IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 4D14-2282

BRADLEY J. EDWARDS,

Appellant,

-vs-

JEFFREY EPSTEIN,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

On appeal from the Fifteenth Judicial Circuit in and for Palm Beach County

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EXHIBIT #2

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PREFACE

This is an appeal from a Final Summary Judgment of the Circuit Court. The parties are referred to by their proper names, as they appeared below, or as otherwise designated. The following designations will be used:

(A) – Appendix to Initial Brief

(R) – Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

This appeal arises from a Summary Judgment granted against the Counter-Plaintiff (hereafter "Plaintiff") on a malicious prosecution case based solely on the application of the litigation privilege (R7:1202-05). The malicious prosecution claim and the lawsuit out of which it arose are part of an interrelated set of criminal and civil cases in which these parties have been involved for years. A summary of the history of those proceedings should suffice to provide an adequate factual context for this appeal.

In September of 2007, billionaire Jeffrey Epstein ("Epstein") entered into a Non-Prosecution Agreement ("NPA") with the United States arising from an investigation into his criminal sexual conduct with a large number of minor female victims (R2:285). In that NPA, Epstein agreed, inter alia, to plead guilty to state felony charges involving the solicitation of prostitution and the procurement of minors to engage in prostitution and further agreed to be registered as a sex offender (R2:285). Epstein also agreed to accept an 18 month sentence of incarceration for the state charges, a one year period of community control, and to waive liability to those of his victims who filed claims exclusively under 18 U.S.C. § 2255 (R2:285). In return for satisfying those conditions, among others, the United States agreed it would not prosecute Epstein for any federal offenses including, but not limited to, numerous allegations of sexual assault (R2:285).

Subsequently, Epstein pled guilty to the state felony charges and, apparently concluding that the NPA had been complied with, the United States has not pursued any criminal charges against Epstein (R2:285)

Bradley Edwards ("Edwards") is an attorney who represented nine of the many victims of Epstein's criminal conduct, and he filed three civil actions seeking compensatory and punitive damages outside the limitations of 18 U.S.C. § 2255 against Epstein, alleging sexual assault and battery (R2:281-82; 3:549). Those cases included Jane Doe v. Epstein ("Jane Doe"), Case No. 08-CIV-80893, U.S. District Court, Southern District of Florida; [redacted]. v. Epstein ("LM"), Case No. 502008CA028051XXXXMBAB (Fla. 15th Circuit); and [redacted]. v. Epstein ("[redacted]" or "Jane Doe #2"), Case No. 502008CA028058XXXXMBAB (Fla. 15th Circuit) (R2:282). Edwards aggressively pursued discovery into the full scope of Epstein's criminal conduct, including the potential involvement in that conduct of some of Epstein's high profile associates (R2:286-87).

Additionally, on behalf of two of his clients, Edwards filed an action in federal court alleging that the NPA had been negotiated in violation of the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. Jane Doe No. 1, et al. v. United States, 749 F.3d 999, 1002 (11th Cir. 2014). Edwards alleged that federal prosecutors had arranged with Epstein to keep the NPA secret from the victims to prevent them from raising any objections to it in court. Doe, 749 F.3d at 1002.

Among other relief in that federal lawsuit, Edwards sought rescission of the NPA, a result which would reopen Epstein's exposure to full prosecution for numerous federal sex offenses. Doe, 749 F.3d at 1002. That litigation has continued for over six years, and the district court has rejected the Government's Motion to Dismiss. Doe v. United States, 817 F.Supp.2d 1337 (S.D. Fla. 2011). Most recently the United States Court of Appeals for the Eleventh Circuit upheld the trial court's ruling that entitled Edwards' clients to the correspondence between Epstein's attorneys and the United States leading up to the NPA. See Doe, 749 F.3d at 999. See generally, Paul G. Cassell, Bradley J. Edwards & Nathanael James Mitchell, Protecting Crime Victims' Rights Before Charges Are Filed: The Need for Expansive Interpretation of the Crime Victims' Rights Act and Similar State Statutes, 104 J. Crim. L. & Criminology 59 (2014) (discussing the Epstein case in detail and its importance to the development of crime victims' rights law).

While Edwards was pursuing the CVRA case and, among others, the three civil cases noted alone for his clients, Epstein filed a lawsuit in the Circuit Court of the Fifteenth Judicial Circuit against Edwards, Scott Rothstein, and one of Edwards' clients, designated as "[redacted]." (R1:1-103). Epstein's Complaint contained five counts, including a civil claim under the Florida Racketeer Influenced and Corrupt Organization Act (RICO), § 895.01, Fla. Stat., et seq.; a civil theft claim pursuant to § 772.101, Fla. Stat., et seq., fraud, conspiracy to

commit fraud, and abuse of process (R1:30-35). The gravamen of the Complaint was that after Edwards had filed the cases against Epstein (suits on behalf of his clients), he had briefly joined the law firm of Rothstein, Rosenfeldt & Adler, P.A. ("RRA"), which subsequently disbanded after Rothstein was charged with and pled guilty to, operating a Ponzi scheme (R1:3). Rothstein's Ponzi scheme involved, inter alia, the assignment of rights to future settlement agreements in civil actions (R1:5). Essentially, Epstein's Complaint claimed that Rothstein, Edwards and [redacted]. defrauded him and engaged in criminal conduct, as well as abuse of process, by trying to maximize the value of the claims against him. While reciting in detail the misconduct of Rothstein which had become public knowledge, Epstein's Complaint did not allege any involvement of Edwards in the Ponzi scheme, only that he "knew or should have known" about Rothstein's misconduct (R1:10). Epstein's Complaint did not deny his own extensive criminal culpability.

Edwards filed an Answer denying the material allegations of the Complaint and included a Counterclaim against Epstein initially alleging abuse of process and subsequently amending to include a malicious prosecution claim after Epstein's claims were all dismissed (as detailed above) (R1:121-136; 2:330-37, 338-39) . Essentially, the malicious prosecution Counterclaim alleged that Epstein had initiated his suit knowing that it had no reasonable factual basis and that Edwards' actions in furtherance of his clients' interests were both entirely proper and

absolutely privileged (R2:335). The Counterclaim further alleged that the suit against Edwards was initiated for the sole purpose of intimidating Edwards and interfering with his ability to represent his clients in ongoing civil actions against Epstein (R2:332). 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 (R2:333-35).

After extensive litigation, Epstein dropped [redacted]. as a party and reduced his claims to abuse of process and conspiracy to engage in abuse of process on the part of Rothstein and Edwards (R1:200).

On September 22, 2010, Edwards filed a Motion for Summary Judgment which was initially denied as premature (R2:240-68, 272). Subsequently, Edwards renewed that motion on October 4, 2011 (R2:360). After extensive filings in support of the renewed Motion for Summary Judgment, a hearing date was set (R4:607). On August 16, 2012, the day before the matter was scheduled to be heard and without ever contesting either the facts or the law on which Edwards' Motion for Summary Judgment was based, Epstein filed a Notice of Voluntary Dismissal as to his remaining claims (R4:612-13).

Edwards' Counterclaim against Epstein, however, was still pending (R2:330-37). Subsequently, the court granted Edwards leave to amend that pleading to include a claim for punitive damages (R4:742-43). The malicious

prosecution claim in the operative pleading, the Fourth Amended Counterclaim, alleged that the filing of the claim by Epstein constituted malicious prosecution because "Epstein filed civil claims against Edwards . . . for the sole purpose of further attempting to intimidate Edwards . . . and others into abandoning or settling their legitimate claims for less than their just and reasonable value" (R4:751).

After the filing of the Fourth Amended Counterclaim, the Third District issued its decision in Wolfe v. Foreman, 128 So.3d 67 (Fla. 3d DCA 2013), which appears to be the first opinion in the country to hold that a malicious prosecution claim is barred by the litigation privilege. As explained infra, Wolfe conflicted with pre-existing Florida case law on this issue. Based on Wolfe, Epstein filed a Motion for Summary Judgment arguing, inter alia, that Edwards' claims were barred, as a matter of law, by the litigation privilege (R5:806, 808).

After a hearing on the motion, the trial court stated its intention to grant summary judgment in favor of Epstein (SR1:1268-71). Before a written ruling, however, Edwards filed a Motion for Reconsideration, observing that the case "squarely presented . . . [the issue of] whether a non-lawyer is protected from liability by the litigation privilege when he initiates a civil lawsuit knowing that it is not only unsupported by probable cause but that it is completely unsupported by both the facts and the law and is filed solely for the purpose of intimidation and

extorting a negotiating advantage in other civil litigation" (SR2:1).[1] That motion cited extensive case law from other jurisdictions demonstrating that Wolfe was an aberration and that virtually no other court in the county had ruled that a cause of action for malicious prosecution could be barred by the litigation privilege (SR2:1-37).

Thereafter, the trial court entered an Order Granting Epstein's Motion for Summary Judgment (R7:1202-05). The trial court's order stated (R7:1203):

> [T]he cases cited by Edwards involved malicious prosecution claims stemming from actions filed by the party themselves, 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.

The trial court also entered a separate Order Denying Edwards' Motion for Reconsideration without comment (R7:1206-07). The court then entered a Final Summary Judgment. Edwards now takes this appeal from that Judgment (R7:1208-09).

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[1] Edwards' Motion for Reconsideration is included in the Appendix and is the subject of a Motion to Supplement the Record-on-Appeal filed contemporaneously with this brief and will be referenced as A1-37.

SUMMARY OF ARGUMENT

The trial court erred in applying the Third District's opinion in Wolfe to justify summary judgment against the Plaintiff on his malicious prosecution claim. The Wolfe decision is aberrational, both within Florida and throughout the nation, as it holds that the litigation privilege bars, as a matter of law, any malicious prosecution action against the party or parties who actually filed the initial action. The Wolfe decision makes no attempt to reconcile the indisputable fact that the litigation privilege and the tort of malicious prosecution have coexisted at the common law without conflict for hundreds of years, and that there is apparently no other decision in the country that reaches the conclusion that the majority did in Wolfe. Moreover, there is conflicting case law on the issue in Florida, which the Wolfe decision simply ignores, including authority from this Court.

Therefore, this Court should not follow Wolfe, but should conclude, consistent with extensive authority in Florida and throughout the country, that the litigation privilege does not apply to the malicious initiation of meritless litigation. The litigation privilege is designed to protect statements and actions during litigation, which are pertinent to the subject matter, but prior to Wolfe, the privilege has never been extended to eliminate the cause of action for malicious prosecution and to thereby immunize people who maliciously file false proceedings to damage others. The tort of malicious prosecution contains within its

elements a qualified immunity, since the plaintiff must demonstrate that the underlying action was brought without probable cause and with malice, and that is enough protection to ensure that that valid litigation is not stifled. However, allowing the litigation privilege to immunize parties who maliciously file meritless litigation is unjustified by the relevant policy considerations, and will eliminate a significant deterrent to unnecessary litigation which unreasonably burdens the court and the parties victimized by such conduct.

Therefore, for the reasons stated above, this Court should reverse the Summary Judgment entered by the circuit court and remand the case for further proceedings.

ARGUMENT

POINT-ON-APPEAL

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT AND APPLYING THE LITIGATION PRIVILEGE AS AN ABSOLUTE BAR TO A MALICIOUS PROSECUTION CLAIM.

Standard of Review

Orders granting summary judgment are reviewed under the de novo standard of review. LaFrance v. U.S. Bank National Association, 141 So.3d 754 (Fla. 4th DCA 2014). Additionally, where the material facts are not disputed, the determination whether a privilege arises is a question of law which is reviewed de novo. Del Monico v. Traynor, 116 So.3d 1205, 1211 (Fla. 2013).

Introduction

The trial court erred in concluding that the litigation privilege bars a claim for malicious prosecution.[2] The trial court relied primarily on the Third District's decision in Wolfe v. Foreman, 128 So.3d 67 (Fla. 3d DCA 2013) which held that the litigation privilege bars malicious prosecution claims. However, Wolfe conflicts with decisions from other district courts in Florida, as well as overwhelming (and seemingly unanimous) authority from other jurisdictions. Wolfe is also inconsistent with the development of the litigation privilege and

[2] In this appeal, Edwards challenges only the trial court's ruling on his malicious prosecution claim, not his abuse of process claim.

malicious prosecution cause of action in the common law. It does not appear any other jurisdiction in the United States applies an absolute litigation privilege to bar malicious prosecution claims; in fact, that cause of action has coexisted with that privilege in the common law for hundreds of years without conflict.

The overwhelming weight of authority and the pertinent policy considerations demonstrate that Wolfe was wrongly decided, and that the litigation privilege as developed by the Florida Supreme Court does not justify the result in this case. Therefore, this Court should reverse the Summary Judgment.

The Development of the Litigation Privilege in Florida Supreme Court Decisions

The Florida Supreme Court first addressed the scope and application of the litigation privilege in Myers v. Hodges, 44 So. 357 (Fla. 1907). In that case, Hodges had filed suit against a corporation in which Myers was the president. Hodges' Bill of Equity contained allegations relating to Myers personally, including that he was "a tricky, dishonorable, unscrupulous and conscienceless man;" … and that he had stated he would do "everything in his power to beat [Hodges] out of the money owing to him, short of swearing to a lie" (44 So. at 358). While that language was stricken from the Bill of Equity by the trial court, after the conclusion of that suit Myers sued Hodges for libel based on those defamatory statements. The trial court ultimately directed a verdict for Hodges on

the libel claim, and the Florida Supreme Court affirmed, based on what is now called the litigation privilege.[3]

In Myers, the Supreme Court first addressed the common law in England on this issue, but rejected its rule of an absolute litigation privilege as to any statements made in judicial proceedings. Instead, the Court adopted the rule developed in the American common law that the litigation privilege would only apply to statements made in a judicial proceeding which were relevant to the subject matter of the action. The Court stated:

> We think the ends of justice will be effectually accomplished by not extending the privilege so far as to make it an absolute exemption from liability for defamatory words wholly and entirely outside of, and having no connection with, the matter of inquiry.

Myers, 44 So.at 361.

The Court in Myers did note, however, that much latitude should be granted in determining whether statements are pertinent to the proceedings; and that if the statements were not pertinent, a qualified privilege arose that could only be

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[3] The Myers decision did not use the term "litigation privilege." That phrase first appeared in Florida case law in the certified question from the Eleventh Circuit Court of Appeals in Levin, Middlebrooks, Mabie, Thomas, Mayes and Mitchell, P.A. v. United States Fire Ins. Co., 639 So.2d 606 (Fla. 1994). Some jurisdictions use different terminology such as "judicial privilege," Mansfield v. Bernabei, 727 S.E. 2d 69, 72-73 (Va. 2012); or just refer to it generally as an absolute privilege, e.g. Goldstein v. Serio, 496 So.2d 412, 414 (La. App. 1986). Edwards will refer to it as the "litigation privilege" throughout this brief.

overcome by showing that the party made the challenged statements with express malice.

Myers explained justifications for allowing such a privilege relate to how a lawsuit is handled after it has been filed:

> That parties and counsel should be indulged with great latitude in the freedom of speech in the conduct of their causes in courts and in asserting their rights, because in this way the purposes of justice will be served. Id.

The Myers decision demonstrates that the litigation privilege arose from and has been developed by the common law, and that it is justified only by the policy considerations involving in-court proceedings. The policy considerations justifying the privilege – latitude regarding the "conduct of …[a] cause in court" – do not in any way pertain to the filing of a lawsuit, much less a meritless one brought with malicious motives.

The first significant clarification of the litigation privilege in Florida after Myers occurred in Fridovich v. Fridovich, 598 So.2d 65 (Fla. 1992). In that case, the Supreme Court held that defamatory statements voluntarily made by a private individual to police before the filing of criminal charges were not absolutely privileged. Instead, such statements were only entitled to a qualified privilege which could be overcome by a showing that they were made with express malice. The Court noted that its ruling was consistent with the view of the majority of

other states and balanced society's interest in detecting and prosecuting crime against a potential defendant's interest in not being falsely accused.

Subsequently, in Levin, Middlebrooks, Mabie, Thomas, Mayes and Mitchell, P.A. v. United States Fire Ins. Co., 639 So.2d 606 (Fla. 1994), the Court held that absolute immunity would be afforded to an act involving tortious interference with the business relationship that occurred during the course of judicial proceeding, so long as the act had some relevance to that proceeding. In that case, the Levin firm represented a client in litigation against an insurance company. The insurance company subpoenaed one of that firm's attorneys to be a witness at trial, resulting in the disqualification of that firm as counsel for the plaintiff. However, the insurance company did not call that attorney as a witness at the trial. After the case was concluded adverse to the insurance company, the law firm sued the insurance company for intentional interference with a business relationship for issuing the subpoena and obtaining disqualification of the law firm. The Court in Levin held:

> 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. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a

> lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

Levin, 639 So.2d at 608.

It is significant that the Levin holding was limited to acts occurring during the legal proceedings, and it did not deviate from the Fridovich holding pertaining to acts involved in initiating litigation.

In Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So.2d 380 (Fla. 2007), the lower court held that the litigation privilege, being a creature of the common law, did not apply in cases where the cause of action was created by statute. The Florida Supreme Court overturned that decision holding that the litigation privilege applies in judicial proceedings, whether the underlying case involved a common law tort or a statutory cause of action. The Court held that "the nature of the underlying dispute simply does not matter" since the policy considerations justifying the privilege still apply, those considerations were the "perceived necessity for candid and unrestrained communications in judicial proceedings" (950 So.2d at 384).

Recently, in Delmonico v. Trayner, 116 So.3d 1205 (Fla. 2013), the Court held that the litigation privilege did not grant absolute immunity for an attorney's conduct in making defamatory, ex parte, out-of-court statements to potential nonparty witnesses, even though that conduct arose from the attorney's

representation of his client in litigation. In discussing the litigation privilege, the Court in Delmonico stated:

> [T]his Court's recognition of the privilege derived from a balancing of two competing interests – the public interest in allowing litigants and counsel to freely and zealously advocate for their causes in court versus protecting the rights of individuals, including the right of an individual to maintain his or her reputation and not be subjected to slander or malicious conduct.

Delmonico, 116 So.3d at 1217.

The Court in Delmonico concluded that since judicial oversight and other protections applicable in judicial proceedings were unavailable (or far less effective) for deterring conduct during an out-of-court informal investigation, such conduct was only entitled to a qualified privilege. That qualified privilege would apply if the statements at issue were relevant to the subject matter of the lawsuit; however, a plaintiff could overcome the privilege by proving that the statements were made with express malice (116 So.3d at 12, 18-19).

Malicious Prosecution Claims in Florida

Standing side-by-side with Florida case law developing a limited litigation privilege is well-developed case law allowing malicious prosecution claims. A review of these cases demonstrates that the litigation privilege was never viewed as inconsistent with the tort of malicious prosecution.

While the tort of malicious prosecution was initially recognized in Tidwell v. Witherspoon, 21 Fla. 359 (Fla. 1885), it was first discussed in-depth by the Florida Supreme Court in Tatum Bros. Real Estate & Investment Co. v. Watson, 109 So.623 (Fla. 1926). There, the Court described malicious prosecution as "a very ancient action" and defined its elements as follows:

> An action for maliciously putting the law in motion lies in all cases where there is a concurrence of the following elements; 1) The commencement or continuance of an original criminal or civil judicial proceeding. 2) Its legal causation by the present defendant against plaintiff who was defendant in the original proceedings. 3) Its bona fide termination in favor of the present plaintiff. 4) The absence of probable cause for such proceeding. 5) The presence of malice therein. 6) Damage conforming to legal standards resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action.

Tatum Bros. Real Estate, 109 So. at 626.

Those elements remain the requirements for a prima facie malicious prosecution action. See Alamo-Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352, 1355 (Fla. 1994).

As stated in Tatum Bros, supra, malicious prosecution was an action ex delicto at the common law (109 So. at 626). Its genesis was English common law which, despite providing for the losing party in litigation to pay the fees and costs of the prevailing party, nonetheless recognized a need for a remedy when special

damages beyond those expenses had been suffered by the prevailing party. See Engel v. CBS, Inc, 182 F.3d 124, 128 (2d Cir. 1999) (collecting cases).[4]

Based on the English common law, malicious prosecution was recognized as a cause of action in American courts, e.g., Tatum Bros, supra, with the relevant policy considerations described by Prosser, as follows:

> The law supports the use of litigation as a social means for resolving disputes, and it encourages honest citizens to bring criminals to justice. Consequently the accuser must be given a large degree of freedom to make mistakes and misjudgments without being subjected to liability. On the other hand, **no one should be permitted to subject a fellow citizen to prosecution for an improper purpose and without an honest belief that the accused may be found guilty.**

Prosser and Keeton on the Law of Torts 119, p. 871 (5th Ed. 1984).

The competing policy consideration underlying malicious prosecution claims were addressed in the elements of the prima facie case. The individual's interest in freedom from unjustifiable litigation and the societal interest in not chilling access to the courts were protected by the onerous requirement that the plaintiff prove an absence of probable cause and, most important, express malice. Id. As noted in Kalina v. Fletcher, 522 U.S. 118, 133 (1997) (Scalia, J., concurring) "[T]here was a kind of qualified immunity built into the elements of the tort." Justice Scalia addressed that safeguard in the context of the Kalina case as follows:

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[4] For a brief summary of the developments in English law from the unsuccessful claimant's obligation to pay costs and fees to the recognition of the malicious prosecution action dating back to the Norman conquest, see Friedman v. Dozorc, 312 NW 2d 585, 595 n.20 (Mich. 1981).

> At common law, therefore, Kalina would have been protected by something resembling qualified immunity if she were sued for malicious prosecution. The tortious act in such a case would have been her decision to bring criminal charges against Fletcher, and liability would attach only if Fletcher could prove that the prosecution was malicious, without probable cause, and ultimately unsuccessful. Kalina's false statements as a witness in support of the warrant application would not have been an independent actionable tort (although they might have been evidence of malice or initiation in the malicious prosecution suit), because of the absolute privilege protecting such testimony from suits for defamation.

The Litigation Privilege Was Not Applied to Malicious Prosecution Claims in Florida Prior to Wolfe

Well-developed Florida case law allowed a malicious prosecution claim to proceed even in the face of an assertion of litigation privilege. In Fisher v. Payne, 113 So.378 (Fla. 1927), the Florida Supreme Court addressed a case in which defendants asserted the litigation privilege to defend against a malicious prosecution action. There, Fisher had a lunacy inquisition filed against her, and the court appointed the three defendants to assess Fisher's sanity. They all concluded that she was insane. The trial court then adjudged Fisher to be insane and had her transported to a state hospital for restraint and maintenance. Approximately a year later, the circuit court rendered a decree restoring Fisher to judicial sanity.

After she was restored to sanity, Fisher filed suit against the three defendants for malicious prosecution, libel, and false imprisonment. The trial court entered judgment for the defendants and Fisher appealed.

In Fisher, the Florida Supreme Court first addressed the plaintiffs' libel claim, and in short order determined that it was barred by the litigation privilege adopted in Myers, supra. However, **the Court in Fisher did not apply the litigation privilege to the malicious prosecution claim**, but rather evaluated the (common law) pleadings and determined them insufficient to demonstrate a prima facie case for malicious prosecution.[5] Specifically, the Court found the declaration did not allege that any of the defendants had initiated the lunacy proceedings against Fisher. The plaintiffs' pleading acknowledged that the defendants were appointed to the examining committee by the court after the action had been filed, but there was no allegation that the defendants were involved in the initiation of the action. As a result, that required element of the tort had not been alleged and a judgment on the pleadings was justified. Id. 113 So. at 381.

In Fisher, the Court also noted that the plaintiffs had failed to allege the essential element of malicious prosecution that the lunacy proceedings were commenced without probable cause. Id. If the Court in Fisher believed that the litigation privilege established in Myers applied as a bar to the malicious prosecution claim, there would have been no need to address whether plaintiffs' allegations sufficiently stated the elements of that tort. Obviously, the Florida

[5] The Court in Fisher also disposed of the false imprisonment claim on the ground that it was not adequately pled (113 So. at 380).

Supreme Court recognized that the litigation privilege and the cause of action for malicious prosecution coexisted in the common law without conflict.

After Fisher and before Wolfe, numerous district court decisions in Florida addressed whether the litigation privilege barred a claim for malicious prosecution. All of these decisions followed the implicit reasoning of Fisher – until the Third District's unique decision in Wolfe, supra.

In Wright v. Yurko, 446 So.2d 1162 (Fla. 5th DCA 1984), the Fifth District consolidated two actions in which a doctor sued people who had initiated or participated in an unsuccessful medical malpractice action against him. In one suit, Wright sued Yurko, the attorney that represented the plaintiffs in the medical malpractice action; and in a second suit he sued the plaintiffs (the Dormans) and Barnett Green, the expert witness who testified for them. Wright alleged claims for perjury, libel, slander, defamation and malicious prosecution. The trial court dismissed the complaint against the Dormans and Green, and granted summary judgment in favor of Yurko. Wright appealed both rulings and they were consolidated on appeal.

In Wright, the Fifth District first addressed the dismissal of the claims against the Dormans and Green. The court affirmed the dismissal of the claims for perjury, libel, slander, defamation and conspiracy to commit those torts based on the litigation privilege (446 So.2d at 1164-65). The court then stated:

> The only private remedy in this context allowed or recognized is the ancient cause of action of malicious prosecution. [Footnote deleted.]

Wright, 446 So.2d at 1165.

The Fifth District proceeded to analyze Wright's complaint and determined that it sufficiently alleged the elements of malicious prosecution claims, concluding that the dismissal order should be reversed.[6] Thus, while the Fifth District in Wright concluded that the litigation privilege barred every other claim in Wright's complaint against the Dormans and Green, it did not bar the malicious prosecution claim.

Similarly, in Graham-Eckes Palm Beach Academy v. Johnson, 573 So.2d 1007 (Fla. 4th DCA 1991) (per curiam), this Court affirmed a final judgment denying relief on claims for intentional inference with a contract for sale of land and slander of title. This Court stated:

> Appellant contends that the absolute privilege normally accorded to pleadings should not apply where the complaint is wholly frivolous and filed to interfere with the performance of a contract for the sale of property. **While 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). [E.S.]

Graham-Eckes, 573 So.2d at 1008.

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[6] As to Wright's suit against Yurko, the Fifth District upheld the summary judgment against Wright on the basis that Yurko had filed an affidavit demonstrating probable cause for the filing of the suit and the doctor had not filed any counter affidavits or other sworn testimony in opposition thereto (446 So.2d at 1165-67).

Thus, this Court ruled that the litigation privilege applied to the slander of title and interference with a contract claims, but that the privilege would not have barred a malicious prosecution claim.

Finally, in Olson v. Johnson, 961 So.2d 356 (Fla. 2d DCA 2007), the Second District also concluded that a malicious prosecution action was not barred by the litigation privilege. In that case, Johnson was in a custody battle with a man named Olson, and she and two of her friends signed affidavits alleging that he was stalking her. Those affidavits provided the basis for a criminal charge to be brought against Olson. However, Olson was acquitted and then sued the three women for malicious prosecution. The trial court granted summary judgment to Johnson, and the Second District reversed, concluding, inter alia, that Olson's claim was not barred by the litigation privilege. The Second District, in an opinion authorized by then-Judge Canady, stated:

> Johnson's reliance on Fridovich is unwarranted. In relying on Fridovich, Johnson confuses the law of defamation-with which Fridovich deals-with the law of malicious prosecution-which is at issue in the instant case. Olson has made no claim based on defamation, and the fact that defamatory statements may have been made in the course of the conduct which Olson alleges as the basis for his claim does not transform that claim into a defamation claim that is subject to an assertion of the absolute privilege or qualified privilege discussed in Fridovich.
>
> There is no equivalent privilege available to a complaining witness such as Johnson who is named as a defendant in a malicious prosecution action. Such a defendant must defend against a malicious

> prosecution claim by disputing an element or elements of the cause of action alleged or by raising an applicable affirmative defense.

Olson, 961 So.2d at 360-61.

That rationale was consistent with prior Florida law and essentially tracks Justice Scalia's analysis of the common law in Kalina, quoted supra, p. 19.

Thus, before Wolfe, the Fifth, Fourth and Second Districts all had ruled that the litigation privilege did not apply to bar malicious prosecution claims.

Other references in Florida district court decisions also demonstrate that prior to Wolfe the litigation privilege was not considered to be an absolute bar to a malicious prosecution action. For example, in Rushing v. Bosse, 652 So.2d 869, 875 (Fla. 4th DCA 1995), this Court noted that the complaint stated, inter alia, a cause of action for malicious prosecution on behalf of a child who was subject to a wrongful adoption proceeding. The trial court dismissed that count as to two attorneys who had been named as defendants. This Court, in an opinion written by then-Judge Pariente, reversed that ruling, stating a malicious prosecution claim could proceed in proper circumstances (652 So.2d at 875):

> The fact that Chilton and Bosse are attorneys does not immunize them from a malicious prosecution action if the evidence establishes that they instituted a claim which a reasonable lawyer would not regard as tenable or unreasonably neglected to investigate the facts and law in making a determination to proceed, provided that as long as the other elements of a malicious prosecution are also proven.

Additionally, in SCI Funeral Services of Florida, Inc. v. Henry, 839 So.2d 702, 706, n.4 (Fla. 3d DCA 2002), the Third District stated, albeit in dicta:

> As the Levin court cited Wright v. Yurko, 446 So.2d 1162 (Fla. 5th DCA 1984), with approval, presumably the cause of action for malicious prosecution continues to exist and would not be barred by the litigation privilege. See Wright, 446 So.2d at 1165.

See also Johnson v. Sackett, 793 So.2d 20, 25 (Fla. 2d DCA 2001) (HRS case worker was **not** entitled to absolute immunity under the common law from malicious prosecution action, although she was entitled to the qualified privilege in § 768.28(9)(a), Fla. Stat).

Finally, in North Star Capital Acquisitions, LLC v. King, 611 F.Supp 2d 1324 (M.D. Fla. 2009), the federal district court addressed whether the litigation privilege protected arguably misleading or deceptive documents which had been served on defendants with the complaint at the initiation of the lawsuit. The district judge ultimately concluded that the Florida Supreme Court would **not** extend the litigation privilege to that conduct, explaining:

> The privilege applies to conduct that occurs during settlement negotiation. See, Jackson v. BellSouth Telecommunications, 372 F.3d 1250, 1277 (11th Cir. 2004). However, not every event bearing any relation to litigation is protected by the privilege because, as noted by counterclaim plaintiffs, "if the litigation privilege applied to all actions preliminary to or during judicial proceedings, an abuse of process claim would never exist, nor would a claim for malicious prosecution." See SCI Funeral Services of Fla., Inc. v. Henry, 839 So.2d 702, 706 n.4 (Fla. 3rd DCA 2002) (noting that the Florida Supreme Court has implied that malicious prosecution claims have survived the expansion of the litigation privilege). [Footnote deleted.]

North Star, (611 F.Supp. 2d. at 1330).

Thus, prior to Wolfe, there was no case law in Florida holding that the litigation privilege barred a malicious prosecution claim. In fact, all of the case law in Florida supported the contrary conclusion that the litigation privilege and the malicious prosecution cause of action coexisted without conflict, as they had for hundreds of years in the common law.

Other Jurisdictions Overwhelmingly, If Not Unanimously, Hold That The Litigation Privilege Does Not Bar a Malicious Prosecution Claim

The pre-Wolfe Florida case law discussed above uniformly held that the litigation privilege does not bar an action for malicious prosecution. That case law was consistent – and remains consistent – with the overwhelming weight of authority throughout the country. Just last year, the Indiana Court of Appeals reviewed the relevant case law and noted the "wealth of authority" in support of this conclusion in The Estate of Mayer v. Lax, Inc., 998 N.E. 2d. 238, 250 (Ind. App. 2013):

> A vast number of other jurisdictions also hold that even where an absolute [litigation] privilege bars an action for defamation based on statements made during a judicial proceeding, it does not bar an action for malicious prosecution. See Hogen v. Valley Hosp., 147 Cal.App.3d 119, 195 Cal.Rptr. 5, 7 (1983) ; Goldstein v. Serio, 496 So.2d 412, 414–15 (La.Ct.App.1986) , writ denied; Keys v. Chrysler Credit Corp., 303 Md. 397, 494 A.2d 200, 204 (1985) ; McKinney v. Okoye, 282 Neb. 880, 806 N.W.2d 571, 579 (2011) ; Rainier's Dairies v. Raritan Val. Farms, 19 N.J. 552, 117 A.2d 889, 895 (1955); Mantia v. Hanson, 190 Or.App. 412, 79 P.3d 404, 408–09 (2003); Crowell v.

> Herring, 301 S.C. 424, 392 S.E.2d 464, 468 (Ct.App.1990) . We see no reason to depart from this wealth of authority and, thus, hold that the absolute privilege for communications made during a judicial proceeding does not bar Lax and Lasco's cause of action for malicious prosecution arising from such communications.

Those are not the only jurisdictions which hold that the litigation privilege does not bar a malicious prosecution claim. See, e.g., Indus. Power & Lighting Corp. v. W. Modular Corp., 623 P.2d 291, 298 (Alaska 1981), Sierra Madre Dev., Inc. v. Via Entrada Townhouses Ass'n, 514 P.2d 503, 507 (Ariz. App. 1973), Simms v. Seaman, 69 A.3d 880, 890 (Conn. 2013), Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc., 774 A.2d 332, 346 (D.C. 2001), Loigman v. Township Committee, 889 A.2d 426, 436 n.4 (N.J. 2006), Willis & Linnen Co., L.P.A. v. Linnen, 837 N.E.2d 1263, 1265-66 (Ohio App. 9 Dist. 2005), and Clark v. Druckman, 624 S.E.2d 864, 872 (W. Va. 2005).

The general acceptance of that holding is further demonstrated by the articulation of the litigation privilege in the American Law Institute's Restatement (Second) of Torts § 587, which describes the privilege, consistent with Florida law, as follows:

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

However, in Comment (a) to § 587, the Restatement specifically notes that the privilege does **not** eliminate a claim from malicious prosecution:

> The privilege stated in this Section is based upon the public interest in according to all men the utmost freedom of access to the courts of justice for the settlement of their private disputes. Like the privilege of an attorney, it is absolute. It protects a party to a private litigation or a private prosecutor in a criminal prosecution from liability for defamation irrespective of his purpose in publishing the defamatory matter, of his belief in its truth or even his knowledge of its falsity. **One against whom civil or criminal proceedings are initiated may recover in an action for the wrongful initiation of the proceedings, under the rules stated in § 674 to 680, if the proceedings have terminated in his favor and were initiated without probable cause and for an improper purpose.**

The Wolfe Decision

Despite the lengthy history of the coexistence of the litigation privilege and the cause of action for malicious prosecution, and the extensive case law cited above, the Third District in Wolfe held that the absolute immunity afforded by the litigation privilege barred an action for malicious prosecution. Wolfe does not appear to have carefully considered the Florida case law or to have reviewed the long-standing common law to the contrary.

In Wolfe, a malicious prosecution claim was brought against Florida attorneys who had been retained by their client's New York counsel to file a complaint in federal court in Miami. The complaint addressed a dispute that had been the subject of prior litigation and a settlement agreement between the same parties. However, neither the client nor his New York counsel fully informed the

Miami lawyers of that prior litigation and the settlement agreement. After filing the complaint the Miami lawyers were provided with those other materials. They immediately notified the client that they could not ethically pursue his claims and they withdrew from the Florida federal court action with court approval. Thereafter, the complaint in that action was dismissed and a final judgment in favor of the defendants was entered.

After the conclusion of the federal litigation, the plaintiffs in Wolfe filed a malicious prosecution action against the Miami lawyers. The trial court granted a judgment on the pleadings, concluding that the litigation privilege granted them absolute immunity.

On appeal, the Third District affirmed that determination. In Wolfe, the Third District relied on its prior decision in LatAm Investments, LLC v. Holland & Knight, LLP., 88 So.3d 240 (Fla. 3d DCA 2011), and other authority to hold that the litigation privilege applied to the abuse of process claim. With respect to the malicious prosecution claim, the Third District stated that "the law is not as clear" whether the privilege barred that claim. Wolfe, 128 So.3d at 68.

In its legal analysis, the Third District noted the establishment of the litigation privilege in Myers, supra, and quoted language from Levin, supra, and Echevarria, supra, that absolute immunity must be afforded to "any act occurring during the course of a judicial proceeding" (128 So.3d at 69). The Third District

concluded that the filing of a complaint was an act that would fall within the scope of that language and, therefore, that conduct must be subject to the litigation privilege. In Wolfe, Judge Sheperd filed a specifically concurring opinion in which he joined in the affirmance, but for different reasons. Judge Sheperd concluded that the malicious prosecution claim was fatally defective because two essential elements were missing: malice and the absence of probable cause (128 So.3d at 71-72).

The Wolfe opinion also noted that while tortious conduct such as malicious prosecution may be barred by the litigation privilege, there was still a remedy available in "the discipline of the courts, the bar association, and the state" (128 So.3d at 71, quoting Levin, supra, 639 So.2d at 608-09). However, that was obviously only a relevant consideration when attorneys are the defendants in the malicious prosecution action. Those remedies have no application to non-lawyers, such as Epstein in the case sub judice.

Moreover, Wolfe overlooks the distinction between the wrongful initiation of a lawsuit, and wrongful conduct during the lawsuit. Levin only addressed the latter. There are different policy considerations involved in immunizing those two categories of conduct, differences which have been consistently recognized by courts in Florida (other than Wolfe) and throughout the country. Furthermore, Levin obviously did not intend for the litigation privilege to bar malicious

prosecution claims because that issue was not before it. Indeed, Levin cited Wright v. Yurko, supra, with approval.

It is important to note what the majority opinion in Wolfe failed to address. The majority did not analyze, or even mention, the fact that the litigation privilege and malicious prosecution claims had coexisted in the common law for hundreds of years. Additionally, the majority did not address any of the Florida case law discussed supra, in which the litigation privilege was **not** applied to malicious prosecution claims. In fact, the majority in Wolfe did not even discuss the dicta from its prior decision in SCI Funeral, supra, to the effect that "the cause of action for malicious prosecution continues to exist and would not be barred by the litigation privilege" (839 So.2d at 706, n.4).

The majority opinion in Wolfe relied upon the Second District's decision in Olson, supra, for the proposition that application of the litigation privilege would not eliminate the malicious prosecution cause of action. The majority stated that the tort would still apply to acts committed prior to the filing of the complaint, if they qualified as a legal cause of the initiation of the underlying proceedings. Putting aside that extreme limitation on malicious prosecution claims, that analysis ignores that Olson rejected the claim of absolute privilege on the basis that it confused the law of defamation with the law of malicious prosecution (961 So.2d at 360-61). Thus, Olson provides no support for the majority decision in Wolfe.

This Court Should Not Follow Wolfe

This Court should not follow Wolfe, but should instead adhere to its holding in Graham-Eckes, supra, where, after upholding the denial of relief based on application of the litigation privilege, the court stated (573 So.2d 1007), "while appellant's argument is persuasive, we hold that its proper cause of action would have been one for malicious prosecution." This Court should also follow the overwhelming weight of authority in Florida and throughout the country, which has upheld the ancient cause of action for malicious prosecution even in the face of a claim of litigation privilege.

An analysis of the Wolfe opinion demonstrates its weaknesses. The majority opinion did not address the common law history of the litigation privilege or the cause of action for malicious prosecution. The majority of Wolfe did not cite any authority on point from any jurisdiction that supported its holding, nor even note its own adverse (albeit not binding) authority, see SCI Funeral Services, supra. Moreover, while the policy considerations underlying the litigation privilege and the malicious prosecution cause of action are related, the balance struck by the courts through the common law has been carefully evaluated and established. Wolfe does not explain why these policy considerations have suddenly changed so drastically as to justify the elimination of the cause of action for malicious prosecution.

While the majority in Wolfe suggests that the tort of malicious prosecution would still exist under its rationale, it limited it to those rare circumstances where a party who motivated, but did not actually file, the vexatious action might be held liable. Paradoxically, under Wolfe's reasoning, the person or entity who actually filed the vexatious action would have absolute immunity because the filing of the complaint was an act done in a judicial proceeding. There is no policy justification for that distinction and, while the Wolfe majority relies on Olson, supra, that was not the rationale of the Second District's decision.

The Wolfe majority opinion is based almost entirely on one short phrase from the Levin decision (which was subsequently quoted in Echevarria) to the effect that any act occurring during a judicial proceeding is absolutely privileged. However, neither Levin nor Echevarria addressed a malicious prosecution claim in which the initiation of the vexatious litigation is the wrong itself. And neither opinion provides a basis to conclude that the Florida Supreme Court would choose to deviate from the overwhelming weight of authority in this country on this issue. The Florida Supreme Court has recognized the common law origins of both the litigation privilege and the malicious prosecution cause of action; legal principles which have comfortably coexisted for hundreds of years. In fact, the Supreme Court applied them, without conflict, in Fisher v. Payne, supra.

While the Supreme Court has obviously accepted the argument that potentially tortious conduct occurring during litigation is entitled to absolute immunity, that is not the same as a conclusion that the malicious initiation of litigation should also be immune. As noted in an early edition of Prosser's treatise:

> There is no policy in favor of vexatious suits known to be groundless, which are a real and often a serious injury; and the heavy burden of proof upon the plaintiff, to establish both lack of probable cause and an improper purpose, should afford sufficient protection to the bona fide litigant and adequate safeguard against a series of actions.

Prosser, Torts, 886 (1941), quoted in Rainier's Dairies v. Raritan Valley Farms, 117 A.2d 889, 896 (N.J. 1995).

In Wolfe, which was a case brought against attorneys, the majority also relied on the fact that there were other "remedies" available to the plaintiffs, including "the discipline of the courts, the bar association and the state," quoting Levin, supra, 639 So.2d at 608-09. However, those remedies do not provide any adequate remedy to Edwards under the circumstances of this case.

The Trial Court's Order Is Based on Erroneous Reasoning

Here, the trial court apparently misunderstood the fundamental basis for a malicious prosecution action. The trial court stated that in this 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." But the core of a malicious prosecution claim is not the action of an attorney drafting a complaint; instead, it is

the action of a party who in the first instance causes the attorney to draft the complaint. When a party maliciously initiates a groundless lawsuit, whether pro se or through an attorney, that party's conduct, knowledge and intent on its own, can provide the basis for the tort of malicious prosecution. That has been the nature of that common law tort for hundreds of years. The trial court's analysis seems to create an absolute defense of attorney participation, which has no basis in the law.

The trial court also stated "the cases cited by Edwards involved malicious prosecution claims stemming from actions filed by the party themselves [i.e., pro se actions], not counsel." This is simply untrue – a mistake that by itself justifies reversal. The trial court was apparently referring to cases such as Olson, supra, which did involve pro se actions. But the trial court inexplicably overlooked numerous cases that Edwards cited allowing malicious prosecution claims to proceed against either the attorney or the person hiring the attorney. See Edwards' Motion for Reconsideration at 2-9 (collecting numerous authorities); see, e.g., Keys v. Chrysler Credit Corp., 303 Md. 397, 407, 494 A.2d 200, 205 (1985) (allowing malicious prosecution suit to move forward against both Chrysler Credit Corporation and its attorneys); Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, NA., 892 P.2d 230, 241 (Colo. 1995) ("an attorney [w]hile fulfilling his obligation to his client, [ ] is liable for injuries to third parties . . . when his conduct is fraudulent or malicious" (internal quotation omitted)); Simms v. Seaman, 308

Conn. 523, 541, 69 A.3d 880, 890 (2013) ("This court also has determined that absolute immunity [i.e., litigation privilege] does not bar claims against attorneys for . . . malicious prosecution").

Here, Edwards has not filed suit against Epstein's attorneys, but solely against Epstein – the wrongdoer who maliciously initiated a lawsuit without any basis. This is consistent with law throughout the country, which recognizes the tort of malicious prosecution for "the wrongful **initiation** of the proceedings." Restatement (Second) of Torts § 587, cmt. (a) (emphasis added). See generally Restatement (Second) of Torts § 674 to 680 (describing the tort of malicious prosecution).[7]

The trial court's ruling granting summary judgment against Edwards should be reversed, so that Edwards can pursue his malicious prosecution claim against

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[7] The trial court's order also briefly states that "all of the allegations made in . . . [the] malicious prosecution claim[s] are of acts occurring during the course of the judicial proceeding and bear some relation to the proceeding." To the extent that the trial court was merely stating that Epstein's act in initiating the lawsuit bears "some relation" to that lawsuit, that trial court was just recounting a tautology. If the trial court was trying to go further than that and assert that Edwards' Counterclaim pertained only to actions after the filing of the lawsuit, the trial court was inaccurate. The malicious prosecution Counterclaim was based on the initiation of the lawsuit. See, e.g., Counterclaim, ("Epstein filed civil claims against Edwards . . . for the sole purpose of further attempting to intimidate Edwards . . . .") (R2:332); ("Epstein acted purely out of malice towards Edwards . . . in filing his unsupported and unsupportable claims.") (R2:333); and ("Indicative of his total disregard for the lack of any predicate for his claims, Epstein ignored the statutory requirement for written notice prior to the initiation of a civil theft claim [in his lawsuit].") (R2:333).

Epstein. Doing so will not open any litigation floodgates, as the experience both in this state and other states amply demonstrates. The elements of the tort of malicious prosecution are themselves exceedingly demanding. The Nebraska Supreme Court recently explained how this protection operates:

> [B]ecause the elements of the tort [of malicious prosecution] are difficult to prove, it is unnecessary to grant . . . absolute [litigation] privilege. [T]here [is] a kind of qualified immunity built into the elements of the tort. Indeed, all those who instigate litigation are given partial protection by the rules that require a plaintiff claiming malicious prosecution to show improper purpose, a lack of probable cause for the suit or prosecution, and other elements. These elements effectively act as and could be analogized to the defamation defense of qualified or conditional privilege, which protects speakers in certain situations, but is lost if the speaker abuses it. . . . We conclude that absolute [litigation] privilege does not bar an action for malicious prosecution.

McKinney v. Okoye, 282 Neb. 880, 889, 804-06 N.W.2d 571, 577-79 (2011).

While the elements of a malicious prosecution claim are onerous, and essentially grant a qualified immunity in all but the most extreme circumstances, extreme circumstances exist here – as Edwards could prove if allowed to go to trial. Boiled down to its essence, this case involves a wealthy sex offender using his vast resources to launch malicious litigation solely to prevent an attorney from pursuing legitimate claims for the victims. If his intimidating action is upheld – and upheld merely because he was able to pay for a duly-licensed attorney to file his meritless lawsuit – then no doubt many other persons of means will follow this path. They will know that so long as they can find and pay for an attorney to file

the lawsuit, they will have impunity from any meaningful recourse from the victims.

The need to preserve the viability of claims for malicious prosecution is highlighted by the circumstances of this case. Without that remedy available, people with the vast resources of Epstein can file lawsuits with impunity, knowing that no matter how baseless his allegations, how malicious his motives, and how much damage he purposely inflicts regardless of what he files, or what he alleges, he is absolutely immune from any recourse from his victims. Such a result would mean not only that people of limited resources would be victimized, but the court system would be as well, as it would be burdened with lawsuits having absolutely no legitimate basis or purpose.

Sanctions such as § 57.105 Fla. Stat., which only authorize an award of attorney's fees, will not serve as an adequate deterrent for those with substantial resources like Epstein. Attorney's fees only compensate one specific out-of-pocket loss to the victim of a malicious lawsuit. Such sanctions do not address other losses that the victims of such suits suffer from simple initiation of the lawsuit, such as economic harm, damage to reputation, and the psychological trauma that inevitably results from being forced to defend against meritless unnecessary litigation.

The tort of malicious prosecution exists precisely to provide compensation for such losses. That is why the tort is well-recognized in the Restatement (Second) of Torts and case law throughout this country. In England, where the prevailing party is automatically entitled to fees and costs, the courts concluded hundreds of years ago, and still hold, that the malicious prosecution cause of action is necessary both to deter wrongful litigation and, if deterrence fails, to compensate for the damages which fees and costs cannot remedy.

One final point deserves mention. If affirmed, the decision below will create a remarkable anomaly in Florida law: egregious conduct worthy of sanction by means of punitive damages is somehow, at the same time, deserving of absolute immunity. Recall that the trial court allowed Edwards to amend his Complaint to add a claim for punitive damages, finding that Edwards had evidence demonstrating that Epstein had acted "in an outrageous manner or with fraud, malice, wantonness or oppression." See Arab Termite & Pest Control of Florida, Inc. v. Jenkins, 409 So.2d 1039, 1041 (Fla. 1982). But after the unexpected arrival of the Wolfe decision, the trial court then concluded that Epstein's conduct was worthy of immunity due to the litigation privilege.

It would be a remarkable conclusion that even malicious conduct committed in an outrageous manner is somehow deserving of protection. An opinion reversing the summary judgment in the narrow circumstances present here would

preserve the ancient and useful cause of action of malicious prosecution, which serves to deter these kinds of meritless lawsuits and to conserve scarce judicial resources. Even more fundamentally, it would be inappropriate for this Court to essentially eliminate a long-established cause of action. Such a drastic change to the common law should only be attempted by the Supreme Court or the legislature. Nothing indicates that such a radical action is warranted by this Court.

CONCLUSION

For all these reasons, this Court should follow the overwhelming weight of authority across this country, as well as within this state, and hold that the litigation privilege does not bar a claim for malicious prosecution. Accordingly, the Judgment of the Circuit Court should be reversed and the cause remanded for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on December 30, 2014.

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CERTIFICATE OF TYPE SIZE & STYLE

Appellant hereby certifies that the type size and style of the Initial Brief of Appellant is Times New Roman 14pt.

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