FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRADLEY J. EDWARDS,

Appellant,

v.

JEFFREY EPSTEIN,

Appellee.
_____/

CASE NO.: 4D14-2282

L.T. Case No.: 502009CA040800

ANSWER BRIEF OF APPELLEE JEFFREY EPSTEIN

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PRELIMINARY STATEMENT

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

STATEMENT REGARDING ORAL ARGUMENT

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

STANDARD OF REVIEW

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

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

STATEMENT OF THE CASE AND FACTS

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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