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

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

BRADLEY J. EDWARDS, et al.,

Defendant/Counter-Plaintiffs.
_____/

No. 50-2009-CA-040800XXXXMBAG

JUDGE: HAFELE

PLAINTIFF/COUNTER-DEFENDANT'S RESPONSE IN OPPOSITION TO DEFENDANT/COUNTER-PLAINTIFF BRADLEY EDWARDS' MOTION TO STRIKE PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S MOTION FOR SUMMARY JUDGMENT ON THE FOURTH AMENDED COUNTERCLAIM AND SUPPORTINGMEMORANDUM OF LAW

Plaintiff/Counter-Defendant Jeffrey Epstein, by and through his undersigned counsel, herein files his Response in Opposition to Defendant/Counter-Plaintiff Bradley Edwards' Motion to Strike Plaintiff/Counter-Defendant Jeffrey Epstein's Motion for Summary Judgment on the Fourth Amended Counterclaim, and respectfully requests that this Court deny Defendant/Counter-Plaintiff Bradley Edwards' Motion to Strike Plaintiff/Counter-Defendant Jeffrey Epstein's Motion for Summary Judgment on the Fourth Amended Counterclaim This response is accompanied by a supporting appendix, in which all items referenced in support of this Opposition may be found (hereinafter "App." with the corresponding page number).

INTRODUCTION

Edwards's Motion to Strike is based solely upon his erroneous argument that this Court's consideration of the probable cause issue raised in Epstein's Motion for Summary

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Judgment is barred by the law of the case doctrine. Edwards argues that the probable cause issue was raised by Epstein as a point on appeal in *Edwards v. Epstein*, 178 So. 3d 942 (Fla. 4th DCA 2015), and that the Fourth District Court of Appeal decided the probable cause issue in Edward's favor. As demonstrated more fully below, Edwards's assertion is meritless and should be denied.

Epstein moved the Fourth District Court of Appeal for permission to present the probable cause issue in supplemental briefing. Edwards opposed the motion, and maintained that the addition of this "new" probable issue would be improper and would also require extensive additions to the record on appeal. Edwards prevailed, as the Fourth District Court of Appeal denied Epstein's motion. The record on appeal was never supplemented, and accordingly the probable cause issue was never briefed by the parties, much less considered by the Court.

Accordingly, Edwards is estopped from advancing the inconsistent positions taken in his Motion to Strike; that the issue of probable cause was both raised by Epstein on appeal and was considered, and ruled upon, by the appellate court. An examination of the parties' briefing in the Fourth District Court of Appeal, and the decision rendered by that Court, conclusively confirms that Epstein did *not* raise the issue of probable cause and that the Fourth District Court of Appeal did not decide the issue of probable cause.

MEMORANDUM OF LAW

The law of the case doctrine is limited to those questions of law that were "actually presented" and "actually decided" on a former appeal. *Florida Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105-06 (Fla. 2001). The doctrine allows the trial court, upon remand from the appellate court, to consider a party's alternative argument that was not before the

appellate court. *See, e.g., Nat'l City Bank v. Accent Marketing Assoc., LLC*, 82 So. 3d 1060 (Fla. 4th DCA 2011). Accordingly, pursuant to the law of the case doctrine, only "questions of law **actually decided on appeal** must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003) (emphasis added).

A. In the Fourth District Court of Appeal, Edwards Successfully Opposed Epstein's Request to Present the Probable Cause Issue and he is Estopped from taking an Inconsistent Position in this Court

After the parties filed their briefs in the Fourth District Court of Appeal, Epstein filed a Motion for Leave to File Supplemental Argument. (App. 1-21). The Motion sought leave to present as a point on appeal the absence of the probable cause element in Edwards's action for malicious prosecution. In opposition thereto, Edwards filed his Appellant's Response to Motion for Leave to File Supplemental Argument. (App. 22-29). Edwards argued that the proposed probable cause point on appeal would inject "new issues into this appeal at the eleventh hour" (App. 22); would "raise new issues not included in his [Epstein's] Answer Brief" (App. 23); would be unfair to allow Epstein to raise probable cause because "it would be extremely burdensome for Edwards, and for this Court, to have to fully brief and review this new issue at this time" (App. 24); that the probable cause issue was not properly raised as a "tipsy coachman" issue in Epstein's Answer Brief (App. 24); and that briefing of the probable cause issue would require supplementation of the record on appeal with hundreds of pages of documents. (App. 26-27). The Fourth District Court of Appeal agreed with Edwards and denied Epstein's motion to present the probable cause issue. (App. 30).

In his Motion to Strike, Edwards assumes positions that are completely at odds with

his positions taken in the Fourth District Court of Appeal. He now argues that Epstein did present probable cause as a point on appeal, and raised probable cause as a tipsy coachman argument. Edwards is estopped from taking these contrary positions in his motion to strike. *Lee v. Fowler*, 155 So. 647 (Fla. 1934) (a party who took one position on appeal is estopped from thereafter taking an inconsistent position in the trial court); *Harper ex rel. Daley v. Toler*, 884 So. 2d 1124, 1135 (Fla. 2d DCA 2004) ("a party may not ordinarily take one position in proceedings at the trial level and then take an inconsistent position on appeal"); *Reserve Ins. Co. v. Pollock*, 270 So. 2d 469, 469 (Fla. 3d DCA 1972) (holding that insurer who admitted liability under insurance policy was "estopped from taking an inconsistent position" on appeal); *see also Bloco, Inc. v. Porterfield Oil Co., Inc*., 990 So. 2d 578, 579 (Fla. 2d DCA 2008) (rejecting party's argument that issue was barred by law of the case doctrine, noting that the party in its brief had "unequivocally acknowledged" that the challenged issue was not then ripe for appellate review); *Grau v. Provident Life and Acc. Ins. Co*., 99 So. 2d 396, 399 (Fla. 4th DCA 2005) ("[a] claim or position successfully maintained in a former action or judicial proceeding bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding . . ."). Accordingly, Edwards's Motion to Strike should be denied on the grounds of both the law of the case and estoppel.

B. Epstein Did Not "Actually Present" to the Fourth District Court of Appeal the Issue of Probable Cause

The positions Edwards now takes in his Motion to Strike that are inconsistent with his previous positions in the Fourth District Court of Appeal are groundless on their merits. Edwards's argument that the probable cause issue was "actually presented" to the Fourth

District by Epstein is based solely upon the following footnote from Epstein's Answer Brief:

> 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.

(App. 41). Edwards' argument fails on several grounds.

Once again, Edwards is taking a position contrary to his previous position on appeal. In his reply brief on appeal, Edwards characterized the footnote as attempting to raise only one issue, namely, "that Edwards' malicious prosecution claim should fail because there was no bona fide termination of the underlying suit." (App.77-78). Edwards contended that the issue raised in the footnote was waived because it was based upon an attempt to incorporate by reference a trial court filing rather than an independent argument in support of a point on appeal. Edwards cited decisional authorities for the proposition that such an attempt was prohibited. (App. 78). Edwards is now estopped from changing positions by arguing that the above-quoted footnote properly raised the probable cause issue as a point on appeal.

The only brief filed by Epstein in the Fourth District Court of Appeal was his Answer Brief. It is apparent from a review of that brief that the issue of probable cause was not raised as a point on appeal by Epstein. The term "probable cause" does not even appear in Epstein's brief. Rather, Epstein's Answer Brief made clear that there was only

one point on appeal:

> 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.

(App. 39). Similarly, in both the Table of Contents and Argument sections of Epstein's Answer Brief, the sole issue actually presented was:

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

(App. 32, 41) (original emphasis).

The footnote in question did not, and could not, raise a point on appeal. *See Simkins Ind., Inc. v. Lexington Ins. Co*., 714 So. 2d 1092, 1093 (Fla. 3d DCA 1998) ("an argument in a footnote does not elevate the matter to a point on appeal."); *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41 n.1 (Fla. 3d DCA 1996) (arguments which are not made as a point on appeal but are found only in a footnote are not properly presented to the appellate court for review). Epstein's footnoted argument was that there was no bona fide termination of the underlying lawsuit; an essential element of a cause of action for malicious prosecution. Epstein argued that underlying lawsuit terminated as a result of his voluntary dismissal rather than a bona fide termination.

Epstein's footnote stated that because Edwards's initial brief failed to address this "assertion," Epstein would not submit argument, but instead reassert "all argument" on this point as raised in his motion for summary judgment. Edwards is wrong in construing the reassertion as raising on appeal *every* ground in Epstein's summary judgment motion, including probable cause. The argument presented by Epstein in the footnote was clearly

and expressly limited to the element of bona fide termination. As his footnote made clear, Epstein's assertion was directed only to "*one of the six* essential elements of a malicious prosecution claim." (e.s.). In sum, the issue of probable cause was neither presented to, nor argued to, the Fourth District Court of Appeal in Epstein's brief.

C. The Fourth District Did Not "Actually Decide" the Issue of Probable Cause

Edwards contends that the Fourth District Court of Appeal "actually decided" the issue of probable cause in the following passage from its decision:

> Epstein suggests that this case could be decided on a tipsy coachman analysis, as he alleges that all the elements of the cause of action were not present. However, the trial court specifically found that material issues of fact remained as to the elements of the claim. Based upon the facts presented and the inferences which may be drawn from those facts, we will not disturb the trial court's evaluation.

Edwards v. Epstein, 178 So. 3d at 943.

As the first sentence of the quoted passage makes clear, the Fourth District Court of Appeal was only addressing Epstein's tipsy coachman claim. As noted, Epstein's tipsy coachman argument did *not* reference the issue of probable cause, but referenced *only* the issue of bona fide termination. Because the issue of bona fide termination was the *sole* tipsy coachman argument, the Fourth District Court of Appeal's decision not to disturb this Court's evaluation of that issue; the issue of bona fide termination, does not bar Epstein, by operation of the law of the case doctrine, from presenting his *alternative* argument as to probable cause for this Court's consideration. *See Nat'l City Bank v. Accent Marketing Assoc., supra.*

Edwards argues that *Gabor v. Gabor & Co., Inc*., 599 So. 2d 737 (Fla. 3d DCA 1992) "is directly on point." *See Edwards's* Motion to Strike, p. 5. However, the *Gabor* case is clearly distinguishable from the case at bench. In that case, the Third District Court

of Appeal held that, based upon law of the case, "it was error for the trial court to enter summary judgment on a point previously determined [on appeal] not amenable to a summary judgment." *Id*. at 738. Here, this Court is being asked to entertain Epstein's summary judgment motion on a point *not* previously determined by the Fourth District Court of Appeal; probable cause. The other authorities cited by Edwards are inapplicable based upon the same material distinction.

CONCLUSION

Accordingly, and in reliance upon the law and facts delineated above, Epstein respectfully requests that the Court deny Edwards's Motion to Strike his Motion for Summary Judgment, and such further relief as this Court deems just and proper.

I HEREBY CERTIFY that a copy of the foregoing was served upon all parties listed on the attached service list, via electronic service, this September 28, 2017.

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