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

3 CASE NO. 502009CA040800XXXXMBAG

4 JEFFREY EPSTEIN,
5 Plaintiff,

6 -vs-

7
8 SCOTT ROTHSTEIN, individually,
9 and BRADLEY J. EDWARDS,
10 individually.

11 Defendants.

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13 HEARING BEFORE THE HONORABLE DAVID CROW
14 Pages 1 through 22

15 Monday, February 11, 2013
16 8:16 a.m. - 8:40 a.m.

17 PALM BEACH COUNTY COURTHOUSE, COURTROOM 9C
18 205 North Dixie Highway
19 West Palm Beach, Florida 33401

20
21 Stenographically Reported By:
22 SUSAN PETTY, FPR
23 Florida Professional Reporter

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24 APPEARANCES:

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14 BY: JACK SCAROLA, ESQUIRE

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1 PROCEEDINGS

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THE COURT: Epstein versus Rothstein. It's the Plaintiff/Counter-Defendant's motion to dismiss. I have reviewed the motion and also the counterclaim. I've read some of the citations you've given me. I did not receive a written response from the defendant.

MR. SCAROLA: The response that we provided, Your Honor, was a highlighted copy of the complaint.

THE COURT: Then I got it. Okay. Yes, ma'am.

MS. COLEMAN: Judge, may I come up to the podium?

THE COURT: Sure, whatever is comfortable.

MS. COLEMAN: I'm more comfortable standing. Thank you. As you said, Judge -- Tonja Coleman on behalf of Mr. Epstein.

We have filed a motion to dismiss Mr. Edwards' fourth amended counterclaim in which he was permitted by this court to add a claim for punitive damages.

We have four basic arguments, and the first of which is basically the issue of proceeding with the punitive damages.

Now, this Court did grant Mr. Edwards leave to assert a claim in punitive damages. The law is clear

that that ruling in no way circumvented or obviated Mr. Edwards' obligation to properly plead punitive damages.

Rule 1.120 of the Florida Rules of Civil Procedure governs pleading special damages, and it requires a heightened standard of requirement when pleading such.

You must plead ultimate facts demonstrating wantonness, oppression, or outrage. And the law is very clear; that the mere use of adjectives is and of themselves insufficient to support a claim of wantonness, recklessness, or maliciousness. And the case for which that proposition stands is *Leuare versus Music & Worth Construction Incorporated*, 486 So. 2d. 1359 Florida First DCA, 1986.

Allegations that are in an amended complaint without supporting ultimate facts are insufficient as a matter of law to stay a cause of action for punitive damages.

Here, all Mr. Edwards has done, by his own admission last week, is change his wherefore clause to state that he is seeking punitive damages.

Changing the wherefore clause in the complaint does not mean there is a heightened standard, Judge. It does not provide one fact upon which we can rely

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and respond or which this court can rely on in assessing whether or not it's a proper claim for

3 punitive damages.

4 The standard for punitive damages, as this
5 Court is aware, is that of a manslaughter standard.
6 It must show a gross and flagrant character
7 evidencing recklessness, indifference to the rights
8 or others, which is equivalent to intentional
9 violation of those rights. And that's the
10 Della-Donna case; 512 So. 2d 1051, Fourth DCA, 1987.

11 Edwards fails to allege any additional facts
12 that support willful and wanton misconduct or gross
13 and flagrant reckless indifference for acts committed
14 by Mr. Epstein.

15 In addition, Judge, it's very important to note
16 that the plaintiff must prove the underlying tort and
17 properly plead the underlying tort before even
18 setting forth a heightened factual basis for punitive
19 damages.

20 The first cause of action as asserted by
21 Mr. Edwards is abuse of process. Malice is one of
22 the underlying elements in that cause of action.

23 As such, the law is clear that because
24 Mr. Edwards must properly plead malice for his
25 underlying cause of action, he must plead a

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1 heightened requirement other than reusing the word
2 malice to support a claim in punitive damages.

3 This complaint fails to do so, and because of
4 that, the punitive damages allegations should be
5 dismissed as to both counts.

6 Our second argument with respect to dismissal
7 turns us to the changes to the cause of action and
8 abuse of process.

9 With respect to the cause of action and abuse
10 of process, Mr. Epstein -- Mr. Edwards -- excuse me.
11 Mr. Edwards' actions -- by his own admission, on the
12 four corners of his complaint -- occurred in the
13 course of the litigation.

14 This Court has previously ruled on motions to
15 dismiss in this case, and I brought the order to show
16 you that, number one, this argument has not been
17 raised before, and, number two, the proper standard
18 is delineated in this Court's own order.

19 While the Court is confined to a limited review
20 of the four corners of the complaint in ruling in a
21 motion to dismiss, the law is very, very clear that
22 an abuse of process requires misuse of process after
23 issue.

24 The plain face in the four corners of Edwards'
25 own complaint show that he's relying on each and

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1 every pleading motion on the docket sheet in support
2 of his claim of abuse of process.

3 On the face of this complaint, Judge, is the
4 affirmative defense of litigation privilege and
5 irrefutably the fact that not one action was pointed
6 to by Mr. Edwards in his complaint or any action that
7 occurred outside the process.

8 The case law is very, very clear, and I'm going
9 to cite two cases for the Court: S&I Investments
10 versus Payless, 315 -- I'm sorry. 36 So. 3d 909
11 Fourth DCA case from 2010, and Marty versus Gresh,
12 501 So. 2d 87 Florida First DCA, 1987, which states:
13 The dismissal of an abuse of process claim is proper

14 if the plaintiff fails to allege any act that
15 constitutes misuse of process after it was issued.

16 Judge, because the wherefore clause now asks
17 for damages as well as punitive damages, dismissal of
18 this abuse of process claim is proper because it
19 doesn't point to any facts that are outside the
20 process.

21 The same would hold true for punitive damages.
22 The mere recitation of the word "malice" absent
23 probable cause is not enough.

24 The case law is clear that a wanton probable
25 cause isn't even enough heightened -- the standard

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1 pleading for malice for an abuse of process claim,
2 much less for punitive damages.

3 Finally, with respect to that abuse of process
4 claim, Judge, is the issue of litigation privilege.

5 In Jackson versus Bellsouth Communications, 372
6 F 3rd 1250, the 11th circuit in applying the Florida
7 state law stated that the litigation privilege should
8 be considered regarding a motion to dismiss when the
9 complaint affirmatively and clearly shows the
10 conclusive applicability of the defense to bar the
11 action.

12 Every fact alleged by Mr. Edwards in his
13 complaint is afforded immunity pursuant to the
14 litigation privilege. It protects all acts taken
15 that are functionally tied to the judicial
16 proceeding, and there arises immediately upon doing
17 of any act required or permitted by law in the due
18 course of the judicial proceeding or is necessarily
19 preliminarily thereto.

20 For that proposition, Fridovich versus
21 Fridovich 598 So. 2d 65 Florida Supreme Court, 1992.

22 In addition, Judge, the Florida Supreme Court
23 in 2007 in Echevarria versus Cole, 950 So. 2d 380,
24 stated: Absolute immunity must be afforded to any
25 act occurring during the course of a judicial

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1 proceeding regardless of whether the act involves a
2 defamatory statement or other tortious behavior so
3 long as it bears some relation to the proceeding.

4 Here, not only does Edwards' own facts fail to
5 show any action taken outside the litigation,
6 Edwards' main complaint actually asserts litigation
7 privilege for the proposition that he was properly
8 permitted to file this lawsuit against Mr. Epstein.

9 In addition, Judge, Logan versus Middleburke
10 wherefore the Supreme Court in 1994 states that the
11 litigation privilege affords a defendant immunity
12 from suit. It's more than a mere defense to a
13 liability.

14 As such, Judge, because the dismissal is
15 appropriate when the complaint affirmatively and
16 clearly shows the defense on the face of the
17 pleading, and this Court is now being asked to look
18 outside the four corners of the complaint. Because
19 the applicability of the litigation privilege
20 completely bars this action and bars any claim for
21 punitive damages and mandates dismissal.

22 Finally, Judge, with respect to the last cause
23 of action, which is malicious prosecution, we would
24 point out to the Court that the change that has

25 occurred since we were last here is that Mr. Epstein
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1 has filed a notice of voluntary dismissal without
2 prejudice in his case-in-chief against Mr. Epstein --
3 Edwards. Excuse me.

4 However, he cannot state a cause of action for
5 malicious prosecution because this is not a bona fide
6 termination in Edwards' favor.

7 The elements or requirement for a malicious
8 prosecution claim require the commencement of a
9 judicial proceeding, its legal causation where the
10 present defendant against the plaintiff, its bona
11 fide termination in favor of the plaintiff, the
12 absence of probable for prosecution, malice and
13 damages.

14 The failure to provide one of these elements in
15 a complaint is fatal to the entire claim. For that
16 proposition we would point the Court to Alamo
17 Rent-a-Car versus Mancusi, 632 So. 2d 1352, again, a
18 Florida Supreme Court case from 1994.

19 Edwards pled that Epstein abandoned his claim
20 and that this count of being -- the complaint being
21 dismissed without prejudice is a bona fide
22 termination.

23 However, the law is very, very clear that this
24 dismissal without prejudice is not a bona fide
25 termination, because it was voluntary and not based

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1 on a reason inconsistent with the guilt of the
2 accused.

3 In addition, Judge, it's very obvious that with
4 respect to a voluntary dismissal without prejudice,
5 Mr. Epstein, would refile his case right now if it
6 were a bona fide termination of the cause of action.
7 We would not be permitted to refile the case. It
8 would be, in fact, a termination as defined by the
9 law and is provided for by the case law interpreting
10 what a bona fide termination means.

11 In sum, Judge, because we could refile the
12 case, there is no bona fide termination, and the
13 cause of action for malicious prosecution should also
14 be dismissed.

15 In summation, Judge, we would point that while
16 Mr. Edwards did file a fourth amended counterclaim
17 for punitive damages, the response to our motion to
18 dismiss as provided by Mr. Scarola shows little more
19 than he is relying upon the underlying facts which
20 this Court agreed showed a short and plain statement
21 of the facts to survive a motion to dismiss under an
22 initial cause of action.

23 It did not, however, rise to the heightened
24 pleading requirements that would be required to plead
25 a claim in punitive damages, and for that reason,

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1 Judge, we respectfully request that the fourth
2 amended counterclaim be dismissed.

3 THE COURT: Okay. Thank you. Mr. Scarola.

4 MR. SCAROLA: Good morning, Your Honor, may it
5 please the Court.

6 Let me begin, if I could, by addressing the
7 arguments that were made in support of this motion in
8 reverse order.

9 The last of the arguments were an attack on the

10 adequacy of this pleading to state claims for abuse
11 of process and malicious prosecution.

12 Your Honor has heard those arguments repeatedly
13 in the past, and Your Honor has rejected those
14 arguments repeatedly in the past.

15 Your Honor has found that the allegations
16 stated in this complaint are sufficient to withstand
17 a motion to dismiss.

18 So the only real issue before this court at
19 this time --

20 THE COURT: Well, I could have been wrong.

21 MR. SCAROLA: Yes, Your Honor, you could have
22 been wrong, but you weren't. You were absolutely
23 right, and this isn't a motion for rehearing.

24 THE COURT: I understand.

25 MR. SCAROLA: If it were a motion for

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1 rehearing, it would be necessary to file that motion
2 to support it with something other than what has been
3 argued before, which hasn't been done. And Your
4 Honor would then need to make a determination as to
5 whether you want to grant the rehearing. None of
6 that has been done.

7 In the guise of attacking the adequacy of these
8 pleadings to state a claim for punitive damages, they
9 have attempted to reargue everything that we have
10 argued. I suggest to Your Honor on many occasions,
11 not just one, but many occasions in the context of
12 both the claims that were brought against Mr. Edwards
13 and in the context of the claims that we have brought
14 against Mr. Epstein, all of those legal issues have
15 been repeatedly examined by Your Honor and they have
16 been rejected with regard to their application to
17 this complaint.

18 So if it is Your Honor's intention to reexamine
19 those again, I would like notice of the fact that
20 Your Honor is granting a motion for rehearing with
21 regard to issues that you have already ruled upon.

22 I think that that's entirely unnecessary. You
23 were right before. You were right repeatedly before,
24 and there is no basis, because there is no new
25 argument to support the contention now that those

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1 underlying allegations somehow failed to state a
2 claim for relief with regard to both abuse of process
3 and malicious prosecution.

4 So let me address the adequacy of the
5 allegations as they relate to punitive damages,
6 because that is a matter that is being raised before
7 Your Honor, not really for the first time, but it is
8 being raised in the context of this notion to dismiss
9 for the first time.

10 The adequacy of the allegations was really
11 addressed when Your Honor granted the motion for
12 leave to amend to assert a claim for punitive
13 damages, because the only thing that the motion to
14 assert a claim for punitive damages did was to
15 provide record evidence to support the factual
16 allegations included in the complaint.

17 As I have informed Your Honor previously, there
18 is only one change to each of the two claims stated
19 previously, and that one change is a change to the
20 wherefore clause. And it simply asserts that having

21 satisfied the statutory prerequisite for the
22 assertion of a claim for punitive damages, having
23 been granted leave to amend, we are amending to
24 assert a claim for punitive damages on the basis of
25 the allegations that were already made and already

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1 substantiated in a proffer. And, in fact,
2 substantially more than just a proffer of evidence,
3 an indication of clear record evidence to support the
4 recovery of punitive damages.

5 I provided Your Honor with a highlighted copy
6 of the complaint and the specific factual
7 allegations, not merely adjectives or unsupported
8 conclusions, but factual allegations to support the
9 claim for punitive damages.

10 In Paragraph 5 we allege in substance that
11 Mr. Epstein faced and faces criminal prosecution in
12 civil liability.

13 In Paragraph 6 we allege that Mr. Epstein
14 asserted his fifth amendment privilege, had no
15 intention of waiving that privilege and had no
16 defense to the criminal claims against him or the
17 civil claims that were being brought against him.
18 And so he decided to resort to extortion since he
19 didn't have any legal defense.

20 In Paragraph 8 we allege that Mr. Edwards did
21 nothing wrong in the prosecution of his cases against
22 Mr. Epstein, and Mr. Epstein had no reason to believe
23 otherwise.

24 In Paragraph 9 we allege that Mr. Epstein sued
25 for monetary damages when he had suffered none, and

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1 that the damage claim was solely part of an
2 extortionate effort on Mr. Epstein's part.

3 In Paragraph 10 we allege that Mr. Epstein
4 acted solely out of malice, and in Paragraph 13 we
5 allege that Mr. Epstein knew not only that the claims
6 were factually unsupported and unsupportable, but
7 that he also knew that the charges against
8 Mr. Edwards could not be prosecuted as a matter of
9 law.

10 I don't know how you can more clearly set forth
11 a plain and concise statement of the facts supporting
12 an entitlement to punitive damages as has been
13 supported by the proffer than as exists in this
14 complaint.

15 The fact that the allegations were not changed
16 between the time that we asserted our claim for abuse
17 of process and malicious prosecution without a claim
18 for punitive damages and when we added the claim for
19 punitive damages says nothing about the adequacy of
20 those allegations. They were adequate from the
21 beginning. They are adequate now, and this is a
22 motion that should be denied, so that this matter can
23 be placed at issue. And we can finally get a trial
24 date in this now four-year-old case. Thank you, Your
25 Honor.

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1 THE COURT: Okay. Brief rebuttal.

2 MS. COLEMAN: Yes, sir. First, Judge I would
3 point out to the court that while Mr. Scarola's
4 suggestions and assertions are just that, suggestions
5 and assertions, he has provided not one rule of law

6 or one case to support any of his position.

7 Secondly, while --

8 THE COURT: I think his position would be all
9 the things you've cited.

10 MS. COLEMAN: Maybe that is his position,
11 Judge, but he didn't argue it, Judge. I'm sorry.

12 THE COURT: Yes. And then the question is, as
13 I understand it, is whether or not the facts --
14 whether they were at issue as alleged or it's been
15 rehashed into something else -- in and of themselves
16 are sufficient for punitive damages. And secondly,
17 whether or not the underlying cause of action of
18 that --

19 MS. COLEMAN: And we present, based upon the
20 voluminous amount of case law which we have provided,
21 that they do not.

22 Mr. Scarola came up here and argued with
23 respect to his proffer regarding the punitive
24 damages. Not one fact was --

25 THE COURT: What he said was malicious

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1 prosecution does not include the allegations that you
2 made against him and his client were false. Two,
3 that you knew you couldn't support that, and, I mean,
4 he says a whole bunch of stuff he says in here.

5 MS. COLEMAN: If I may, Judge, all of those
6 issues; the extortion, the malice, the lack of
7 probable cause are elements of the underlying cause
8 of action of abuse of process.

9 If trying to plead and prove those underlying
10 causes of action elements were enough, everyone would
11 be in it for punitive damages. There would be no
12 reason for a proffer.

13 Those pleadings do not rise to the level of the
14 magic language. The wantonness, the recklessness,
15 the manslaughter standard, none of those facts
16 support those elements.

17 Literally if you look at the cause of action
18 for abuse of process and what is required, it says:
19 Lack of probable cause would be listed. The case law
20 is very clear that that isn't even enough to support
21 a cause of action for abuse of process.

22 But extortion and malice are all part of the
23 underlying cause of action for abuse of process. It
24 is an intentional tort.

25 Therefore, you must rise above the intentional

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1 tort elements to get to punitive damages. This
2 complaint fails to do that, number one.

3 Number two, if this proffer had all this
4 additional proof, it should have been pled in the
5 complaint. That's the whole purpose of going through
6 the discovery process and finding out that
7 information before you're permitted to plead punitive
8 damages, Judge, is to make an evidentiary proffer to
9 support the claim.

10 Why, in common sense, would we go through all
11 of that work if it wasn't necessary to add those
12 elements to the complaint as punitive damages.

13 This is not an attorney's fees complaint. If
14 someone is permitted legally to plead attorney's
15 fees --

16 THE COURT: I can tell you why, because of the

17 statute, because everybody's pulling punitive damages
18 without --

19 MS. COLEMAN: Right.

20 THE COURT: -- any gatekeeper. In tort cases
21 now, they make all kinds of horrible allegations, no
22 matter whether or not that's sufficient for punitive
23 damages, the judge says you supported those
24 allegations with some type of facts.

25 MS. COLEMAN: So those facts should be pled.

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1 That's exactly my point. You're making my point.
2 You have to plead the facts that support punitive
3 damages.

4 THE COURT: You're supposed to plead ultimate
5 facts.

6 MS. COLEMAN: If I had --

7 THE COURT: I understand that, ma'am. Are you
8 understanding me? I'm sorry. I apologize.

9 I'm saying that you can plead ultimate facts
10 which support a punitive claim without the necessity
11 of actually having that punitive claim.

12 And the fact that all the facts alleged in the
13 complaint may be sufficient to support a claim for
14 punitive damages, you must put a proffer of evidence
15 to support those allegations before you can actually
16 get punitive damages. Do you understand what I'm
17 saying?

18 MS. COLEMAN: Yes. I understand it, but with
19 respect to properly pleading punitive damages, it's
20 only in a wherefore clause. It's not pled. It's not
21 part of the complaint.

22 THE COURT: I think that's the issue I have to
23 decide. You say it isn't. He says it is.

24 MS. COLEMAN: In addition, I would just like to
25 bring to the Court's attention -- I brought copies of

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1 previous orders, and they show that with respect to
2 denying the motion to dismiss, for example, you
3 stated: The motion to dismiss deals with the
4 truthfulness of the allegations against the
5 defendant, affirmative defenses that may be available
6 to the defendant and have references outside the four
7 corners of the complaint. These matters are more
8 appropriate for a subject of a motion for summary
9 judgment in their defenses at trial. The issues of
10 the litigation privilege and the issues as they
11 appear on face of the complaint -- the claim has not
12 been raised before.

13 I would also submit to the Court, because we
14 just dismissed case without prejudice, that issue
15 with respect to the motion for prosecution has not
16 yet been heard before the Court either. For those
17 reasons, Judge, this is not a rehearing.

18 THE COURT: I'm going to have to take a look at
19 this again. Okay? You want to give me the orders?

20 MS. COLEMAN: Those are copies of your orders,
21 previous orders, Judge.

22 THE COURT: You should get an order shortly.
23 Thank you.

24 MR. SCAROLA: Thank you very much, Your Honor.
25 The proceedings concluded at 8:40 a.m.)

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1 CERTIFICATE OF REPORTER

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I, Susan Petty, Florida Professional Reporter,
certify that I was authorized to and did stenographically
report the foregoing proceedings and that the transcript,
pages 1 through 22, is a true and complete record of my
stenographic notes.

Dated this 15th day of February, 2013.

Susan Petty, FPR
Florida Professional Reporter
Notary Public, State of Florida
Commission No.: #DD 985956
Commission Expires: April 26, 2014