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.
_____/

REPLY BRIEF OF APPELLANT

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

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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:

(R) – Record-on-Appeal

(SR) – Supplemental Record-on-Appeal

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.

Introduction

This case involves a critical issue: whether a litigant can maliciously file a harassing lawsuit that lacks any factual basis and hide behind the litigation privilege. Indeed, the facts presenting this issue could not be starker. A lawyer ethically advances the interests of his clients – children seeking to hold their billionaire abuser civilly liable for his many acts of sexual molestation. Lacking any viable defense to the civil claims, the defendant abuser decides to go on the offensive by applying his vast resources to attack his opponents with a baseless lawsuit. His intention is to use his completely fabricated claims as a bargaining tool to trade off against the well-founded, legitimate, and indefensible claims of his victims and their advocate. The victims and their lawyer refuse to give in to the pressure, but after years of effort – on the eve of trial – the trial court concludes that the litigation privilege requires immunity even for the abuser's most baseless claims.

The issue thus squarely presented by this appeal is whether any valid policy interest could possibly be served by providing immunity for such misuse of the

legal system. Florida case law has long recognized that the tort of malicious prosecution comfortably exists alongside the litigation privilege. A privilege for "freely and zealously advocat[ing] for . . . a cause[] in court," Delmonico v. Trayner, 116 So.3d 1205 (Fla. 2013), presupposes a properly-filed case before the court. A malicious prosecution claim, in contrast, requires proof that a litigant launched a bad-faith suit that "is wholly frivolous and filed [for harassing purposes]." Graham-Eckes Palm Beach Academy v. Johnson, 573 So.2d 1007 (Fla. 4th DCA 1991) (per curiam). To extend the litigation privilege to an abusive lawsuit filed for harassing purposes makes no sense whatsoever.

Florida should not become the first and only state in the nation to permit an absolute litigation privilege to devour the tort of malicious prosecution, leaving victims of such assaults completely without remedy. Accordingly, the trial court's decision relying on Wolfe v. Foreman, 128 So.3d 37 (Fla. 3rd DCA 2013), must be reversed and the case remanded for further proceedings.

Florida Case Law Before Wolfe

The Florida Supreme Court has never applied the litigation privilege to bar a malicious prosecution claim, nor has it ever suggested that the privilege applies to conduct causing the tortious initiation of a lawsuit. Epstein concedes, by his failure to cite any authority, that no court in Florida (or, indeed, anywhere in the country) had ever applied the privilege in this manner until Wolfe v. Forman, 128 So.3d 37

(Fla. 3rd DCA 2013). Epstein claims that the litigation privilege applies to statements and conduct occurring "during the course of a judicial proceeding" – and then argues that his decision to launch a lawsuit was in the course of such a proceeding. However, the common law has recognized the distinction between the tortious initiation of a lawsuit and tortious statements and conduct occurring during the actual course of a lawsuit that was initiated in good faith. Malicious prosecution actions and the litigation privilege have coexisted for hundreds of years without conflict. The only decision conflating the two is Wolfe. The Third District misconstrued decisions of the Florida Supreme Court, disregarded conflicting Florida precedent, and even ignored its own opinions indicating that the privilege did not bar a malicious prosecution claim.

Epstein attempts to diminish the outlier status of Wolfe by suggesting that the Florida Supreme Court has consciously decided to expand the litigation privilege beyond the common law principles that have governed its application for hundreds of years.

The Florida Supreme Court showed this to be demonstrably false in DelMonico v. Trayner, 116 So.3d 1205 (Fla. 2013), its most recent decision addressing the litigation privilege. There, the Court reiterated the litigation privilege's common law roots:

> This privilege is a common law creation with a 400-year history. . . . More than one hundred years ago, this Court aligned itself with the

> common law and the "overwhelming" trend in other jurisdictions by recognizing Florida's absolute privilege in the bellwether case of Myers v. Hodges, 53 Fla. 197, 44 So. 357, 361 (1907).

DelMonico, 116 So.3d at 1211, 1212. The DelMonico Court continued, elaborating on the underlying consistency of the two doctrines:

> Based on a review of the history of the absolute privilege in Florida and the purpose served by the doctrine, Myers and its progeny firmly established a unifying concept: this Court's recognition of the privilege derived from a balancing of two completing 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.

Id. at 1217.

That "unifying concept" has remained the same for a hundred years, and during that time the Florida Supreme Court has never applied the privilege to bar a malicious prosecution claim.[1] In the common law, the balance of the competing considerations has always resulted in the recognition of the viability of malicious prosecution claims. Such claims are based on the principle that "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, The Law of Torts § 119, at 871 (5th ed. 1984).

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[1] In Londono v. Turkey Creek, Inc., 609 So.2d 14 (Fla. 1992), the Florida Supreme Court reaffirmed the viability of malicious prosecution claims against parties who bring baseless litigation, and it has never receded from the scope of that tort. The Court has also been clear that it does not overrule itself sub silentio. See, e.g., Arsali v. Chase Home Finance, LLC, 121 So.3d 511, 516 (Fla. 2013).

It is clear that Florida follows the common law on the scope of the litigation privilege. It is, therefore, very significant that no other state in the country has ever held that the privilege bars a malicious prosecution claim. See generally Restatement (Second) of Torts § 587, cmt. (a). In fact, in its discussion of the privilege, DelMonico, 116 So.3d at 1215, quotes with approval a New Jersey decision, Rainer's Dairies v. Raritan Valley Farms, Inc., 117 A.2d 1118, 1121 (N.J. 1955), and a California decision, Fenelon v. Superior Court, 273 Cal. Rptr. 367, 370-71 (Cal. App. 1990). Both of those jurisdictions have unambiguously held that the litigation privilege does not bar a malicious prosecution claim. See, e.g., Loigman v. Township Committee, 889 A.2d 426, 436 n.4 (N.J. 2006) ("The litigation privilege does not apply to tort claims for malicious prosecution") (quoting Thomason v. Norman E Lehrer, P.C.,183 F.R.D. 161, 167 (D.N.J. 1998)); Flatley v. Mauro, 139 P.3rd 2, 16 (Cal. 2006) ("The privilege is an absolute privilege and it bars all tort causes of action except a claim of malicious prosecution."). It is not reasonable to believe that the Florida Supreme Court intended to deviate from the common law sub silentio without expressly addressing the application of the privilege to malicious prosecution claims.

The Aberrational Wolfe Decision

Epstein's entire argument rests on a single decision: Wolfe, supra. As Edwards carefully explained in his opening brief (see IB at pp. 11-26), Wolfe is a

truly unprecedented decision which disregarded conflicting Florida precedents, i.e., Wright v. Yurko, 446 So.2d 1162 (Fla. 5th DCA 1984); Graham-Eckes Palm Beach Academy v. Johnson, 573 So.2d 1007 (Fla. 4th DCA 1991); Rushing v. Bosse, 652 So.2d 869, 875 (Fla. 4th DCA 1995); Olson v. Johnson, 961 So.2d 356 (Fla. 2d DCA 2007); Johnson v. Sackett, 793 So.2d 20, 25 (Fla. 2d DCA 2001). Wolfe also ignored contrary statements in the Third District's own decisions, i.e., SCI Funeral Services of Florida, Inc. v. Henry, 839 So.2d 702, 706 n.4 (Fla. 3d DCA 2002); Boca Investors Group, Inc. v. Potash, 835 So.2d 273, 275 (Fla. 3rd DCA 2002) (Cope, J., concurring). Additionally, Wolfe never attempted to reconcile the coexistence of the tort of malicious prosecution and the litigation privilege for hundreds of years at the common law.

To take but one illustration of how out of step Wolfe is with prior case law, consider Wright v. Yurko, supra. Epstein blatantly misstates the facts of that case, contending that "Wright is factually distinguishable, because unlike the instant case, Wright included a cause of action against the attorney who filed the alleged malicious prosecution, not the represented plaintiff" (AB p. 21). That is demonstrably false.

The plaintiff in Wright was a doctor who had been sued unsuccessfully for medical malpractice. After the conclusion of that suit, Wright sued the attorney who had filed that claim (Yurko), as well as the two plaintiffs from the malpractice

suit (Leon and Lyla Dorman), and their expert witness, alleging numerous torts including malicious prosecution. The trial court granted summary judgment in favor of the attorney and dismissed the claims Wright brought against the plaintiffs and the expert witness.

On appeal, the Fifth District affirmed the summary judgment in favor of the attorney, because Wright had not filed any evidence opposing Yurko's motion. The court also affirmed the dismissal of the defamation, conspiracy to commit defamation, and perjury counts against the plaintiffs and their expert witness based on the litigation privilege, noting that "such torts committed in the course of judicial proceedings are not actionable" (446 So.2d at 1164). However, the Fifth District specifically reversed as to the malicious prosecution count, holding **"the only private remedy in this context allowed or recognized is the ancient cause of action of malicious prosecution"** (446 So.2d at 1165) (footnote deleted).

Wright is thus directly on point in allowing a malicious prosecution claim in the face of an assertion of litigation privilege and directly conflicts with Wolfe. Moreover, the Fifth District applied the exact language misconstrued by Wolfe, i.e., that the litigation privilege precluded "torts committed in the course of judicial proceedings." See Wright, 446 So.2d at 1164. Obviously Epstein cannot distinguish Wright and instead misstates its facts to conceal its relevance.

The Florida Supreme Court cited Wright with approval no less than three times in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Company, 639 So.2d 606, 608 (Fla. 1994). Epstein's only response is that Levin does not cite Wright directly for the proposition that the litigation privilege is not a bar in malicious prosecution claims (AB p. 20). Of course, Levin did not cite Wright for that proposition because it did not intend its holding to apply to malicious prosecution claims. Accepting Epstein's position would require this Court to conclude that the Florida Supreme Court cited Wright with approval three times, even though its real intention was to disapprove Wright on the merits. That is simply irrational.

Epstein claims Edwards is asking this Court to ignore Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 748 So.2d 380 (Fla. 2007), despite the fact that Edwards discussed Echevarria three times in his Initial Brief (IB pp. 15, 29, 33). In Echevarria, the Florida Supreme Court addressed a narrow legal issue: "We limit our review to the question of law upon which jurisdiction was granted, and hold that the litigation privilege applies in all causes of action, statutory as well as common law" (950 So.2d at 380-38). The Court quashed the decision of the First District, which held that the litigation privilege did not apply in cases involving statutory claims. The Court in Echevarria did not address the tortious initiation of litigation and simply recounted the scope of the privilege as defined in

prior cases – i.e., that it applies to statements and actions taken "during the course of the judicial proceeding" (950 So.2d at 384). Thus, the scope of the privilege was not changed, and the Florida Supreme Court adhered to the common law standard, as stated in DelMonico.

In Echevarria, the Supreme Court also relied on the same public policy considerations as discussed in prior cases: "It is the perceived necessity for candid and unrestrained communications in those proceedings, free of the threat of legal actions predicated upon those communications, that is at the heart of the rule" (950 So.2d at 384). That policy does not conflict with the policy considerations underlying the tort of malicious prosecution – i.e., discouraging the filing of baseless litigation, which unjustifiably harms innocent parties and burdens the courts.

Epstein's Use of Legal Counsel Does not Provide Immunity

Epstein highlights his use of legal counsel as an alleged ground for immunity from suit. But in Echevarria, the Court cited Rushing v. Bosse, supra, with approval, a case in which this Court determined that attorneys could be sued for malicious prosecution and were not entitled to an absolute privilege. Rushing

was cited in Edwards' Initial Brief and is totally ignored in Epstein's Answer Brief.[2]

Epstein also quotes from a statement in the trial court's order that "the cases cited by Edwards [in his opposition to Summary Judgment] involved malicious prosecution claims stemming from actions filed by the party themselves [sic], not counsel" (AB p. 14). That is simply false; none of the cases cited by Edwards involved pro se litigation. Epstein makes no attempt to support the trial court's erroneous statement, but follows it with the statement that all of Epstein's filings "were done by an attorney in good standing with the Florida Bar" (AB pp. 14-15). That fact is irrelevant to a malicious prosecution claim and is only relevant to an affirmative defense, which was not an issue before the court on Epstein's Motion for Summary Judgment.

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[2] While ignoring published precedent from this Court, Epstein cites Steinberg v. Steinberg, 152 So.3d 572 (Fla 1st DCA 2014) (table) (unpublished disposition), even though it is merely a per curiam decision without opinion. Indeed, quite remarkably, while the rest of his brief is carefully bluebooked, Epstein cites Steinberg as though it is a published decision in the Southern Reporter (AB p. 6, 9). An unpublished disposition "has no relevance for any purpose and is properly excluded from a brief or oral argument." Department of Legal Affairs v. District Court of Appeal Fifth District, 434 So.2d 310, 312 (Fla. 1983). A per curiam decision without opinion does not create any precedent, and the First District has stated that "a per curiam affirmance without opinion does not bind the appellate court in another case to accept the conclusion of law on which the decision of the lower court was based." Goldberg v. Graser, 365 So.2d 770, 773 (Fla. 1st DCA 1978). In any event, the First District in Steinberg chose not to adopt the rationale of Wolfe, and no one can do anything but speculate as to the basis for that affirmance. This Court should disregard Epstein's deceptive and improper discussion of Steinberg.

At the hearing on the matter below, the trial court repeatedly noted that Epstein had counsel and suggested this provided some insulation from liability, based on an assumption of counsel's good faith evaluation of the claim. (SR:1242-43, 1247, 1250). However, legal representation does not create any privilege or immunity barring a malicious prosecution claim, but rather only the affirmative defense of advice of counsel. See, e.g., Glass v. Parish, 51 So.2d 717 (Fla. 1951); Buchell v. Bechert, 356 So.2d 377 (Fla. 4th DCA 1978). Therefore, the trial court's concern was misplaced and only demonstrates an additional flaw in its ruling.

Epstein further claims that he had a "justifiable belief" that Edwards had participated in a Ponzi scheme (AB p. 3), but he cites nothing in the record to support that alleged belief. And Epstein appears to have forgotten that, as noted in the Initial Brief, none of his complaints ever alleged that Edwards was actively involved in the Ponzi scheme, only that he "knew or should have known" that Rothstein was engaged in one. See, e.g., R1:10. Obviously, Epstein had no basis to sue Edwards for racketeering (RICO), civil theft, fraud, and other intentional torts. Indeed, his improper purpose is further demonstrated by the fact that he alleged those same claims against L.M., one of the minor girls whom he had sexually molested.

Epstein references an alleged "concession" by Edwards' counsel in the trial court that he deems significant. But Epstein cites only to the trial court's order (AB

p. 4), because there is no such concession in the record. At the hearing, Edwards' counsel did not concede anything; in response to the trial court's question, counsel acknowledged the fact that the malicious prosecution claim was not based on any extra-judicial acts, but instead on Epstein's initiation of the baseless lawsuit. That, of course, is the gravamen of any malicious prosecution claim (R2:333). Edwards' counsel specifically highlighted the proceeding itself as the basis for the action:

> But that is why all of the positions that I articulated that would suggest that Levin nor Echevarria would apply to a malicious prosecution claim because it is distinctly different from the nature of – just as Judge Sasser says, **"It's not something that is going on during the course of proceedings. It's the proceeding itself."** [E.S.]

(SR:1266).

The allegations of the Fourth Amended Counterclaim demonstrate that Epstein's initiation of the lawsuit is the tortious conduct at issue, e.g. (R4:752):

> 26. EPSTEIN acted purely out of malice toward EDWARDS and others, and he had ulterior motives and purposes in filing his unsupported and unsupportable claims. EPSTEIN'S primary purpose in filing each of the claims against EDWARDS was to inflict a maximum economic burden on EDWARDS in having to defend against the spurious claims, to distract EDWARDS from the prosecution of claims against EPSTEIN arising out of EPSTEIN'S serial abuse of minors, and ultimately to extort EDWARDS into abandoning the claims he was prosecuting against EDWARDS.

Epstein's Futile Tipsy Coachman Argument

In a bizarre attempt to trigger a tipsy coachman analysis, Epstein claims that his Motion for Summary Judgment also argued that Edwards' malicious

prosecution claim should fail because there was no bona fide termination of the underlying suit (AB p.7 n.1). Epstein notes Edwards did not address that issue in the Initial Brief, and then he attempts to incorporate his argument on that point from his Motion for Summary Judgment. This tactic is fatally defective for numerous reasons.

First, as the Florida Supreme Court has repeatedly stated, trying to incorporate by reference in an appellate brief arguments from trial court filings is improper and causes those issues to be waived: "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990). See also Ferrell v. State, 29 So.3d 959, 968 n.6 (Fla. 2010); Douglas v. State, 141 So.3d 107, 126 n.14 (Fla. 2012).

Second, professional candor should have compelled Epstein to disclose to this Court that the trial court expressly rejected his argument on bona fide termination as a basis for summary judgment, stating: "In other words, I would not grant the motion [for summary judgment] because of at least those two reason; that is that **I believe that there are questions of fact related to the probable cause issue, as well as the bona fide determination issue additionally**." [E.S.]

(SR:1234). Epstein clearly has the burden to overcome that specific ruling, and he has not even tried.

Third, Epstein misrepresents the law by citing Valdez v. GAB Robins, 924 So.2d 862 (Fla. 3rd DCA 2006), for the proposition that a voluntary dismissal without prejudice is not a bona fide termination. That case states that whether a withdrawal or abandonment of a lawsuit constitutes a bona fide termination is a factual issue that "depends on the total circumstances surrounding the withdrawal or abandonment" (924 So.2d at 867), quoting Doss v. Bank of America, N.A., 857 So.2d 991, 994-995 (Fla. 5th DCA 2003). If a defendant voluntarily dismissed the prior action because it was baseless, that satisfies the requirement of bona fide favorable termination. See Cohen v. Corwin, 980 So.2d 1153, 1156 (Fla. 4th DCA 2008) (and cases cited therein); see also Johnson Law Group v. Elimadebt USA, LLC, 2010 WL 2035284 (S.D. Fla. 2010).

Given Epstein's repeated assertions of his Fifth Amendment privilege and his failure to present any evidence, the trial court properly determined there was a factual issue whether Epstein dismissed the case because he recognized it was baseless. Why Epstein would raise this issue improperly, conceal the trial court's ruling, and misrepresent legal authority to support this argument is perhaps something his counsel can explain at oral argument.

A Privilege for Filing a Meritless Lawsuit that is Worthy of the Sanction of Punitive Damages?

Edwards ended his Initial Brief by pointing to a remarkable anomaly that would be created if Epstein's legal theory is upheld (IB pp. 39-40). The trial court had allowed Edwards to amend his Complaint to seek punitive damages, which means the court had found that a reasonable jury could conclude that Epstein had acted in "an outrageous manner or with fraud, malice, wantonness, or oppression." Id. at 39 (citing Florida case law on punitive damages). But then, after Wolfe, the trial court concluded that this same outrageous conduct was worthy of protection by a court-created privilege.

Epstein's answer on this point, as it has been throughout much of the litigation below, is silence. This Court should not sanction such an astonishing incongruity, but should instead reverse the trial court's extension of privilege to these stark facts.

CONCLUSION

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 March 30, 2015.

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CERTIFICATE OF TYPE SIZE & STYLE

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

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