

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

Appellate Case No. 4D18-0787
LT Case No. 502009CA040800XXXXMB AG

JEFFREY EPSTEIN,

Petitioner/Plaintiff,

v.

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

Respondents/Defendants.¹

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

On Review of a Non-Final Order of the Circuit Court of the
Fifteenth Judicial Circuit in and for Palm Beach County, Florida

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¹As set forth in Epstein's Petition, non-parties [REDACTED], E.W. and Jane Doe have sought to intervene below on a limited and unrelated issue. As such, they are not parties in this certiorari proceeding, and Edwards has improperly captioned them as such on his Response.

INTRODUCTION

Disappointingly, Bradley Edwards (“Edwards”) has used his Response to Jeffrey Epstein’s (“Epstein”) meritorious and well-grounded Petition as yet another vehicle for false and misleading ad hominem attacks against Epstein. Edwards’ inaccurate and misleading factual and procedural recitation is typical of the smoke-and-mirrors strategy he steadfastly has adhered to throughout the course of this litigation to justify a malicious prosecution counterclaim against Epstein for which Edwards has no factual or legal support. In fact, Edwards’ counterclaim is thoroughly disproved by direct documentary evidence of Edwards’ own misconduct and credibility that Epstein is currently asking the trial court to review for presentation to the jury when this case is tried.² Edwards’ repeated efforts to

²Just one of numerous examples of Edwards’ transparent strategy to misdirect this Court is his touting of his alleged “10 years long pro bono effort to prosecute [an unrelated] federal action in which the only relief sought is to set aside Epstein’s secretly negotiated plea deal so that Epstein’s victims can have a voice in the disposition of federal criminal charges against him.” (Response, at pp. 1-2). The action to which Edwards refers is a federal action filed by Edwards on behalf of two clients against the federal government under the Crime Victim’s Rights Act (the “CVRA Action”). Edwards well knows that by the time Epstein commenced his claim against Edwards in December 2009, Edwards was not pursuing his efforts in the CVRA Action. Specifically, in August 2008, Edwards informed the federal court that, “Because of the legal consequences of invalidating the current agreement, it is likely not in my clients’ best interest to ask for the relief that we initially asked for.” (8/4/08 Tr. 4-5.) Edwards reaffirmed this position in filing his three clients’ complaints in August and September 2008 when he expressly invoked the provisions of that same non-prosecution agreement to support Edwards’ false allegations that Epstein was estopped by that agreement to deny liability to his three clients. Edwards’ clients settled their claims with Epstein in July 2010. Edwards took no further steps in the

dredge up and sensationalize Epstein's criminal past³—which has not one iota of relevance to the issues in this appeal—should not deter this Court from finding that the trial court's severance of Edwards' counterclaim was a clear departure from the essential requirements of law and will cause irreparable injury.

The only two relevant issues in this consolidated appeal are the two that Edwards seeks to obfuscate with his vitriolic narrative about Mr. Epstein's past: (1) that this case was not at issue when Edwards noticed it, and the trial court improperly set it for trial (which is the subject of the consolidated mandamus proceeding that has been separately briefed); and (2) that Edwards' malicious prosecution counterclaim against Epstein is inextricably and undisputedly factually intertwined with, and cannot be severed from, Epstein's damages claim against Edwards' former law partner, convicted Ponzi schemer Scott Rothstein, which is the only proper subject for briefing on this certiorari petition.

As is undeniably true about the law on the Rule 1.440 issue, the law on the severance issue is clear and unassailable. Ordering the bifurcation of factually inextricably interwoven claims—like Epstein's claim and Edwards' counterclaim in this case—warrants certiorari relief. *See, e.g., Maris Distrib. Co.*, 710 So. 2d at

CVRA Action for *almost two years*, and on September 8, 2010, the CVRA court closed the case for inactivity. While Edwards informed the CVRA court in October 27, 2010, that the case should *not* be closed, it was not until March 2011 that his clients reinitiated efforts to invalidate Epstein's non-prosecution agreement by moving for summary judgment.

³See Response at pp. 1-3, 5.

1024 (quashing order severing breach of contract cause of action from other counts which arose in the context of the contract, as **facts** underlying all counts were interrelated); *accord Fortin*, 178 So. 3d at 439.⁴

REPLY STATEMENT OF THE CASE AND FACTS

Edwards Did Not Wait for a Favorable Disposition of Epstein's Claims Against Him Before Filing His Malicious Prosecution Counterclaim

Epstein's claim against Rothstein (originally filed as a claim against both Rothstein and Edwards) in connection with the use of Epstein case materials, which were improperly utilized to lure investors into the Rothstein Ponzi scheme is clearly and irrefutably related to Edwards' counterclaim against Epstein for filing that original claim. Yet, to mislead this Court into believing the original claim and resulting counterclaim are somehow unrelated, Edwards *again* misrepresents the timing of his first malicious prosecution allegations and counterclaim against Epstein.⁵ Edwards continues to inaccurately assert that he alleged a count for malicious prosecution only *after* Epstein had dismissed his claim against Edwards in this lawsuit. In his Response, after noting Epstein's dismissal, Edwards states: "Thus, [Epstein's] only remaining claim is his conspiracy to commit abuse of process claim against Rothstein. Edwards *then* amended his counterclaim, which

⁴Short cites will be used for case law cited in the Petition.

⁵Edwards made the same misrepresentation—that the claim and counterclaim are separate and unrelated—in his mandamus response.

included a malicious prosecution claim against Epstein.” (Response, at p. 5) (emphasis added).

The procedural record is clear. Just 17 days after the suit commenced, Edwards filed his first counterclaim against Epstein for abuse of process. (**App. 2.**) The same factual allegations of that abuse of process counterclaim are repeated, nearly word for word, in the second cause of action for malicious prosecution which Edwards added to his counterclaim by an amendment, filed on October 4, 2011. (**Supp. App. 21.**) Epstein did not dismiss his claim against Edwards until August 16, 2012—nearly a year after Edwards had already filed his malicious prosecution counterclaim. (**App. 9.**) Edwards filed his first malicious prosecution counterclaim based on the alleged abandonment of separate causes of action asserted in Epstein’s original complaint, and then Edwards subsequently amended his malicious prosecution counterclaim only to add an allegation relating to Epstein’s dismissal of Edwards without prejudice. Edwards’ assertion that he waited for Epstein to dismiss his claim against Edwards before Edwards filed his malicious prosecution counterclaim against Epstein is not true, plain and simple. No matter what he now says to avoid this pivotal record fact, Edwards chose to file his counterclaim for malicious prosecution in the same action as Epstein’s claim against Edwards and Rothstein. Edwards could have filed a separate lawsuit after Epstein’s claim against him was dismissed, but he did not do so, choosing to take

advantage of the obvious efficiencies and perceived strategic advantages of pursuing discovery and motion practice in the same litigation over competing claims based on obviously interrelated facts.

The fact that Epstein ultimately dismissed his claim against Edwards without prejudice does not suddenly make Edwards' inextricably intertwined counterclaim factually unrelated to the claim-in-chief. Though Epstein chose at that time to defer recovery against Edwards by dismissing Edwards from his claim without prejudice, the basic facts upon which Epstein sought recovery against both Edwards and Rothstein did not change once Epstein limited his recovery efforts to Rothstein. In fact, Edwards is the critical link between the Ponzi scheme and the damages Epstein sought to recover as a result of the Ponzi scheme, whether they are recovered from Edwards or Rothstein.

It is Edwards' abusive litigation (i.e., deposition notices for President Clinton and now President Trump) that generated materials for Rothstein to use to defraud investors in the Ponzi scheme. It was Epstein's costs in the defense of that abusive litigation which gave rise to Epstein's damages in this action. Whether Epstein seeks to recover those costs from Rothstein alone or from both Rothstein and Edwards, Edwards' role in conducting that litigation is pivotal and will make the difference in determining whether Epstein has suffered any damages from the Ponzi scheme that are recoverable from Rothstein. Thus, Epstein's claim against

Rothstein for damages resulting from the use of Epstein's cases in the Ponzi scheme and Edwards' counterclaim against Epstein based in large part on Edwards' assertion that that litigation he conducted was not abusive and was not conducted to further the Ponzi scheme could not be more interrelated.

Edwards Cannot Escape the Binding Pre-Trial Stipulation in Which He Contracted that His Counterclaim Against Epstein Would Be tried With (and following) Epstein's Damages Claim Against Rothstein

Nor can Edwards claim to have misunderstood that Epstein's claim and counterclaim would be tried together in the same action and in that order when his counsel signed a binding and unambiguous pre-trial stipulation just three months ago on December 22, 2017, in which Edwards expressly and clearly agreed to **one** trial on the claim and counterclaim: **Issue 1: "Case Against Rothstein"; Issue 2: "Malicious Prosecution Counterclaim"**. (App. 13 at C. 1.) Apparently referring to his disagreement with the stipulated *language* of Issue 1⁶ (i.e., the framing of the issue) Edwards claims he recognized in the stipulation the possibility of prejudice to him or confusion of the jury resulting from the cases being tried together. (Response, pp. 7, 23). If that were truly the case, then Edwards' counsel should not

⁶ **Case Against Rothstein**. What, if any, damages were sustained by Epstein and proximately caused by Rothstein." (*Edwards does not agree with this language* for the reason that *the issue as stated* fails to tie causation to Rothstein's operation of the Ponzi scheme. It is Edwards' position that *failure to limit the issue in this way* as to Rothstein has the potential of confusing the jury in determining whether Epstein had any probable cause to claim damages against Edwards arising out of the same circumstances.) (App. 13 at C. 1) (italicized emphasis added).

have signed the binding pre-trial stipulation and should have requested severance at that time, which he chose not to do. Three months before trial would still have been extremely late in the proceedings to request bifurcation, but it would certainly have been better (and more credible) for Edwards to have raised the issue then before signing the pre-trial stipulation, rather than months after signing it and only *two weeks* before trial.

That Edwards requested bifurcation only at the eleventh hour, less than two weeks before trial, in a case that commenced more than eight years ago, is clear evidence that Edwards never believed that the risk of prejudice and confusion from a single trial was problematic. In that regard, it is important to note that Edwards' motion for separate trials was framed in the alternative, seeking either a single trial in which the previously agreed order of presentation of the claim and the counterclaim in that trial were reversed, so that the counterclaim would be tried first, or bifurcation. The alternative relief sought in this motion is itself a strong indication that despite all of his protestations regarding prejudice and confusion from trying the two claims in the same action, all Edwards really sought through his last-minute bifurcation gambit was a tactical advantage in presenting his counterclaim to the jury first.

ARGUMENT

I. EPSTEIN WILL SUFFER IRREPARABLE HARM IF FORCED TO PROCEED WITH SEPARATE TRIALS BECAUSE THE CLAIMS INVOLVE INTERRELATED FACTUAL ISSUES AND, THEREFORE, A RISK OF INCONSISTENT VERDICTS EXISTS.

“[A] **severance** under Florida Rule of Civil Procedure 1.270(b), while residing in the sound discretion of the trial court upon an appropriate showing, **should remain the exception.**” *Travelers Exp., Inc. v. Acosta*, 397 So. 2d 733, 737 (Fla. 3d DCA 1981) (emphasis added). *See also Estate of Carrillo v. Fed. Deposit Ins. Corp.*, No. 11-22668-CIV, 2012 WL 13013081, at *1 (█. Fla. Apr. 25, 2012) (“Bifurcation is the exception, not the rule, and the party seeking bifurcation shoulders the heavy burden of establishing that bifurcation is warranted.”) (citation omitted).

Edwards Cannot Dispute That His Counterclaim Against Epstein, and Epstein’s Claim Against Rothstein, Involve Interrelated Factual Issues

Edwards *agrees* with Epstein that “certiorari is an appropriate remedy **for orders severing claims that involve interrelated factual issues** because of the risk of inconsistent verdicts.”⁷ Yet, Edwards misrepresents to this Court that Judge

⁷ Response, at p. 16, citing *Martinique Condos., Inc.*, 230 So. 3d at 1270 (emphasis added). *See also Minty v. Meister Financialgroup, Inc.*, 97 So. 3d 926, 931 (Fla. 4th DCA 2012); *Kavouras v. Mario City Rest. Corp.*, 88 So. 3d 213, 214 (Fla. 3d DCA 2011); *Choi v. Auto-Owners Ins. Co.*, 224 So. 3d 882, 883 (Fla. 2d DCA 2017) (all stating “Certiorari is an appropriate remedy for orders severing or bifurcating claims which involve **interrelated factual issues** because severance risks inconsistent outcomes.”) (emphasis added).

Hafele concluded that the claim and counterclaim were not factually intertwined. (Response, p. 21). To the contrary, Judge Hafele acknowledged there was “factually . . . some overlap,” and that he was “not suggesting [otherwise].” (**App. 19**, p. 222.) And *no less than six times* did Judge Hafele state that Epstein’s claim was the genesis (i.e., the “origin,” “source,” or “root”) of Edwards’ counterclaim. (**App. 19** - Tr. 26:8-12, 26:18-23; 27:8-9; 38:24-39:3; 76:8-11; 77:1-3.)

But despite acknowledging that Epstein’s claim birthed Edwards’ counterclaim, the lower court improperly focused on the claim and counterclaim presenting different *legal* issues, and Edwards grabbed hold of that argument and ran with it.⁸

Edwards’ three-page soliloquy urging the Court to infer a concession by Epstein that his claim and Edwards’ counterclaim are “separate” and “distinct” based on Epstein’s proposed verdict forms and jury instructions (including a standard jury instruction applicable in every case where both claims and counterclaims are tried together in the same action) is sheer nonsense lacking any legal basis and must be disregarded in its entirety. (Response, pp. 17-19). If this were the test for whether bifurcation is appropriate, no claim and counterclaim could ever be tried together. Each such claim and counterclaim, alleging a separate

⁸ The trial court harped on the legal differences, stating: “From a purely *legal* standpoint, this separate action, there is nothing that I can think of that would necessitate these two matters to be tried together. . . But Edwards, on a totally separate *legal* theory” (**App. 19**, p. 224.)

cause of action, as it must, would be accompanied by jury instructions and verdict forms that would always invariably present “distinct” issues. The same is true for Epstein’s claim against Rothstein and Edwards’ counterclaim against Epstein.

The Risk of Inconsistent Verdicts Demonstrates Irreparable Harm

If Edwards’ counterclaim remains severed and is tried separately—despite having been joined at the hip with Epstein’s claim against Rothstein since 2009—the risk of inconsistent verdicts is real.

Instructive, is the Third District’s opinion in *Travelers Express Inc. v. Acosta*, 397 So. 2d 733 (1981), in which the court considered whether a plaintiff’s malicious prosecution claim should be heard together with the defendant’s claims for conversion, breach of trust and conspiracy to defraud. In reversing the trial court’s dismissal of the counterclaims so that all claims could be tried together to avoid potentially inconsistent verdicts, the appellate court observed:

A verdict for Myriam [Acosta] on her claim of malicious prosecution, whether tried separately or together, coupled with a verdict in favor of Travelers on its counterclaims, would produce repugnant, inconsistent verdicts. For example, a verdict for Myriam on her claim of malicious prosecution requires establishment of all elements of the tort, one of which is the absence of probable cause, while a verdict for Travelers on its counterclaims would necessarily establish the probable cause which was found to be absent in a verdict for Myriam on her malicious prosecution claim. . . .

There is no shorthand solution to avoid repugnant and inconsistent verdicts in the ever-increasing multiplicity of claims, cross-claims, and counterclaims. Our inquiry is limited only to pointing out the

potential problems so that, **where a problem becomes apparent, litigants and trial courts may fashion a solution to avoid needless trials and the attendant costs, delays, and expenditure of judicial effort.**

Id. at 738 (internal citations omitted).

Similarly, here, one jury could find that Epstein was damaged by Rothstein's conspiracy to use the cases Edwards was litigating against Epstein to support Rothstein's Ponzi scheme in that Epstein was forced to pay the costs to defend against abusive litigation conducted by Edwards to support Rothstein's Ponzi scheme. A second jury could find that Epstein had no probable cause to originally sue both Rothstein and his partner Edwards because Edwards' litigation practices challenged by Epstein were not abusive and Epstein had no damages. To tackle this potential problem head on, the claim and counterclaim should be tried together to avoid a needless *second* trial and the attendant costs, delays, and expenditure of judicial effort. *See id.*

II. THE ELEVENTH-HOUR SEVERANCE IS A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW.

Edwards Stipulated to a Consolidated Trial and Has Waived Bifurcation

Severance would be a departure from the essential requirements of law because Edwards stipulated to a consolidated trial. Moreover, Edwards specifically and unambiguously stipulated to the order in which the claim and counterclaim would be tried. Yet Edwards ignores the sanctity of the pre-trial

stipulation—that “powerful blueprint that fully enables a well-run and fair trial,” and “trump card upon which all parties to any litigation can virtually always rely.” *Palm Beach Polo Holdings, Inc.* 174 So. 3d at 1038, 1039.

Edwards argues he did not waive bifurcation via the pre-trial stipulation, because the stipulation left several “unanswered” issues to be decided, e.g., jury instructions and verdict forms. (Response, p. 24.) Bifurcation was simply not one of them. In this case, as in almost all others, issues will remain even on the doorstep of trial. Charge conferences to argue over jury instructions even happen at any time during a trial. Issues regarding admissibility of evidence do not empower Edwards to violate a binding stipulation on issues that have unequivocally been settled, including his binding unambiguous agreement to hold a single trial in which Epstein’s claim against Rothstein is presented first, followed by Edward’s counterclaim Epstein.

CONCLUSION

Two separate trials will cause irreparable harm to Epstein and likelihood of inconsistent verdicts is real. Furthermore, the trial court’s severance of Edwards’ counterclaim against Epstein from Epstein’s originating and **factually** intertwined claim against Rothstein is a clear departure from the essential requirements of the law. Bifurcation would cause a duplication of judicial resources because the claim and counterclaim are intertwined. Severing them would cause two trials to be had

when there should be one, with duplicative evidence and testimony from many of the same witnesses. Furthermore, Edwards waived bifurcation in the binding pre-trial stipulation, executed just three months ago, and his eleventh-hour claim of prejudice by a consolidated trial on both claims is just not credible.

Epstein, therefore, respectfully requests this Court to grant the petition and quash the severance order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition was furnished **via email** this __ day of March, 2018:

<p>Jack Scarola Karen E. Terry David P. Vitale, Jr. Searcy, Denny, Scarola, Barnhart & Shipley, [REDACTED]. 2139 Palm Beach Lakes Boulevard West Palm Beach, FL 33409 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] <i>Co-Counsel for Defendant/Counter-Plaintiff Bradley J. Edwards</i></p>	<p>Philip M. Burlington Nichole J. Segal Burlington & Rockenbach, [REDACTED]. Courthouse Commons, Suite 350 444 West Railroad Avenue West Palm Beach, FL 33401 [REDACTED] [REDACTED] [REDACTED] <i>Co-Counsel for Defendant/Counter-Plaintiff Bradley J. Edwards</i></p>
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CERTIFICATE OF TYPE SIZE & STYLE

I certify that the type, size, and style utilized in this Petition is 14-point Times New Roman.

/s/ _____
Kara Berard Rockenbach