 1542634 at *2 (Fla. 1st DCA 2010) *(quoting Kimbrell v. Paige,* 448 So.2d 1009, 1012 (Fla. 1984). Obviously, any question of improper "pumping" of a particular case could have been resolved *in that very case* rather than now re-litigated in satellite litigation.

E. Edwards is Immune From Any Claim For Abuse of Process Because He Acted Properly Within the Boundaries of the Law in Pursuit of the Legitimate Interests of his Clients.

Epstein's Complaint also raised the claim of "abuse of process." Confusingly stated allegations appear to be related to those just discussed, but culminate in a separate cause of action — count 3 — alleging "abuse of process." An abuse of process claim requires proof of three elements: "(1) that the defendant made an illegal, improper, or perverted use of process; (2) that the defendant had ulterior motives or purposes in exercising such illegal, improper, or perverted use of process; and (3) that, as a result of such action on the part of the defendant, the plaintiff suffered damage." *S & I Investments v. Payless Flea Market, Inc.,* 36 So.3d 909, 917 (Fla. 4th DCA 2010) (internal citation omitted). In fact, Edwards has correctly stated this cause in his counterclaim against Epstein. While Edwards's claim is unassailable, Epstein cannot prove these elements and never had any good faith basis to believe he could.

The first element of an abuse of process claim is that a defendant made "an illegal, improper, or perverted use of process." On the surface, Epstein's Complaint appears to contain several allegations of such litigation-related impropriety. On examination, however, each of these allegations amounts to nothing other than a claim that Epstein was unhappy with some discovery effort, motion or argument made by Edwards. This is not the stuff of an abuse of process claim, particularly where Epstein fails to allege that he was damaged as the

result of Edwards's pursuit of the claims against him beyond the self-inflicted losses that flowed from his own criminal conduct. *See Marty v. Gresh,* 501 So.2d 87, 90 (Fla. 1st DCA 1987) (affirming summary judgment on an abuse of process claim where "appellant's lawsuit caused appellee to do nothing against her will").

In any event, none of the allegations of "improper" process was or ever could be supported because every action Edwards took was entirely proper. For purposes of completeness, the following is a point-by-point refutation of Epstein's allegations:

- Complaint ¶42(a): Edwards properly included listed damages in Jane Doe's federal action of more than $50,000,000, because those were the damages that Edwards was going to seek at trial on behalf of Jane Doe. *See* Statement of Undisputed Facts.

- Complaint ¶42(b): Edwards was entitled to help Jane Doe exercise her First Amendment rights to criticize the unduly lenient plea bargain he received in a criminal case, *See* Statement of Undisputed Facts, and criticizing what happened in the *criminal* case is not actionable in an unrelated civil case;

- Complaint ¶ 42(c): Edwards only asked reasonable questions of Epstein at his deposition, all of which related to the merits of the case against Edwards. *See* Statement of Undisputed Facts.

- Complaint ¶ 42(d): Edwards only pursued legitimate discovery designed to further the cases filed against Epstein. *See* Statement of Undisputed Facts.

- Complaint ¶ 42(e): Edwards did not made "ridiculously inflammatory and sound-bite rich" statements, but rather made statements supported by the evidence. For example, there is ample evidence that Epstein has abused more than 400 children, *See* Statement of Undisputed Facts, a fact that Epstein has always invoked his Fifth Amendment right of silence regarding rather than elaborate.

- Complaint ¶ 42(f): Edwards properly filed a motion seeking to restrain Epstein's fraudulent transfer of assets in federal court where Edwards had evidence that Epstein was titling cars and other assets in the names of other persons, *See* Statement of Undisputed Facts.

Epstein also fails to meet the second element of an abuse of process claim: that Edwards had some sort of ulterior motive. The case law is clear that on an abuse of process claim a "plaintiff must prove that the process was used for an immediate purpose other than that for which it was designed." *S&I Investments v. Payless Flea Market, Inc.,* 36 So.3d 909, 917 (Fla. 4th DCA 2010) *(citing Biondo v. Powers,* 805 So.2d 67, 69 (Fla. 4th DCA 2002). As a consequence, "[w]here the process was used to accomplish the result for which it was intended, regardless of an incidental or concurrent motive of spite or ulterior purpose, there is no abuse of process." *Id.* (internal quotation omitted). Here, Edwards has fully denied any improper motive, *See* Statement of Undisputed Facts, and Epstein has no evidence of any such motivation. Indeed, it is revealing that Epstein chose not to ask even a single question about this subject during the deposition of Edwards. In addition, all of the actions that Epstein complains about were in fact used for the immediate purpose of furthering the lawsuits filed by L.M., E.W., and Jane Doe. In other words, these actions all "accomplished the results for which they were intended" -- whether it was securing additional discovery or presenting a legal issue to the court handling the case -- ultimately leading to the full recovery of damages for the victims of Epstein's molestations.

F. Pursuit of Discovery Concerning Epstein's Friends Was Reasonably Calculated to Lead to Relevant and Admissible Testimony About Epstein's Abuse of Minor Girls.

Epstein alleged that Edwards improperly pursued discovery from some of Epstein's close friends. Such discovery, Epstein claims, was improper because Edwards knew that these individuals lacked any discoverable information about the sexual assault cases against Epstein.

Each of the friends of Epstein was reasonably believed to possess discoverable information. The undisputed facts show the following with regard to each of the persons referenced in each of Epstein's now dismissed complaints:

- Complaint ¶38(i): With regard to Donald Trump, Edwards had sound legal basis for believing Mr. Trump had relevant and discoverable information. *See* Statement of Undisputed Facts.

- Complaint ¶38(ii): With regard to Alan Dershowitz (Harvard Law Professor), Edwards had sound legal basis for believing Mr. Dershowitz had relevant and discoverable information. *See* Statement of Undisputed Facts.

- Complaint ¶38(iii): With regard to former President Bill Clinton, Edwards had sound legal basis for believing former President Clinton had relevant and discoverable information. *See* Statement of Undisputed Facts.

- Complaint ¶38(iv): With regard to former Sony Record executive Tommy Mottola, Edwards was not the attorney that noticed Mr. Mottola's deposition. *See* Statement of Undisputed Facts.

- Complaint ¶38(v): With regard to illusionist David Copperfield, Edwards had sound legal basis for believing Mr. Copperfield had relevant and discoverable information. *See* Statement of Undisputed Facts.

- Complaint ¶40(i): With regard to former New Mexico Governor Bill Richardson, Edwards had sound legal basis for naming Former New Mexico Governor Bill Richardson on his witness list. *See* Statement of Undisputed Facts.

As to the existence of a reasonable basis for pursuing discovery from all of the above, see also the filed transcript of the recorded conversation with Virginia Roberts.

It is worth noting that the standard for discovery is a very liberal one. To notice someone for a deposition, of course, it is not required that the person deposed actually end up producing admissible evidence. Otherwise, every deposition that turned out to be a "false alarm" would lead to an abuse of process claim. Moreover, the rules of discovery themselves provide that a

deposition need only be "reasonably calculated to *lead to* the discovery of admissible evidence." Fla. R. Civ. P. 1.280(b) (emphasis added).

Moreover, the discovery that Edwards pursued has to be considered against the backdrop of Epstein's obstructionist tactics. As the Court is aware, in both this case and all other cases filed against him, Epstein has asserted his Fifth Amendment privilege rather than answer any substantive questions. Epstein has also helped secure attorneys for his other household staff who assisted in the process of recruiting his minor female victims. Those staff members in turn also asserted their Fifth Amendment rights rather than explain what happened behind closed doors in Epstein's mansion in West Palm Beach. *See* Statement of Undisputed Facts. It is against this backdrop that Edwards followed up on one of the only remaining lines of inquiry open to him: discovery aimed at Epstein's friends who might have been outside of Epstein's sphere of influence and in a position to either directly confirm or circumstantially corroborate the fact that Epstein was sexually abusing young girls.

In the context of the sexual assault cases that Edwards had filed against Epstein all which included the potential for the recovery of punitive damages, any act of sexual abuse had undeniable relevance to the case — even acts of abuse Epstein committed against minor girls other than L.M., E.W., or Jane Doe. Both federal and state evidence rules make acts of child abuse against other girls admissible in the plaintiff's case in chief as proof of "modus operandi" or "motive" or "common scheme or plan." *See* Fed. R. Evid. 415 (evidence of other acts of sexual abuse automatically admissible in a civil case); Fla. Stat. Ann. §90.404(b) (evidence of common scheme admissible); *Williams v. State,* 110 So.2d 654 (Fla. 1959) (other acts of potential sexual misconduct admissible).

A second reason exists for making discovery of Epstein's acts of abuse of other minor girls admissible. Juries considering punitive damages issues are plainly entitled to consider "the existence

and frequency of similar past conduct." *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 462 n.28 (1993). This is because the Supreme Court recognizes "that a recidivist may be punished more severely than a first offender . . . [because] repeated misconduct is more reprehensible than an individual instance of malfeasance." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 577 (1996) (supporting citations omitted). In addition, juries can consider other similar acts evidence as part of the deterrence calculation in awarding punitive damages, because "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing . . . that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *Id.* at 576-77. In the cases Edwards filed against Epstein, his clients were entitled to attempt to prove that Epstein "repeatedly engaged in prohibited conduct" — i.e., because he was a predatory pedophile, he sexually assaulted dozens and dozens of minor girls. The discovery of Epstein's friends who might have had direct or circumstantial evidence of other acts of sexual assault was accordingly entirely proper.

G. Assertions that Edwards Should Have Known That the Three Cases Had "Minimal" Value Were and Are Clearly Spurious Because the Cases in Fact Had Substantial Value.

A final claim made by Epstein is that Edwards "knew or should have known that their three filed cases were weak and had minimal value." Complaint ¶42(h). It is now no longer necessary to speculate about the value of the three cases. Epstein voluntarily paid to settle all three cases – a decision made after Rothstein's fraud had been discovered and fully revealed – and as a consequence of the decision to settle the cases, could not have been influenced by any fraud. Epstein has insisted that the sum he paid remain confidential. As such, the Settlement

Agreements have not been attached as an Exhibit, but can be shown to the Court *in camera.* In light of the sum that was paid, no reasonable jury could now find that the cases had "minimal value."

III. EPSTEIN'S LAWSUIT LACKED ANY LEGITIMATE PURPOSE FROM THE OUTSET BECAUSE OF HIS REFUSAL TO PARTICIPATE IN REASONABLE DISCOVERY.

As is readily apparent from the facts of this case, Epstein filed a lawsuit intending to refuse to allow any real discovery about the merits of his case. Instead, when asked hard questions about whether he has any legitimate claim at all, Epstein has hidden behind the Fifth Amendment. As a result, under the "sword and shield doctrine" widely recognized in Florida caselaw, his suit must be dismissed.

"[T]he law is well settled that a plaintiff is not entitled to both his silence and his lawsuit." *Boys & Girls Clubs of Marion County, Inc. v. JA.*, 22 So.3d 855, 856 (Fla. 5th DCA 2009) (Griffin, J., concurring specially). Thus, "a person may not seek affirmative relief in a civil action and then invoke the Fifth Amendment to avoid giving discovery, using the Fifth Amendment as both a 'sword and a shield.' *DePalma v. DePalma,* 538 So.2d 1290, 1290 (Fla. 4th DCA 1989) *(quoting DeLisi v. Bankers Insurance Co.,* 436 So.2d 1099 (Fla. 4th DCA 1983)). Put another way, "[a] civil litigant's fifth amendment right to avoid self-incrimination may be used as a shield but not a sword. This means that a plaintiff seeking affirmative relief in a civil action may not invoke the Fifth Amendment and refuse to comply with the defendant's discovery requests, thereby thwarting the defendant's defenses." *Rollins Burdick Hunter of New York, Inc. v. Euroclassic Limited, Inc.,* 502 So.2d 959 (Fla. 3rd DCA 1983).

Here, Epstein did precisely what the "well settled" law forbids. Specifically, he sought "affirmative relief' — i.e., forcing Edwards to pay money damages — while simultaneously precluding Edwards from obtaining legitimate discovery at the heart of the allegations that form the basis for the relief Epstein claimed to be seeking. As recounted more fully in the statement of undisputed facts, Epstein has refused to answer such basic questions about his lawsuit as:

- "Specifically what are the allegations against you which you contend Mr. Edwards ginned up?"
- "Well, which of Mr. Edwards' cases do you contend were fabricated?"
- "Is there anything in L.M.'s Complaint that was filed against you in September of 2008 which you contend to be false?"
- "I would like to know whether you ever had any physical contact with the person referred to as Jane Doe in that [federal] complaint?"
- "Did you ever have any physical contact with E.W.?"
- "What is the actual value that you contend the claim of E.W. against you has?"

The matters addressed in these questions are the central focus of Epstein's claims against Edwards. Epstein's refusal to answer these and literally every other substantive question put to him in discovery has deprived Edwards of even a basic understanding of the evidence alleged to support claims against him. Moreover, by not offering any explanation of his allegations, Epstein is depriving Edwards of any opportunity to conduct third party discovery and opportunity to challenge Epstein's allegations.

It is the clear law that "the chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush," *Scipio v. State,* 928 So.2d 1138 (Fla. 2006), and "full and fair discovery is essential to these important goals," *McFadden v.*

State, 15 So.3d 755, 757 (Fla. 4th DCA 2009). Accordingly, it is important for the Court to insure "not only compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules in both the criminal and civil context." *McFadden,* 15 So.3d at 757. Epstein has repeatedly blocked "full and fair discovery," and obviously intended to do so from the day his claims against Edwards were filed—facts from which a reasonable inference can and must be drawn that he never intended to prosecute his spurious claims but only to use them for purposes of intimidation.

IV. EDWARDS IS ENTITLED TO ADVERSE INFERENCES FROM EPSTEIN'S INVOCATION OF THE FIFTH AMENDMENT

Epstein's repeated invocations of the Fifth Amendment raise adverse inferences against him that leave no possibility that a reasonable factfinder could ever accept his allegations against Edwards. Given all of the inferences that are to be drawn against Epstein, no reasonable finder of fact could conclude that Epstein was somehow the victim of improper civil lawsuits filed against him. Instead, a reasonable finder of fact could only find that Epstein was a serial molester of children who was being held accountable through legitimate suits brought by Edwards and others on behalf of the minor girls that Epstein victimized.

Regardless of whether viewed in the context of a litigant seeking affirmative relief or simply defending claims, "[I]t is well-settled that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976); *accord Vasquez v. State,* 777 So.2d 1200, 1203 (Fla. App. 2001). The reason for this rule "is both logical and utilitarian. A party may not trample upon the rights of others and then escape the consequences by invoking a constitutional privilege — at least not in a civil setting." *Fraser v.*

Security and Inv. Corp., 615 So.2d 841, 842 (Fla. 4th DCA 1993). And, in the proper circumstances, "'Silence is often evidence of the most persuasive character.'" *Fraser v. Security and Inv. Corp.,* 615 So.2d 841, 842 (Fla. 4th DCA 1993) *(quoting United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149, 153-154 (1923) (Brandeis, J.).

In the circumstances of this case, a reasonable finder of fact would have "evidence of the most persuasive character" from Epstein's repeated refusal to answer questions propounded to him. To provide but a few examples, here are questions that Epstein refused to answer and the reasonable inference that a reasonable finder of fact would draw:

- Question not answered: "Specifically what are the allegations against you which you contend Mr. Edwards ginned up?" Reasonable inference: No allegations against Epstein were ginned up.

- Question not answered: "Well, which of Mr. Edwards' cases do you contend were fabricated?" Reasonable inference: No cases filed by Edwards against Epstein were fabricated.

- Question not answered: "Did sexual assaults ever take place on a private airplane on which you were a passenger?" Reasonable inference: Epstein was on a private airplane while sexual assaults were taking place.

- Question not answered: "How many minors have you procured for prostitution?" Reasonable inference: Epstein has procured multiple minors for prostitution.

- Question not answered: "Is there anything in L.M.'s Complaint that was filed against you in September of 2008 which you contend to be false?" Reasonable inference: Nothing in L.M.'s complaint filed in September of 2008 was false — i.e., as alleged in L.M.'s complaint, Epstein repeatedly sexually assaulted her while she was a minor and she was entitled to substantial compensatory and punitive damages as a result.

- Question not answered: "I would like to know whether you ever had any physical contact with the person referred to as Jane Doe in that [federal] complaint?" Reasonable inference: Epstein had physical contact with minor Jane Doe as alleged in her federal complaint.

- Question not answered: "Did you ever have any physical contact with E.W.?" Reasonable inference: Epstein had physical contact with minor E.W. as alleged in her complaint.

- Question not answered: "What is the actual value that you contend the claim of E.W. against you has?" Reasonable inference: E.W.'s claim against Epstein had substantial actual value.

Without repeating each and every invocation of the Fifth Amendment that Epstein has made and the reasonable inferences to be drawn from those invocations of privilege, the big picture is unmistakably clear: No reasonable finder of fact could rule in Epstein's favor on his claims against Edwards. Accordingly, Edwards is entitled to inferences that the claims against him had and have absolutely no legitimate basis in fact.

The inferences against Epstein are not limited to those arising from his privilege assertions. Epstein's guilt is also reasonably inferred from his harassment of, intimidation of, efforts to exercise control over, and limitation of access to witnesses who might testify against him.

Epstein's efforts to intimidate his victims support the inference that Epstein knew that they were going to provide compelling testimony against him. The evidence that Epstein tampered with witnesses (later designated as his accomplices and co-conspirators) will be admissible to demonstrate his consciousness of guilt. "[I]t is precisely because of the egregious nature of such conduct that the law expressly permits the jury to make adverse inferences from a party's efforts to intimidate witnesses."

Jost v. Ahmad, 730 So.2d 708, 711 (Fla. 2nd DCA 1998) (internal quotation omitted). To be clear, Epstein's attempt to tamper with witnesses is "not simply admissible as impeachment evidence of the tampering party's credibility. The opposing party is entitled to

introduce facts regarding efforts to intimidate a witness as *substantive evidence." Id.* at 711 (emphasis in original) (internal citation omitted). This substantive evidence of Epstein's witness intimidation provides yet another reason why no reasonable jury could find in favor of his claims against Edwards,

CONCLUSION

For all the foregoing reasons, the Court should grant Defendant, Bradley J. Edwards, Esq., the right to assert a claim for punitive damages against Jeffrey Epstein for his intentional abuse of process for the illegitimate purpose of attempting to deter Bradley Edwards's efforts to advance the interests of his clients in holding Epstein fully responsible for his serial exploitation and sexual abuse of minors.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 18th, 2011, a copy of the foregoing has been served via U.S. Mail and email transmittal to all those on the attached service list.

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* All referenced materials have previously been filed with the court and delivered in support of Edwards's Motion for Final Summary Judgment.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CIV-80893-MARRA/JOHNSON

JANE DOE,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

DEFENDANT EPSTEIN'S MOTION FOR SETTLEMENT CONFERENCE, OR IN THE ALTERNATIVE, MOTION TO DIRECT PARTIES' BACK TO MEDIATION

Defendant, JEFFREY EPSTEIN, by and through his undersigned attorneys, pursuant to the Federal Rules of Civil Procedure and the Local Rules for the Southern District of Florida, moves this Court for an order requiring the parties to attend a Settlement Conference before Magistrate Judge Linnea R. Johnson, or in the alternative, for an Order directing the parties to reconvene at a second mediation on or before July 1, 2010, and as grounds set forth would state:

1. The above-styled matter is currently scheduled on the Court's trial docket beginning July 19, 2010. (D.E. #119, Order Re-Setting Trial Date and Pretrial Deadlines). The Court's Mandatory Pretrial Stipulation and Motions in Limine deadlines are set for July 1, 2010. In this regard, if the parties could reach an agreement at a settlement conference or a mediation before these pre-trial deadlines, it would result in substantial conservation of judicial resources and preparation time.

2. The parties attended mediation on April 5, 2010, at Matrix Mediation, LLC, with Rodney Romano serving as mediator, but were unable to reach an agreement. (See D.E. #139).

EXHIBIT A

3. Since the April 5, 2010 mediation, additional discovery has been completed and exchanged, including each parties' psychological (Plaintiff) and psychiatric (Defendant) expert depositions. As well, Defendant filed his Motion for Summary Judgment and Motion for Bifurcation. Both parties have exchanged witness and exhibit lists. Each party will be filing extensive Motions in Limine. Plaintiff's Trial Witness List has identified over 170 potential witnesses, and further, Plaintiff identifies over 140 trial exhibits, including composite exhibits that are hundreds of pages in length. It is conceivable this case could last 12- 20 trial days.

4. Additionally, since the parties attended mediation on April 5, 2010, Defendant has resolved all pending lawsuits, including Plaintiff, C.L. (Case No.: 10-80447) and JANE DOES Nos. 2-8 (Case Nos.: 08-80119, 08-80232, 08-08380, 08-80381, 08-80994, 08-80993, 08-80802), C.M.A. (Case No.08-80811), Jane Does Nos. 101, 102 and 103 (Case Nos. 09-80591, 09-80656, 10-80309), another Jane Doe (Case No. 08-80804), Jane Doe II (Case No. 09-80469), as well as other non-filed claims. Furthermore, Defendant has also resolved three state court claims. The only cases not resolved are this case and two (2) cases in state court (all three Plaintiffs are represented by Plaintiff's counsel, Brad Edwards, Esq. and his firm). [1]

5. Plaintiffs in other filed cases were represented by various law firms as the court is aware.

6. With the additional discovery completed to date and with the motions, trial preparation and judicial rulings necessary to try this case, all yet to be done, Defendant

[1] There is also a case styled L.M. v. Jeffrey Epstein, CASE NO.: 09-CIV-81092 – MARRA/JOHNSON, which was never served on the Defendant. Defendant has filed a Motion to Dismiss.

believes that a settlement conference or mediation is in the best interest of both parties to attempt resolution. There is no prejudice to either party.

7. Therefore, Defendant requests the Court issue an order directing the parties to attend a Settlement Conference before Magistrate Judge Johnson or that the Court direct the parties to attend a further mediation before July 1, 2010. Both Magistrate Judge Johnson and Rodney Romano (as the mediator in this case) are very familiar with the particular case and other claims that were asserted.

8. Defendant's Counsel has spoken with the secretary for the mediator, Rodney Romano, and she believes that he would be able to schedule a 2-3 hour mediation on short notice this week.

WHEREFORE, Defendant, JEFFREY EPSTEIN respectfully requests the Court to enter an Order directing the parties to attend a Settlement Conference before Magistrate Judge Linnea R. Johnson, or in the alternative, a mediation on or before July 1, 2010.

Rule 7.1 Certification

I hereby certify that counsel has communicated by telephone with Plaintiff's counsel in a good faith effort to resolve the issues set forth herein. Plaintiff's position is that the parties have already complied with the mediation requirements.

By: s/Robert D. Critton, Jr.
Robert D. Critton, Jr.
Michael J. Pike
Attorneys for Defendant Epstein

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following service list in the manner specified via transmission of Notices of Electronic Filing generated by CM/ECF on this 28th day of June, 2010:

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950 So.2d 380, 32 Fla. L. Weekly S64
(Cite as: 950 So.2d 380)

Supreme Court of Florida.
ECHEVARRIA, McCALLA, RAYMER, BARRETT & FRAPPIER, etc., et al., Petitioners,
v.
Bradley COLE, etc., Respondent.

No. SC05-564.
Feb. 1, 2007.

Background: Mortgagors who defaulted on their loans sued law firm retained by lenders to handle foreclosure proceedings, alleging violations of Consumer Collection Practices Act and the Deceptive and Unfair Trade Practices Act, and sought class certification. The Circuit Court, Leon County, L. Ralph Smith, J., certified the class. Parties appealed. The District Court of Appeal, 896 So.2d 773, affirmed in part, reversed in part, and remanded with instructions. Law firm sought review on ground of direct conflict.

Holding: The Supreme Court, Anstead, J., held that litigation privilege applies in all causes of action, whether for common-law torts or statutory violations.

Decision of District Court of Appeal quashed.

Pariente, J., concurred and filed opinion in which Cantero, J., concurred.

Wells, J., concurred in part, dissented in part, and filed opinion.

Bell, J., concurred in part and dissented in part.

West Headnotes

Action 13 ⚿12

13 Action
13I Grounds and Conditions Precedent
13k12 k. Defenses in General. Most Cited Cases

Torts 379 ⚿122

379 Torts
3791 In General
379k120 Defenses and Mitigating Circumstances
379k122 k. Litigation Privilege; Witness Immunity. Most Cited Cases

Litigation privilege applies in all causes of action, whether for common-law torts or statutory violations.

***380** John Beranek of Ausley and McMullen, Tallahassee, FL, Michael J. McGirney and Dale T. Golden of Marshall, Dennehey, Warner, Coleman and Goggin, Tampa, FL, for Petitioners.

M. Stephen Turner, Kelly Overstreet Johnson, David K. Miller and Jennifer Winegardner of Broad and Cassel, Tallahassee, FL, Thomas J. Guilday, Claude W. Walker and Shawn M. Heath of Huey, Guilday, Tucker, Schwartz and Williams, Tallahassee, FL, for Respondent.

ANSTEAD, J.

Echevarria, McCalla, Raymer, Barrett & Frappier, et al., seek review of the decision of the First District Court of Appeal in *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 896 So.2d 773 (Fla. 1st DCA 2004), on the ground that it expressly and directly conflicts with a decision of the Third District Court of Appeal, *Boca Investors Group, Inc. v. Potash*, 835 So.2d 273 (Fla. 3d DCA 2002), on a question of law. We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const. We limit our review to the question of law upon which jurisdiction was granted, and hold that the litigation privilege applies in all causes of ***381** action, statutory as well as common law. Accordingly, we quash the contrary decision of the First District and remand for further proceedings consistent with our holding.

Facts and Procedural History

This case was presented to the district court un-

der the limited circumstances of an interlocutory review of a trial court's order certifying the case for class action status. The First District explained the underlying facts giving rise to this action in its decision below:

> The plaintiffs are property owners who defaulted on their mortgages with their respective lenders. The Echevarria firm, one of the defendants below, was the primary firm retained by the lenders to handle the foreclosure proceedings against the plaintiffs. Echevarria sent reinstatement letters to the plaintiffs at the outset of the foreclosure proceedings, stating that the plaintiffs were in default on their respective mortgages and faced foreclosure unless they reinstated the mortgages by bringing their payments up to date. The letters further claimed that the plaintiffs owed certain costs incurred by the lenders in the course of the proceedings. Kim Nabors and Otis Pye, the original plaintiffs in this action, both had defaulted on their respective mortgages and received reinstatement letters from Echevarria. Neither reinstated their mortgage, and their properties were ultimately foreclosed.
>
> Nabors and Pye filed suit against Echevarria and the other named defendants, alleging that the firm had violated the Florida Consumer Collection Practices Act and the Florida Unfair and Deceptive Trade Practices Act. The essence of the complaint was that the defendants acted unlawfully by asserting a claim for a debt that was in excess of the actual costs their clients incurred during the foreclosure proceedings. Specifically, the plaintiffs argued that the reinstatement letter claimed costs of $325 for title search and examination and various other charges for service of process, when the only cost incurred by the firm was $55 for the title search.
>
> In response, the defendants asserted that the $325 charge was legitimate, as it included $150 for a title search and $175 for a title examination performed by their in-house staff. They further argued that they had not violated either of the statutes referred to in the complaint because their contracts with their lender clients authorized them to charge these amounts.
>
> ....
>
> Cole had previously received a reinstatement letter from Echevarria regarding the potential foreclosure of his mortgage, and as a result, paid the disputed amounts to reinstate his mortgage. On November 13, 2000, Cole, Nabors and Pye moved for leave to file a third amended complaint to assert Cole's statutory claims.
>
> ....
>
> Later, Cole, as the putative class representative, filed a motion to certify a class that consisted of "all persons from whom the defendants have filed foreclosure actions and claimed, attempted or threatened to collect costs in the collection of a 'consumer debt,' as that term is defined in 559.55(1), Florida Statutes, which were in excess of the amount allowed or authorized by law" for the four years prior to the filing of the initial complaint through the present. He subsequently filed an amended motion for class certification seeking to define the class as all persons in Florida to whom the defendants sent reinstatement letters or against whom they had filed a ***382** foreclosure action as counsel for a lender or mortgagee for the period of July 6, 1994, through June 30, 2001.
>
> The trial court granted the plaintiff's amended motion to certify the class action, and concluded that Cole was an appropriate class representative under rule 1.220, Florida Rules of Civil Procedure. In the certification order, the trial court defined the class as all persons in Florida to whom the Echevarria firms sent reinstatement letters between July 6, 1994, and June 30, 2001, seeking to collect amounts for (1) a title search or examination exceeding the firms' actual out-of-pocket expenses incurred to a third-party vendor; (2) service of process; and (3) fees or

costs that had not been incurred at the time the firms sent the reinstatement letter. However, the court limited the class to those persons whose default or failure to timely pay their mortgage obligations did not ultimately result in a foreclosure judgment or sale.

Echevarria, 896 So.2d at 774-75 (footnotes omitted). In appealing the trial court's decision to the First District, Cole argued that the class definition was too narrow because it excluded property owners who received a reinstatement letter but who then failed to reinstate their mortgage, leading to a foreclosure judgment or sale of their properties. *Id.* at 775-76.

Cole asserted that an action under the Consumer Collection Practices Act does not depend on whether the underlying debt is valid, owed, paid, or reduced to judgment since the right to bring a suit under the Act arises from the debt collector's conduct in collecting the debt and whether the conduct involves unscrupulous debt collection practices. *Id.* at 776. The trial judge seemingly agreed with Cole that the class should include everyone who received a reinstatement letter; the class certification order stated both that it was irrelevant whether the prospective class member reinstated the mortgage and that the mere transmission of the letter impacted all class members similarly. *Id.* Nevertheless, despite its explicit finding that "the violation of the Consumer Collection Practices Act is triggered by the transmission of the reinstatement letter seeking illegitimate costs, not by the ultimate outcome of any foreclosure proceedings," the trial court limited the class to include only those whose failure to pay their mortgage obligations did not result in a foreclosure judgment or sale. *Id.*

In attempting to reconcile the discussions on the record from the trial court's hearing with the trial court's statements in the final order regarding the significance of an actual foreclosure judgment, the First District concluded that the trial court's inclusion of this qualifier in the class definition was a misstatement. *Id.* The First District further held that, if it was not a misstatement, the trial court's decision to limit the class size in such a manner was plain error under both the trade practices and the collection statutes because there was no legal justification for such a limitation. *Id.*

Echevarria asserted that the trial court limited the class in an attempt to avoid the implications of a possible litigation privilege bar to those claimants involved in judicial mortgage foreclosure actions. *Id.* The First District rejected that argument, finding that the litigation privilege did not apply to the instant case because the suit was initiated as a statutory cause of action. *Id.* at 777. The court below reasoned that the litigation privilege has traditionally been reserved only for common law tort actions such as libel, defamation and fraud. *Id.* at 776-77. Then, invoking a separation of powers analysis, the court stated that "a judicially created policy such as the judicial***383** immunity rule must not be used to limit the application of a legislatively created, statutory cause of action." *Id.* at 777. Thus, the First District concluded that "the judicially created judicial immunity rule cannot be applied as a bar to the statutory causes of action in this case." *Id.*

Litigation Privilege

Echevarria now appeals to this Court, citing conflict with the Third District's decision in *Boca Investors* as to the application of the litigation privilege in proceedings involving statutory causes of action. *Boca Investors* initially involved a suit for tortious interference with a business relationship; however, the plaintiffs later moved to amend their original complaint to add a "statutory anti-trust claim." 835 So.2d at 274-75. The trial court dismissed the case and denied the motion to amend, citing this Court's decision in *Levin, Middlebrooks, Mabie, Thomas, Mayes Mitchell, P.A. v. United States Fire Insurance Co.,* 639 So.2d 606 (Fla.1994), for the proposition that absolute immunity is properly afforded to any act occurring during the course of a judicial proceeding. *Boca Investors,* 835 So.2d at 274. The Third District sub-

sequently upheld the trial court's dismissal, including the rejection of the amendment, finding "such a [statutory] claim is also based on statements covered by the litigation privilege. *See Burton [v. Salzberg,* 725 So.2d 450, 451 (Fla. 3d DCA 1999)]." *Boca Investors,* 835 So.2d at 275. Thus, in a case where a statutory antitrust claim was asserted, the Third District explicitly acknowledged that the litigation privilege could be invoked. Because the First District's decision below, holding that the litigation privilege cannot be invoked when a statutory claim is being litigated, is in direct and express conflict with the Third District's holding in *Boca Investors,* we accepted jurisdiction and now resolve the conflict. [FN1]

> FN1. The parties have raised numerous other issues both in the briefs and at oral argument which go well beyond the conflict issue, including, for example, an issue as to the point at which the litigation privilege may first be asserted. As we emphasized in our jurisdictional order, we granted jurisdiction in this case to consider only the conflicting holdings on the application of the litigation privilege.

Analysis

In *Myers v. Hodges,* 53 Fla. 197, 44 So. 357 (1907), this Court recognized the principle of the litigation privilege in Florida, essentially providing legal immunity for actions that occur in judicial proceedings. In that case, involving a libel suit based on statements contained in a complaint, this Court established a qualified litigation privilege, requiring that the alleged defamatory statements be relevant to the judicial proceeding. *Id.* at 361-2. Under our holding, once this threshold showing was met, the statements were entitled to immunity. *Id.*

We most recently applied the litigation privilege in *Levin.* In that case, the Eleventh Circuit certified a question to this Court, asking whether Florida's litigation privilege protects the act of certifying to a trial court an intent to call opposing counsel as a witness at trial in order to obtain counsel's disqualification, and later failing to subpoena and call that person as a witness, from a claim of tortious interference with a business relationship. 639 So.2d at 607. Answering in the affirmative, we extended the litigation privilege to all torts, finding 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 ... so long as the act has some relation to the proceeding." *Id.* at 608. ***384** We reasoned that the justification behind immunizing defamatory statements applies equally to "other misconduct occurring during the course of a judicial proceeding." *Id.* We concluded the opinion by noting that adequate remedies still exist for misconduct in a judicial proceeding, most notably the trial court's contempt power, as well as the disciplinary measures of the state court system and bar association. *Id.* at 608-09. Notably, our holding was without qualification as to the nature of the judicial proceedings, whether based on common law, statutory authority, or otherwise. [FN2]

> FN2. In addition to numerous traditional defamation claims, courts in Florida have applied *Levin* to uphold the use of the privilege in such diverse actions as civil conspiracy and tortious conduct in interfering with custody and visitation rights. *See Van Horn v. McNabb,* 715 So.2d 380, 381 (Fla. 4th DCA 1998) ("It is clear, from the face of the complaint, that Van Horn enjoys absolute immunity from any alleged defamation or other tortious act done in the course of the prior judicial proceeding."); *Rushing v. Bosse,* 652 So.2d 869, 875-76 (Fla. 4th DCA 1995) (affirming a dismissal for a count of civil conspiracy, citing to *Levin* and holding that "absolute immunity would be afforded to any conduct occurring during the course of the adoption proceeding, regardless of whether the conduct involved a defamatory statement or other tortious behavior, including a violation of rule 2.060(d) because signing the petition for

adoption ... has some relation to the adoption proceeding").

Levin plainly establishes that "[t]he rationale behind the immunity afforded to defamatory statements is equally applicable to *other misconduct* occurring during the course of a judicial proceeding." 639 So.2d at 608 (emphasis supplied). Importantly, the policy reasons for adopting a rule of immunity for actions taken in judicial proceedings focus on the judicial nature of the proceedings, not whether they were initiated under common law or statute. It is the perceived necessity for candid and unrestrained communications in those proceedings, free of the threat of legal actions predicated upon those communications, that is at the heart of the rule. The nature of the underlying dispute simply does not matter. Hence, the rationale upon which we relied in extending the litigation immunity privilege to all tortious causes of action likewise applies to a statutory cause of action: "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." *Id.*

We see no reason why this rationale would be limited by whether the misconduct constitutes a common-law tort or a statutory violation. The litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin. "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." *Id.*

Conclusion

Given the precedent established by *Levin,* we hold that the litigation privilege applies in all causes of action, whether for common-law torts or statutory violations. Accordingly, we approve the decision in *Boca Investors,* quash the decision of the First District herein, and remand for further proceedings consistent herewith.

It is so ordered.

LEWIS, C.J., and PARIENTE, QUINCE, and CANTERO, JJ., concur.

***385** PARIENTE, J., concurs with an opinion, in which CANTERO, J., concurs.

WELLS, J., concurs in part and dissents in part with an opinion.

BELL, J., concurs in part and dissents in part.

PARIENTE, J., concurring.

I agree with the majority's resolution of the conflict issue. I also agree with the majority's decision not to address the other issues raised by the parties, including whether the litigation privilege covers the reinstatement letters at issue in this case. However, as Justice Wells notes, this is a threshold issue that requires a determination of whether the letters were sent "in the due course of the judicial proceedings or as necessarily preliminary thereto." Concurring in part, dissenting in part opinion at 385 (quoting *Ange v. State,* 98 Fla. 538, 123 So. 916, 917 (1929)). Although the First District stated that "Echevarria sent reinstatement letters to the plaintiffs at the outset of the foreclosure proceedings," *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole,* 896 So.2d 773, 774 (Fla. 1st DCA 2004), the First District did not address whether the letters were, in fact, sent "in the due course of" or as "necessarily preliminary" to the foreclosure action. Rather, the First District ruled that the litigation privilege did not apply because the lawsuit was initiated as a statutory cause of action. *See id.* at 777. Now that this Court has held that the privilege is applicable in litigation based on both common law and statutory causes of action, the First District should consider on remand whether the privilege covers the reinstatement letters sent in this case.

CANTERO, J., concurs.

WELLS, J., concurring in part and dissenting in part.

The majority opinion resolves the conflict regarding whether Florida's litigation privilege may be applied as a bar to statutory causes of action by

approving the Third District Court of Appeal's decision in *Boca Investors Group, Inc. v. Potash,* 835 So.2d 273 (Fla. 3d DCA 2002), and quashing the First District Court of Appeal's decision in *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole,* 896 So.2d 773 (Fla. 1st DCA 2004). However, the majority does not answer the more fundamental question of whether the litigation privilege extends to cover the reinstatement letters at issue in *Echevarria.* If the litigation privilege does not cover these letters, it is immaterial whether the plaintiffs' cause of action is derived from statute or common law. I write separately to clarify that in my view, Florida's litigation privilege does not extend to the reinstatement letters. It would be a waste of judicial resources to not answer this question while *Echevarria* is before the Court.

In *Ange v. State,* 98 Fla. 538, 123 So. 916 (1929), the Court explained that the litigation privilege "extends to the protection of the judge, parties, counsel, and witnesses, and 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." *Ange,* 123 So. at 917. [FN3] In ***386***Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., v. United States Fire Insurance Co.,* 639 So.2d 606, 608 (Fla.1994), the Court reiterated that the litigation privilege "must be afforded to any act occurring during the course of a judicial proceeding."

> FN3. In *Fridovich v. Fridovich,* 598 So.2d 65, 69 (Fla.1992), the Court receded in part from *Ange,* explaining:
>
> > We thus hold, as a majority of the other states have held in this context, that defamatory statements voluntarily made by private individuals to the police or the state's attorney prior to the institution of criminal charges are presumptively qualifiedly privileged. We therefore recede from *Ange* and *Robertson [v. Industrial Insurance Company,* 75 So.2d 198 (Fla.1954),] to the extent they are inconsistent with our ruling today.
>
> (Footnotes omitted.) However, importantly, the Court reaffirmed *Ange's* crucial holding that the litigation privilege arises upon the doing of any act necessarily preliminary to a judicial proceeding. *Id.* at 66.

In the instant case, the majority rightfully declines to address at what point "a judicial proceeding" begins for purposes of the litigation privilege because it is unnecessary to do so given the facts of this case. Majority op. at 383 n. 1. The reinstatement letters sent by Echevarria were not a required condition precedent to foreclosure proceedings and were not related to the prosecution or defense of a foreclosure suit. Thus, the reinstatement letters are not covered by the litigation privilege.

Florida courts have previously addressed what statements are "necessarily preliminary" to judicial proceedings. The Fourth District Court of Appeal helpfully explained that publications necessarily preliminary to judicial proceedings include presuit communications that are required by statute or by contract as a condition precedent to suit. *Pledger v. Burnup & Sims, Inc.,* 432 So.2d 1323, 1326 (Fla. 4th DCA 1983). More recently, this Court considered whether voluntary statements made prior to the instigation of criminal charges should be protected by the litigation privilege. *See Fridovich,* 598 So.2d at 66. The Court held that while statements compelled by investigatory subpoena are absolutely privileged, voluntary statements to police are only qualifiedly privileged. The Court also noted that voluntary statements to private individuals are not privileged at all. *Fridovich,* 598 So.2d at 69 & nn. 7-8.

The reinstatement letters at issue were not a statutory or contractual prerequisite to foreclosure. As noted in *Pledger,* Florida law requires a plaintiff to send notice before filing a complaint in certain types of actions. For example, section 766.106, Florida Statutes (2006), requires a medical malprac-

tice claimant to notify each prospective defendant by mail prior to filing a complaint. Medical malpractice litigation arguably "begins" when this notification is sent.

Here, no statute or contract provision required Echevarria to send borrowers reinstatement information in order to proceed with foreclosure. The First District stated:

> Echevarria sent reinstatement letters to the plaintiffs at the outset of the foreclosure proceedings, stating that the plaintiffs were in default on their respective mortgages and faced foreclosure unless they reinstated the mortgages by bringing their payments up to date.

Echevarria, 896 So.2d at 774. This statement should not be read to mean that the reinstatement letters were sent "in the due course of" foreclosure litigation or "necessarily preliminary" to it. Such a reading is not supported by the record. In actuality, the reinstatement letters did not refer to foreclosure proceedings.[FN4] Mr. Echevarria testified that reinstatement letters were not sent to every borrower facing foreclosure. Rather, the letters containing the allegedly unlawful claim were sent in response to borrower requests for information regarding the possibility of reinstating the mortgage.

> FN4. Echevarria's letter to class representative Cole never uses the word "foreclosure," except that it is signed by "Haelee Holjes Foreclosure Paralegal."

***387** In terms we used in *Ange,* the reinstatement letters were not statements "required or permitted by law in the due course of the judicial proceedings," nor were the letters sent because they were legally necessary in order to prosecute foreclosures. The letters were relevant only to reinstatement of the mortgages. The letters did not become part of a judicial proceeding simply because they were sent by a law firm. If the letters contained statements which were in violation of the law, it should make no difference whether the letters were sent by the bank or the bank's lawyers. The litigation privilege as this Court has defined it would not insulate either the bank or the bank's lawyers from liability for the unlawful statements.

The policy reasoning underlying the litigation privilege indicates that the privilege was not intended to preclude actions based on any misrepresentations contained in these reinstatement letters. In *Levin,* the Court explained that Florida's litigation privilege "resulted from the balancing of two competing interests: the right of an individual to enjoy a reputation unimpaired by defamatory attacks versus the right of the public interest to a free and full disclosure of facts in the conduct of judicial proceedings." *Levin,* 639 So.2d at 608. The Court held that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding because:

> 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.

Id. The Court designed the privilege to ensure litigants' freedom of advocacy without leaving victims of tortious conduct without remedy by restricting the litigation privilege to acts occurring during the course of judicial proceedings. Victims of torts committed during judicial proceedings are protected by the trial judge's contempt power and the Court's authority to discipline members of The Florida Bar. *Id.*

But when communications are separate from pending litigation and are not necessary in order to pursue future litigation, tort victims do not have the benefit of these judicial safeguards. Therefore, the litigation privilege should not be structured so as to deprive those who are intended to have the protection of law in respect to the communications from having that protection. Recipients of misleading or fraudulent reinstatement letters must be able to en-

force Florida's Consumer Collection Practices Act (FCCPA) and Deceptive and Unfair Trade Practices Act (FDUTPA), the statutory bases of the causes of action pleaded in *Echevarria,* for relief. To not allow such enforcement would be an unintended and unstated consequence of the litigation privilege.

In short, the reinstatement letters currently at issue were nonadversarial communications between private individuals. As noted above, this Court has emphasized that the litigation privilege does not apply to voluntary presuit statements made by private individuals to private individuals. *See Fridovich,* 598 So.2d at 69 n. 8. Thus, the litigation privilege does not bar a civil suit based on these letters, regardless of whether that suit is statutory or common law in nature.

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