IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

JEFFREY EPSTEIN,

Petitioner,

-vs- CASE NO. 4D18-0762

SCOTT ROTHSTEIN, individually, BRADLEY J. EDWARDS, individually, and [redacted]., [redacted]., and JANE DOE, Intervenors.[1]

Respondents

_____/

RESPONSE TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

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[1] Petitioner did not include [redacted]., [redacted]. or Jane Doe in the caption of the Petition, however, they have been granted leave to appear in the trial court as Intervenor.

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THE WRIT OF MANDAMUS

"Mandamus is a narrow, extraordinary writ used to coerce an official to perform a clear legal duty." *Campbell v. Wells Fargo Bank, N.A.*, 204 So.3d 476, 479 (Fla. 4th DCA 2016)(citing *Sica v. Singletary,* 714 So.2d 1111, 1112 (Fla. 2d DCA 1998)). "To state a cause of action for mandamus, a party must allege a clear legal right to performance of the act requested, an indisputable legal duty, and the lack of an adequate remedy at law." *Poole v. City of Port Orange*, 33 So.3d 739, 741 (Fla. 5th DCA 2010).

Additionally, mandamus "**is a discretionary writ that is awarded, not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles**." *Campbell,* 204 So.3d at 479 (quoting *Haft v. Adams,* 238 So.2d 843, 844 (Fla.1970))(emphasis added). "If the issuance of the writ will not promote substantial justice or would lend aid to the effectuation of a palpable injustice, the court may, in the exercise of its discretion, decline to grant the writ." *State ex rel. Robert L. Turchin, Inc. v. Herin*, 99 So.2d 578, 581 (Fla. 1957).

The trial court summarized the inequitable nature of Epstein's request to remove the case from the trial docket. The court first noted that the only reason the case was allegedly not at issue was *Epstein's* failure, over more than six years, to seek a default against Rothstein:

It would seem to me that you are essentially creating the error yourselves by not doing due diligence.

(App. 19, p.198).

The court later expressed the inequity in more concrete terms:

[I]t seems to me to be highly inequitable – and I understand your argument is legal in nature – but highly inequitable **to come before the court and suggest that by way of dilatory conduct on the part of the Epstein trial team in not securing the technicality that we are speaking about, and that is a default against an individual who will remain in prison for the rest of his life**. Who is, to my knowledge, based anecdotally, only based on anecdotal evidence, is penniless and has been disgorged of any assets that he has and that his family has, **that somehow because of this technicality we're caused to put this case back and not try the case after, again, an inordinate amount of time and expense**, which is in essence taxpayer money, of which this Court has been and continues to be a steward of those expenses and time.

Again, coupled with the fact that it was represented to this Court that there would be no further delays and that the case would be ready to try. That tells me and that represents to me, that counsel has done their due diligence.

Part of [Epstein's November 2017 Motion to Continue] said, "We have heard the Court loud and clear, now we" – Link and Rockenbach – "are on the case, with support from the Gunster firm, and we will not allow the same type of conduct that transpired earlier, which the Court was critical of, [to] happen again."

That pledge to this Court means something to this Court. **That means that the docket has been assiduously reviewed, and that everything else, short of gearing up for trial on the substantive issues that are before this forum, have been resolved, rectified, and that certainly we are not going to be reaching back seven years on a technicality to somehow thwart the efforts of the Court in trying to move forward on behalf of both sides to resolve a case that has drawn significant amount of public interest and that has been pending for**

> **… nine years is too simple**. Three thousand and thirteen days, as of today.

(App.19, pp.202-04)(emphasis added).

The factual predicate for the trial court's statement will be discussed further below. It will be clear to this Court that the trial court's conclusions were correct and justified based upon the facts of this case, and that the manifest inequities compel denial of the request for mandamus relief.

STATEMENT OF THE CASE AND FACTS

Background Facts

In 2008, billionaire Jeffrey Epstein plead guilty to a state felony charge involving the solicitation of prostitution and the procurement of minors to engage in prostitution and further agreed to be registered as a sex offender (App.13, p.133). Bradley Edwards ("Edwards") is a civil attorney who represented multiple victims of Epstein's serial abuse of children. Edwards filed three civil actions against Epstein in state court alleging sexual assault and battery (App.13, p.134). Edwards also filed a federal action on his client's behalf under the Federal Crime Victim's Rights Act challenging the extraordinary plea deal Epstein entered into with the federal government. *See Jane Doe No. 1, et al. v. United States*, 749 F.3d 999, 1002 (11th Cir. 2014).[2] Edwards has continued for 10 years to prosecute that action in which Epstein is an Intervenor.

[2] Epstein agreed to plead guilty to two state charges and serve 18 months in county jail in exchange for immunity from federal prosecution on felony charges arising out of the molestation of approximately 40 identified child victims as young as 13 years of age. (Res.App. 1, pp.4-17). Incredibly, the plea bargain also immunized all of Epstein's unnamed co-conspirators for all of their unidentified crimes. *Id.* Evidence implicates multiple high-profile associates of Epstein as beneficiaries of this immunity. *Id.*

Epstein Attempts to Intimidate His Victims by Filing Suit Against and Retaliates Against their Lawyer

On December 7, 2009, while Edwards was pursuing the cases noted above on behalf of his clients, Epstein filed the original Complaint here against Edwards, Scott Rothstein ("Rothstein"), and one of Edwards' clients, designated as "[redacted]." (App. 1). The gravamen of the Complaint was that after Edwards had filed those cases against Epstein, he had briefly joined the law firm of Rothstein, Rosenfeldt & Adler, P.A. ("RRA"), which subsequently imploded after Rothstein was charged with (and later pled guilty to), operating a Ponzi scheme (App.1). Rothstein's Ponzi scheme involved, *inter alia*, the assignment of rights to purported settlement agreements in civil actions, including a fabricated $200 million settlement of non-existent claims, brought against Epstein (App.1). Essentially, Epstein's Complaint claimed that Rothstein, Edwards and [redacted]. defrauded him and engaged in criminal conduct, as well as abuse of process, by grossly exaggerating the value of the three real claims against him (App.1). While reciting in detail the misconduct of Rothstein which had become public knowledge, Epstein's Complaint alleged that Edwards and [redacted]. were knowing participants in the Ponzi scheme (App.1). Epstein's Complaint did not deny his own extensive criminal culpability or claim that Epstein had any knowledge of the Ponzi scheme before its public disclosure.

Edwards Answered the Complaint, denying its material allegations (App.2). Edwards included a counterclaim against Epstein initially alleging abuse of process (App.2, pp.53-56). On the eve of a hearing on Edwards's meticulously detailed and unopposed motion for summary judgment, Epstein dismissed his claims against Edwards (App.9, p.116). Having favorably disposed of Epstein's false claims against him, Edwards amended his counterclaim to include a malicious prosecution claim (App.3). Essentially, the malicious prosecution counterclaim alleged that Epstein had initiated his suit knowing that it had no reasonable factual basis, that Epstein intended to and did frustrate all discovery into the basis of his claims against Edwards by asserting his Fifth Amendment right to remain silent, that Epstein suffered no damage from a fraud he knew nothing about, and that Edwards's actions in furtherance of his clients' interests were both entirely proper and absolutely protected by the litigation privilege (App.3, pp.63-69). The counterclaim further alleged that the suit against Edwards was initiated for the sole purpose of harming and intimidating Edwards, and interfering with his ability to represent his clients in both the ongoing civil actions against Epstein and the pro bono Crime Victim's case that posed a serious threat to Epstein's sweetheart immunity deal (App.3, pp.63-69). Edwards alleged the lawsuit was a vehicle for Epstein to make false statements harmful to Edwards' reputation, professional standing, and his ability to effectively represent his clients (App.3, pp.63-69).

The following is a timeline of subsequent relevant proceedings:

January 21, 2010	Epstein obtains default against Rothstein as to the original Complaint (App.4).
February 17, 2010	Epstein, through counsel, moves to set-aside the default, which motion is never ruled upon (Res.App. 4, pp.34-36).[3]
April 13, 2011	Epstein files his First Amended Complaint (App.6) and never moves to default Rothstein.
August 22, 2011	Epstein filed the Second Amended Complaint (App.8) which included a claim against Edwards for abuse of process and a claim against Rothstein for conspiracy to commit abuse of process (App. 8, 100-14). Rothstein never answered the Second Amended Complaint. Epstein never moved to default Rothstein.
August 16, 2012	Epstein voluntarily dismisses his claim against Edwards (App.9, p.116).
January 9, 2013	Edwards amends his Counterclaim against Epstein – the Counterclaim currently at issue (App.3).
June 2014-June 2017	Trial court proceedings are stayed pending the disposition of appellate proceedings that eventually confirm the viability of Edwards's claim for malicious prosecution.
May 24, 2017	Edwards notices the case for trial (App. 10, p.118).
July 20, 2017	The trial court set the case on the trial docket for the period beginning December 5, 2017 (App. 11, pp.122-27). Epstein did not object and, in fact, participated in all pre-trial proceedings.

[3] Citations to the Appendix to the Response to the Emergency Petition for Writ of Mandamus are as follows: (Res.App.[document #], p.[page#]).

On November 1, 2017, with the December trial date rapidly approaching, despite having been continuously represented by a host of capable counsel, Epstein obtained new/additional counsel, Link & Rockenbach. (Res.App. 2, pp.18-20). New counsel for Epstein almost immediately sought a continuance of the upcoming trial date, despite the fact that it had been set for more than five months (Res.App. 3, pp.21-33). In the Motion for Continuance, Epstein's counsel stated that if granted, they would not seek another continuance and would be "ready to try the case in 90 days." (Res.App. 3, p.23). On November 14, 2017, the trial court granted the motion and reset the case for March 13, 2018 (App. 12, pp.128-30). Epstein did not object.

On March 1, 2018, Edwards moved to sever the trials of Edward's claim against Epstein and Epstein's claim against Rothstein (App. 14, pp. 145-50). The motion noted that while Rothstein has been represented by counsel in this action, he had not been actively defending the case (App.14, pp.145-46). He noted that Rothstein is currently serving a substantial federal prison sentence and has no collectible assets (App.14, p.146). He also noted the risk of substantial jury confusion if the same fact finders were obliged because of a default to accept allegations against Rothstein while those same allegations were being vigorously contested by Edwards (App.14, pp.147-48). The witnesses Epstein identified to

testify in his case against Rothstein had no testimony which could be relevant to Epstein's claimed damages resulting from a Ponzi scheme in which he was not an investor (App.14, p.146). Edwards contended that Epstein only sought to prosecute the claim against Rothstein so that he could admit evidence at the trial without objection from Rothstein which would be inadmissible against Edwards, would prejudice Edwards, and would further confuse the jury (App.14, pp.146-48). Edwards later filed a supplement to his motion for separate trials in which he brought to the court's attention that Epstein had never obtained a default against Rothstein as to the sole claim against him in the Second Amended Complaint (App. 15).

On March 5, 2018, ten months after Edwards noticed the case for trial and more than seven months after the trial court first set the case for trial, Epstein claimed for the first time that the case was not at issue because he failed to obtain a default against Rothstein (App. 16, pp.158-67). In his Motion to remove the case from the trial docket, Epstein argued that Rule 1.440 had to be strictly complied with and that failure to remove the case from the trial docket would be reversible error (App. 16, p.161).

On March 8, a hearing was held on Epstein's motion to remove the case from the docket and Edwards's motion to separate the trials. As to the removal issue, the

trial court noted that the issue could have and should have been brought to the court's attention by Epstein long before that hearing (App.19, pp.197-98).

As to the severance issue, the court noted that Epstein's claim against Rothstein and Edwards's claim against Epstein were essentially unrelated at this point. (App.19, p.212). The court explained that the only connection between the two cases was that Edwards's case had its genesis in the fact that Epstein originally brought the claim against Edwards, Rothstein, and [redacted]., and then voluntarily dismissed the claim [against Edwards] on the eve of summary judgment." (App.19, p.211-12). Indeed, the trial court explained "I have no recollection whatsoever of anything coming up during the approximate four years that I have presided over this case in division AG of anything whatsoever having to do with Mr. Epstein's prosecution of that one-count Complaint against Rothstein from that September 2011 amended complaint." (App.19, pp.258-59).

The court reasoned that there is no longer any legal relationship between Edwards's case against Epstein and the damages-only claim by Epstein against Rothstein. The court held that there would be no prejudice to Epstein in severing the cases (App.19, p.265) Finally, the court explained that there would be an "absolute danger of confusion relative to a jury's consideration of Edwards's case versus

Epstein's case against Rothstein solely" if the cases were to be tried together (App.19, p.266)

Thus, the trial court denied Epstein's motion to remove the case from the docket and granted Edwards's Motion to sever the two cases for trial (App.18, p.184; App.19, pp.265-67). The court held that it would try *Edwards v. Epstein* as scheduled on March 13, 2018 (App.19, p.257). As to the Rule 1.440 issue, the court found this Court's decision in *Labor Ready* to be controlling (App.19, pp.256-57).

ARGUMENT

EPSTEIN'S PETITION FOR WRIT OF MANDAMUS SHOULD BE DENIED BECAUSE EPSTEIN WAITED UNTIL THE EVE OF TRIAL, MORE THAN TEN MONTHS AFTER THE CASE HAD BEEN SET FOR TRIAL, TO SEEK TO ENFORCE RULE 1.440.

A. The Equitable Principles Compel Denial of the Petition

As discussed above, Epstein filed the Second Amended Complaint on August 22, 2011. Rothstein never answered the complaint. Pursuant to Rule 1.500(a), Florida Rules of Civil Procedure, it was incumbent upon Epstein to seek a default against Rothstein and he could have done so at any time beginning in **September 2011**.

This case was noticed for trial on May 24, 2017, almost six years after the duty arose on Epstein's part to seek a default against Rothstein. Epstein could have objected to the case being set for trial arguing that it was not at issue pursuant to Rule 1.440. He did not do so. By order of July 24, 2017, the case was specially set for trial in December 2017. Epstein could have immediately, at that time, sought to have the case removed from the docket based upon Rule 1.440. He did not do so. Instead, Epstein waited until March 5, 2018 more than seven months after the case was set for trial to finally claim that the case was not at issue. It was based upon

either: (1) the absolutely inexcusable failure to seek a default against Rothstein over a six-year period, or (2) a classic "gotcha" tactic that was held in reserve to delay the trial at the last minute.

At the time Epstein finally decided to assert his Rule 1.440 argument, the case was just five business days from the start of trial. As the trial court noted at the hearing, the parties and the court had expended significant time and resources to ensure the case was ready to be tried on March 13. One hundred citizens of Palm Beach County had already been called to sit as potential jurors in the case. International travel had already been arranged for one of Edward's key witnesses. The prejudice to Edwards who has already waited nine years to clear his name was immense and solely because of Epstein's dilatory conduct in waiting over six years to move for a default against Rothstein.

It would be indisputably inequitable for this Court to issue a writ of mandamus after Epstein sat on his hands and waited until the final hour before trial to assert his Rule 1.440 claim, for which he had no conceivable prejudice. Under well-established equitable principles, a party may be barred from asserting a right after waiting an "unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Ticktin v. Kearin*, 807 So.2d 659, 663 (Fla. 3d DCA 2001). Here, Epstein waited an unreasonable and unexplained length of time before asserting his

Rule 1.440 challenge and then seeking a writ of mandamus. He has unclean hands, he unreasonably delayed (laches), he has no conceivable prejudice or violation of his rights; and the prejudice to the trial court, Edwards, and the public is obvious. For equitable reasons alone, the writ of mandamus should not issue.

B. Granting Relief Here Would be Unprecedented and Contrary to the Purposes of the Rule

Rule 1.440, Florida Rules of Civil Procedure provides, in relevant part:

> **(a) When at Issue.** An action is at issue after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading. … The existence of crossclaims among the parties shall not prevent the court from setting the action for trial on the issues raised by the complaint, answer, and any answer to a counterclaim.
>
> **(b) Notice for Trial.** Thereafter any party may file and serve a notice that the action is at issue and ready to be set for trial. …
>
> **(c) Setting for Trial.** If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less than 30 days from the service of the notice for trial. …

Thus, the rule provides that an action is at issue, in relevant part, 20 days after service of the last pleading, a notice for trial can be set once the case is at issue, and trial must be set at least 30 days from the service of the notice for trial.

This Court has recognized that "[R]ule 1.440 was designed as a safeguard for procedural due process." *Labor Ready Se. Inc. v. Australian Warehouses Condo. Ass'n*, 962 So.2d 1053, 1055 (Fla. 4th DCA 2007)(citing *Grossman v. Fla. Power & Light Co.,* 570 So.2d 992, 993 (Fla. 2d DCA 1990)).

Here, no due process rights of Epstein are at issue. Only the due process rights of Rothstein could conceivably be impaired if this case proceeded to trial as to him(and the trial court protected those rights by granting a severance). **Not a single case cited by Epstein involves a scenario where the party claiming the Rule 1.440 violation was the party pursuing the affirmative claim that was at issue**. To grant relief here to Epstein would be literally unprecedented, and would open a Pandora's Box of similar gamesmanship in future cases.

Denial of relief here would be consistent with this Court's prior acknowledgment that strict compliance with the rule is not always required where due process concerns are not at issue. *Id.* "Rather, depending upon the circumstances, the mandatory provision of the rule may be waived." *Id.* at 1056; *see also HSBC Bank USA, N.A. v. Serban*, 148 So.3d 1287, 1291–92 (Fla. 1st DCA 2014); *Parrish v. Dougherty*, 505 So.2d 646, 648 (Fla. 1st DCA 1987).

C. Epstein Waived the Right to Rely on Rule 1.440

Epstein has waived reliance on Rule 1.440. As discussed above, Epstein filed the Second Amended Complaint on August 22, 2011. Rothstein never answered the complaint. Pursuant to Rule 1.500(a), Florida Rules of Civil Procedure, it was incumbent upon Epstein to seek a default against Rothstein and he could have done so at any time.

On May 24, 2017, Edwards noticed this case for trial. Epstein did not object. On July 24, 2017, the trial court set the case for trial for the period beginning on December 5, 2017. Epstein did not object. When Epstein moved for a continuance of the December 2017 trial date, he made no claim that the case was not at issue. Rather, he affirmatively assured the trial court that he would be ready for the trial to proceed in March. On November 14, 2017, the trial court reset the case to March 13, 2018, on Epstein's request and with his arduous assurances that he would seek no further delay.

On March 5, after having had more than six years to seek a default before the case was set for trial and almost 10 months after the case was noticed for trial, Epstein, for the first time, raised his 1.440 objection. At that belated date, it was too little too late.

This case has been pending since 2009. Edwards noticed this case for trial almost 10 months ago. Epstein could have, and should have, made an objection based upon a violation of Rule 1.440 long before now. His failure to do so constitutes a waiver of the right to rely on the rule.

This Court's decision in *Labor Ready Se. Inc. v. Australian Warehouses Condo.* [redacted], 962 So.2d 1053 (Fla. 4th DCA 2007) is controlling. There, the case was set for final hearing on April 17. On March 14, after the final hearing had already been set, the plaintiff filed an amended complaint. The defendants argued that the amendment prevented the cause from being at issue. The defendants filed responsive pleadings on March 28, 20 days prior to the scheduled trial. All parties fully participated in the final hearing without objection. No one argued they were not ready for trial, but simply argued a technical violation of rule 1.440.

On appeal in *Labor Ready*, the defendants argued that the Rule 1.440 violation entitled them to a new hearing. This Court rejected the argument, noting that the defendants' due process rights had not been violated. Specifically, the court noted:

- Both parties were prepared to go to trial
- The parties had four years to prepare for trial
- No one was prejudiced by the technical amendment to the complaint.
- There was no ambush or violation of the procedural safeguards that Rule 1.440 was designed to protect.

The court concluded that "[i]n situations where the parties have received actual, timely notice of the trial, they are precluded from arguing prejudice based upon a technical violation." *Id.* at 1055 (citing *Abrams v. Paul*, 453 So.2d 826, 829 (Fla. 1st DCA 1984)).

Here, there is even less a basis to allow Epstein to rely upon a violation of Rule 1.440 than there was in *Labor Ready*. Here, this case has been pending for almost nine years. It has been almost six years since the second amended complaint was filed and more than five years since Edwards filed the currently pending counterclaim. As in *Labor Ready*, Epstein and Edwards have admitted they are both prepared to go to trial on March 13, as scheduled. In fact, counsel for Epstein reiterated several times at the hearing on the motion to remove the case from the docket that they were prepared to try the case on March 13 (App.19, pp.199, 234, 236). Moreover, counsel for Epstein could not identify any prejudice Epstein would suffer if the Counterclaim proceeded for trial as scheduled, despite the trial court specifically asking him to identify any prejudice (App.19, 241). Finally, as in *Labor Ready*, there was no ambush here or violation of the procedural safeguards Rule 1.440 was meant to protect. Here, as opposed to in *Labor Ready*, the case has been set for trial for 10 months. Furthermore, the party seeking to have the case removed from the docket is not even the party whose responsive pleading was required to

place the case at issue. Thus, Epstein has even less of a basis to be entitled to the relief he belatedly seeks here than the defendants in *Labor Ready*.

Another relevant case is *HSBC Bank USA, N.A. v. Serban*, 148 So. 3d 1287 (Fla. 1st DCA 2014). There, the case was set for trial October 17. The parties were given sufficient notice pursuant to Rule 1.440(c). On September 11, the defendant moved for leave to amend his answer and affirmative defenses; the court granted the motion on September 19. The court directed the plaintiff to file its reply within ten days. The plaintiff filed its reply to the answer on October 2 and reply to affirmative defenses on October 9. The plaintiff did not request to have the case removed from the docket pursuant to Rule 1.440 and did not otherwise request a continuance. On the morning of trial, the plaintiff requested a continuance because a key witness was not able to attend. The plaintiff also argued that a continuance would be fair, in light of the recent amendments to the pleadings. He claimed, for the first time, that the case was not at issue anymore due to the amendments. The defendant objected to the continuance due to the time and expense incurred for counsel to appear at trial and because the plaintiff had failed to show good cause for a continuance. The trial court rejected the plaintiff's 1.440(a) argument, finding that counsel could have filed a written motion for continuance prior to the day of trial, but waited until the parties and the court had assembled to seek a later trial date.

On appeal in *Serban*, the plaintiff argued that rule 1.440(a), required reversal. Like Epstein here, the plaintiff argued that strict compliance with Rule 1.440 was required. The plaintiff relied upon a previous First District opinion, *Bennett v. Continental Chemicals, Inc.*, 492 So.2d 724 (Fla. 1st DCA 1986), in which the court adopted a bright line rule that strict compliance with Rule 1.440 was required. The First District rejected this argument and held that the "bright line approach" applied in *Bennett* was not applicable in all cases. The court explained that "**[m]inor violations of rule 1.440 are insufficient grounds for reversal when it is clear that no deprivation of due process resulted from the violation**." *Id.* at 1291 (emphasis added). The court continued, noting that, the plaintiff had filed the complaint more than five years prior to the scheduled trial; there was no question that the parties were notified of the trial date by the court's order entered more than sixty days before the trial date; and the plaintiff did not promptly move for a continuance after the amendment was permitted.

Here, as in *Serban*, the case has been pending for many years. The parties have known of the current trial date for four months and have prepared for trial accordingly. Epstein, like the plaintiff in *Serban*, failed to object to any technical defects under Rule 1.440 in a timely manner. A distinction between the two cases, of course, is that Epstein had ten months to raise his objection while the plaintiff in

Serban had just over a month to do so. If strict compliance with the rule could be waived there, it certainly has been waived here.

Epstein claims that *Labor Ready* and *Serban* are inapplicable because they were before the courts on final appeal whereas this case is here on mandamus. That distinction makes no difference here. First, the nature of the appellate remedy sought cannot affect whether a party's conduct in the trial court constituted a waiver. Here, a waiver occurred long before trial. The form of appellate remedy Epstein seeks will not change that fact. This Court has expressly held that a party can waive the right to enforce the technicalities of Rule 1.440 by its conduct in the trial court and Epstein has done so here. As such, it does not matter what remedy he seeks, he should not be entitled to enforce the rule under the circumstances of this case.

Epstein relies almost exclusively on the Second District's decision in *Gawker Media, LLC v. Bollea*, 170 So.3d 125, 127 (Fla. 2d DCA 2015); which is distinguishable. In *Gawker*, the plaintiff brought suit against multiple related defendants. One of the defendants, Blogwire, contested personal jurisdiction. That challenge resulted in an appeal. In the meantime, all other defendants had filed answers and affirmative defenses to the original claims.

While Blogwire's appeal was pending, the plaintiff moved to sever the claims against Blogwire and to set the remaining claims for trial. Over the other defendants'

objections, the trial court granted that motion and set the case for trial. The defendants immediately filed petitions for writ of certiorari, contending that severing defendants under those circumstances was not permitted and that, because Blogwire had not answered the complaint, the case was not at issue and could not be set for trial. The Second District quashed the severance order and the order setting trial without an opinion.

Upon remand, in an effort to keep the trial date which had already been set and was approaching, the plaintiff in *Gawker* dismissed Blogwire from the action. The next day, the trial court allowed the plaintiff to amend his complaint to add a claim for punitive damages against the remaining defendants. The defendants filed a written objection to the plaintiff's notice that the case was at issue, and emphatically opposed setting the case for trial at a case status hearing. Nonetheless, the court set the case for trial on the previously scheduled date, just 17 days away. Three days later, the defendants filed their petition for writ of mandamus. It must be emphasized that the parties seeking mandamus relief in *Gawker* were the parties whose due process rights were being violated; not a party whose dilatory conduct prevented their own claim from being at issue.

In *Gawker*, the Second District issued the writ of mandamus. In distinguishing several cases which had found the assertion of Rule 1.440 waived on final appeal,

including *Labor Ready* and *HSBC*, the court noted the procedural distinction that *Gawker* had been brought as a mandamus petition. The court explained that mandamus is meant to enforce the respondent's "**unqualified obligation to perform a clear legal duty**." *Id.* at 131. The court continued:

> If the petitioner is entitled to demand performance of the duty, he or she need not preserve the issue beyond making the demand. Further, it is unnecessary for the petitioner to suffer prejudice as a result of the respondent's dereliction. All that must be shown is that (1) **the respondent is duty-bound to act under the law**, and (2) the respondent has failed or refused to do so. *Pleus v. Crist,* 14 So.3d 941 (Fla.2009). A third and final element is that the petitioner must have no adequate legal remedy for the respondent's failure to carry out its duty. *Id.*; *Sturdivant v. Blanchard,* 422 So.2d 1028 (Fla. 1st DCA 1982).

Id. (emphasis added).

Epstein uses this language to support its claim that this Court's decision in *Labor Ready* is not relevant here but he glosses over the actual point made in *Gawker*. Critical to the Second District's discussion was the explanation that in order to be entitled to mandamus, "[a]ll that must be shown is that (1) the respondent is duty-bound to act under the law, and (2) the respondent has failed or refused to do so." *Id.* at 131. Here, **the trial court was not duty bound to remove the case from the docket under Rule 1.440 because Epstein waived his right to seek such relief,** as discussed thoroughly above.

In *Gawker*, as opposed to here, the defendants raised their Rule 1.440 challenge immediately at the time the issue was ripe, i.e., when the trial was originally set while the Blogwire appeal was pending and when the court set the case for trial again after dismissal of Blogwire. Here, on the other hand, Epstein waited more than 10 months from when the case was first set for trial to finally assert his Rule 1.440 challenge.

Additionally, in Gawker, the due process rights of the parties who sought compliance with Rule 1.440 were actually violated. That is, those defendants were not afforded the necessary time guaranteed by the rule, after the plaintiff amended the complaint to add punitive damage claims, to prepare for trial. Here, of course, Epstein's due process rights have not been violated, only Rothstein's due process rights could be at issue. Trial has been set for months, the operative pleadings have not been amended, and, as admitted by Epstein, he is prepared to go to trial and would suffer no prejudice were the case to proceed to trial.

Thus, Epstein waived any right he might arguably have to assert a violation of Rule 1.440 by waiting almost 10 months after the case was set for trial to raise the issue. During that time, the parties and the court expended significant time and resources ensuring that the case could be tried as scheduled. While Epstein's rights will not be abridged in any way were the case to proceed as scheduled, the rights of

Edwards to have his case finally heard, the interests of the trial court and the citizens of Palm Beach County who have been summoned to hear the case, will most certainly be adversely affected. Epstein should not be rewarded for his eleventh-hour ploy to delay this case where he has waived multiple opportunities to do so and it arises solely from his own dilatory conduct.

D. Edwards' Claim Against Epstein is Separate and Distinct from Epstein's Claim Against Rothstein

As explained above, Edwards' malicious prosecution counterclaim was obviously independent of Epstein's remaining claim against Rothstein. By definition, a malicious prosecution count cannot be brought until the underlying claims, i.e., Epstein's claims against Edwards, have been terminated in Edwards's favor (and by virtue of the likely default by Rothstein, the identical allegations will be terminated in Epstein's favor, a directly opposite result). *See Alamo Rent-A-Car v. Mancusi*, 632 So.2d 1352 (Fla. 1994). Thus, Edwards's malicious prosecution claim was not a compulsory counter-claim and would at best be considered a permissive counter-claim which a trial court has discretion to sever in the absence of prejudice. *See Turner Construction Co. v. ENF Contractors, Inc.*, 939 So.2d 1108 (Fla. 3d DCA 2003); *see also Trak v. Microwave Corp. v. Medaris Management, Inc.*, 236 So.2d 189, 192 (Fla. 4th DCA 1970).

As the trial court noted, the only connection between Epstein's claim against Rothstein and Edwards' claim against Epstein is that they arose out of the same complaint and "the only thing that it [Edwards's counterclaim] now shares is a common case number." (Transcript p.37). The court also noted that there was "nothing that I can think of that would necessitate these two matters to be tried together." (p.39). Based on those factors, the trial court severed the claims and directed that Edwards's malicious prosecution claim against Epstein could proceed to trial. (Transcript p.72). Epstein's counsel conceded that "it is clearly in this court's discretion to sever this case." (Transcript p.41).

Nonetheless, Epstein adhered to his position that severance could not cure the supposed defect in the notice for trial filed in May of 2017. But, there is nothing talismanic about notices for trial under Rule 1.440. The rule's requirements are designed to preserve due process rights, not to create arbitrary impediments to the orderly administration of justice. Here there were never any due process rights of Epstein at issue. Instead, he was attempting to vicariously rely on Rothstein's due process rights, which Epstein was violating, to impede Edwards's ability to proceed to trial in this 9-year old case. The court's ruling that severed the malicious prosecution claim provided complete protection for Rothstein's due process rights and therefore there is no need for any further remedy, let alone mandamus, to protect anyone's rights.

CONCLUSION

For the reasons stated above, the Petition for Writ of Mandamus should be denied.

CERTIFICATE OF TYPE SIZE & STYLE

Respondents hereby certifies that the type size and style of the Response of Respondents is Times New Roman 14pt.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail to The Honorable Donald W. Hafele, 205 N. Dixie Highway, Room 10.1216, West Palm Beach, FL 33401 and to all counsel on the attached service list, by email, on March 12, 2018.

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Epstein v. Rothstein/Edwards
Case No. 4D18-0762

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