IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA

DAVID AUSTIN GAY,

Plaintiff,

vs. CASE NO.: 05-2023-CA-012999-XXXX-XX

WAYNE IVEY,
in his individual capacity and
in his official capacity as Sheriff of
Brevard County; and
BREVARD COUNTY SHERIFF'S OFFICE,

Defendants.
_______________________________________/

MOTION TO DISMISS PLAINTIFF'S COMPLAINT,
BY DEFENDANT SHERIFF IVEY

COMES NOW, Defendant Wayne Ivey, in his individual and official capacities, and Defendant Brevard County Sheriff's Office, by and through undersigned counsel and pursuant to Rule 1.140(b)(6) of the Florida Rules of Civil Procedure, move the Court for an Order dismissing Plaintiff's Complaint, and state:

1. Plaintiff alleges that between January and February 2021, Defendant Ivey and Defendant Brevard County Sheriff's Office ("BCSO") caused his name and image to appear on a "promotional social media show" entitled "Wheel of Fugitive." (Complaint, ⁋ 9).

2. Plaintiff alleges that the purpose of this show is for Defendant Ivey to "tell the audience that all ten persons on the wheel are fugitives with reservations at the Brevard County Jail and that he needs the public's help to get them to jail" (Complaint, ⁋ 10). Plaintiff further alleges that in each video, "IVEY encourages citizens to help capture the alleged fugitives." *Id*.

3. Plaintiff alleges that his name and image appeared on the show during four episodes in January and February of 2021, but that he was not a "fugitive" at the time of the airing of any of these four episodes because the warrant for his arrest had been executed prior to the airing of these "shows."

4. Plaintiff alleges that the show and each of the four episodes in which Plaintiff appears, were all produced and published by "IVEY and BCSO" (Complaint, ⁋ 9, 11, 30, 32, and 38).

5. Plaintiff's 12-count Complaint alleges the following:

a. One count of Defamation against Defendant Ivey for each of the four allegedly defamatory episodes (Counts 1 – 4). Plaintiff does not indicate whether these counts are against Defendant Ivey in his individual or official capacity;

b. One count of Defamation against Defendant BCSO for each of the four allegedly defamatory episodes (Counts 5 – 8);

c. One count of Intentional Infliction of Emotional Distress against Defendant Ivey, which includes all four of the allegedly defamatory episodes (Count 9). Plaintiff does not indicate whether this count is against Defendant Ivey in his individual or official capacity;

d. One count of Intentional Infliction of Emotional Distress against Defendant BCSO, which includes all four of the allegedly defamatory episodes (Count 10);

e. One count of Reckless Infliction of Emotional Distress against Defendant Ivey which includes all four of the allegedly defamatory episodes (Count 11). Plaintiff does not indicate whether this count is against Defendant Ivey in his individual or official capacity; and,

f. One count of Reckless Infliction of Emotional Distress against Defendant BCSO which includes all four of the allegedly defamatory episodes (Count 12).

6. First, the "Brevard County Sheriff's Office" must be dismissed as a party, with prejudice, because as a matter of law the Sheriff's Office is not a legal entity capable of being sued. The claims against the Sheriff's Office should also be dismissed as redundant to the claims against Sheriff Ivey, in his official capacity. And as a practical matter, there is no allegation against Defendant Ivey that is not also made against Defendant the Sheriff's Office.

7. Second, all claims against Sheriff Ivey, whether for defamation or labeled as infliction of emotional distress, and whether brought against the Sheriff in either his individual or official capacities, should be dismissed, with prejudice. As a matter of law, the Sheriff has immunity against tort claims for the statements within the videos. This should result in dismissal of all claims in the Complaint, with prejudice.

8. In addition, all claims against Sheriff Ivey in his individual capacity should be dismissed, as the Complaint fails to allege facts which would overcome the Sheriff's presumptive entitlement to qualified immunity under § 768.28(9)(a), Florida Statutes.

WHEREFORE, Defendant Sheriff Wayne Ivey, in his individual and official capacities, and the Brevard County Sheriff's Office move this Court for an Order dismissing Plaintiff's Complaint with prejudice.

MEMORANDUM OF LAW

I. MOTION TO DISMISS STANDARD.

A complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged. *Barrett v. City of Margate,* 743 So.2d 1160, 1162 (Fla. 4th DCA 1999) (citing *Messana v. Maule Indus.,* 50 So.2d 874, 876 (Fla. 1951)). The complaint must set forth factual assertions that can be supported by evidence which gives rise to legal liability. It is

insufficient to plead opinions, theories, legal conclusions or arguments. *Id.* at 1162-63. A complaint must contain sufficient factual allegations to withstand a motion to dismiss. *See Labance v. Dawsy,* 14 So.3d 1256, 1260 (Fla. 5th DCA 2009).

Immunity from suit based on privileged statements can be considered on a motion to dismiss where the Complaint alleges facts demonstrating the existence of the defense. Fla. R. Civ. P. 1.110; *Kidwell v. Gen. Motors Corp.,* 975 So. 2d 503, 505 (Fla. 2d DCA 2007); *Vaswani v. Ganobsek*, 402 So. 2d 1350, 1351 (Fla. 4th DCA 1981); *Fariello v. Gavin*, 873 So.2d 1243, 1245 (Fla. 5th DCA 2004); *James v. Leigh*, 145 So. 3d 1006, 1008 (Fla. 1st DCA 2014) ("Although immunity is generally raised as an affirmative defense in an answer or other responsive pleading, it may be raised in a motion to dismiss if its applicability is demonstrated on the face of the complaint or exhibits.").

Questions of immunity from *suit*, rather than simply immunity from *liability*, must be decided as early in the litigation process as possible:

> It makes little sense to afford a shield of immunity from suit to a public official and then fail to enforce it at the earliest moment when enforcement is appropriate. For this reason, it is a departure from the essential elements of law to fail to dismiss a complaint when it is clear on the face of the complaint that the government official is entitled to statutory or common law immunity.

Brown v. McKinnon, 964 So. 2d 173, 176 (Fla. 3d DCA 2007).

> [A]bsolute and qualified immunity for public officials are not merely defenses to liability; as the terms themselves imply, they protect a public official from having to defend a suit at all. This entitlement is

> lost if the defendant is required to go to trial; having been forced to defend the suit, the public official cannot be reimmunized after-the-fact.

Stephens v. Geoghegan, 702 So. 2d 517, 521 (Fla. 2d DCA 1997).

II. THE "BREVARD COUNTY SHERIFF'S OFFICE" IS NOT A PROPER PARTY AND MUST BE DISMISSED

Plaintiff has named the "Brevard County Sheriff's Office" as a Defendant in this case; however, the Brevard County Sheriff's Office does not have the capacity to sue or be sued. *Keck v. Seminole Cnty. Sheriff's Office*, 610-CV-847-ORL-31GJK, 2010 WL 2822011, at *2 (M.D. Fla. July 16, 2010) ("As a threshold matter, Plaintiff's claims against the 'Seminole County Sheriff's Office' are improper inasmuch as the Sheriff's Office is not *sui juris* and cannot be sued."); *Mann v. Hillsborough County Sheriff's Office*, 946 F.Supp. 962, 970 (M.D. Fla. 1996); *Florida City Police Department v. Corcoran*, 661 So.2d 409 (Fla. 3rd DCA 1995). In this regard, the proper defendant should be "Wayne Ivey, in his official capacity as Sheriff of Brevard County, Florida."

Thus, as a matter of law, the Sheriff's Office must be dismissed as a party. And, as the Sheriff is sued in his official capacity, a suit against the Sheriff's Office would in any event be redundant as a suit against the Sheriff in his official capacity is in reality a suit against the Sheriff's Office. The Court should therefore dismiss the Sheriff's Office as a party, with prejudice.

III. SHERIFF IVEY, IN BOTH HIS INDIVIDUAL AND OFFICAL CAPACITIES, IS IMMUNE FROM SUIT FOR DEFAMATION FOR STATEMENTS MADE IN THE SCOPE OF HIS DUTIES

The claims against Defendant Ivey in his individual and his official capacities should be dismissed because a Florida sheriff cannot be sued for defamation based on statements made in the course of his duties, even if those statements are alleged to be false, malicious, or badly motivated.

In Florida, "public officials who make statements within the scope of their duties are absolutely immune from suit for defamation." *Stephens v. Geoghegan*, 702 So.2d 517, 522 (Fla. 2d DCA 1997) (emphasis added). *See also Weeks v. Town of Palm Beach*, 252 So. 3d 258, 261 (Fla. 4th DCA 2018) ("Public officials are absolutely immune from claims for defamation where their allegedly defamatory statements are made within the scope of their duties."); *Bates v. St. Lucie Cty. Sheriff's Office*, 31 So.3d 210, 213 (Fla. 4th DCA 2010).

As the Florida Supreme Court explained more than 50 years ago, "It seems to be well settled in this State that words spoken or written by public servants in judicial and legislative activities are *protected by absolute privilege from liability from defamation*. However false or malicious or badly motivated the accusation may be, no action will lie therefor in this State." *McNayr v. Kelly*, 184 So. 2d 428, 430 (Fla. 1966) (emphasis added). This privilege extends to members of the executive branch as well as the judicial and legislative. *Id.* at 432 ("The great weight of authority now

recognizes no distinction between executive officials of government and judicial or legislative officials of government on this question of immunity.").

Statements made by public officials in the scope of their duties are absolutely privileged from suit, regardless of the level of the official. *Hauser v. Urchisin*, 231 So. 2d 6, 8 (Fla. 1970). The privilege explicitly applies to statements made by members of law enforcement. *Stephens, supra*. *See also Crowder v. Barbati, 987 So. 2d 166, 167 (Fla. 4th DCA 2008)* ("This absolute privilege extends to a sheriff for comments made in the course of the sheriff's duties."); *Stewart v. Sun Sentinel Co.*, 695 So.2d 360, 361 (Fla. 4th DCA 1997); *Cassell v. India*, 964 So. 2d 190, 194 (Fla. 4th DCA 2007).

The Florida Supreme Court has explained that this immunity is designed to safeguard the ability of public officials to faithfully and fearlessly execute the duties of their office. *See McNayr* at 431 ("…it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."); *Hauser* at 8 ("The public interest requires that statements made by officials of all branches of government in connection with their official duties be absolutely privileged.").

The defense of absolute immunity or privilege "is a separate and distinct concept from sovereign immunity," and the waiver of sovereign immunity found in section 768.28, Florida Statutes, "does not abrogate such absolute immunity." *Quintero v. Diaz*, 300 So. 3d 288, 290 (Fla. 3d DCA 2020). This is true even where the Complaint alleges that those statements are "false, malicious, or badly-motivated." *Id*.

The controlling factor in deciding whether a public employee is absolutely immune from actions for defamation is whether the allegedly false communication was within the scope of the officer's duties. *City of Miami v. Wardlow*, 403 So. 2d 414, 416 (Fla. 1981). This is a question of law to be decided by the court, and not a question of fact to be determined by a jury. *Resha v. Tucker*, 670 So. 2d 56, 59 (Fla. 1996); *see also Nodar v. Galbreath*, 462 So.2d 803 (Fla.1984).

The "scope of an officer's duties" is to be construed broadly. *See Mueller v. The Florida Bar*, 390 So. 2d 449, 451 (Fla. 4th DCA 1980) ("Precedent indicates an inclination to give a broad definition to the term 'scope of duties' and its synonyms… We are persuaded that public policy dictates adherence to that philosophy."); *Tenney v. Brandhove*, 341 U.S. 367, 374 (1951) ("[t]he article ought not to be construed strictly, but liberally."). The scope of an official's duties "extends beyond enumerated, required tasks, and includes discretionary duties that are associated with a given position." *Stephens, supra,* at 523 (Fla. 2d DCA 1997).

Courts will find that an act was within the scope of an official's duties if it is "within the outer perimeter of [the official's] line of duty." *Barr v. Matteo*, 360 U.S. 564, 575 (1959).

It is apparent on the face of the Complaint that the allegedly defamatory statements made in this case were well within the scope of Defendant Ivey's duties as Sheriff of Brevard County. The Complaint begins by noting that the videos were not published by Sheriff Ivey alone, but that "IVEY *and* BCSO published on the internet" the relevant videos. (Complaint, ¶. 9 (emphasis added)). As the Complaint makes clear, "[i]n each video, IVEY encourages citizens to help capture the alleged fugitives." (Complaint, ¶. 10). He states that the fugitives "need to find their way to the Brevard County Jail." (Complaint, ¶. 10).

Of particular note, while Defendant Ivey is sued in both his individual and his official capacities, the Complaint does not allege a single action taken by Defendant Ivey that is not also alleged, using identical words, against Defendant BCSO. In other words, every single action alleged to have been taken by Defendant Ivey is also alleged to have been in the service of the Sheriff's Office.

As a matter of law, the allegations against Defendant Ivey in his *official* capacity must be for matters conducted within the scope of his duties as Sheriff. The Sheriff's Office cannot be held liable for the torts of employees acting outside the scope of their employment. *Hemmings v. Jenne*, 10-61126-CIV-COHN, 2010 WL

4005333, at *4 (S.D. Fla. Oct. 12, 2010) ("Florida law allows for the imposition of vicarious liability on a governmental entity for the intentional torts of its employee, but only when the tort is committed within the scope of employment.").

In either capacity, the nature of the "Wheel of Fugitive" as a vehicle "to help capture alleged fugitives" (Complaint, ¶ 10) also demonstrates that the statements were made within the scope of Defendant Ivey's duties. The execution of warrants stands at the heart of a sheriff's statutory authority. The powers, duties, and obligations of Florida sheriffs are laid out in § 30.15, Florida Statutes, which provides in relevant part: "(1) Sheriffs, in their respective counties, in person or by deputy, <u>shall</u>… (b) Execute such other writs, processes, <u>warrants</u>, and other papers directed to them, as may come to their hands to be executed in their counties." § 30.15, Fla. Stat. Ann. (emphasis added).

The act of executing warrants is a specifically enumerated task laid out by the Florida legislature. There is no task more central to the obligation of a sheriff than that of apprehending individuals for whom a court has issued a warrant. Furthermore, this task is nondiscretionary: a sheriff or sheriff's deputy has no authority to refuse or fail to execute a facially valid warrant.[1] *Willingham v. City of Orlando*, 929 So. 2d 43, 49 (Fla. 5th DCA 2006); *see also Crain v. State*, 914 So.2d

[1] There is no allegation within the Complaint that the warrant against Plaintiff was invalid on its face.

1015, 1023 (Fla. 5th DCA 2005) (officers are not permitted to second guess the validity of a facially sufficient warrant); *Fields v. State*, 591 So.2d 1129 (Fla. 4th DCA 1992) (detective had no discretion in arresting Fields on an outstanding warrant).

Soliciting the aid of the public in resolving these warrants is also a well-established activity of Florida sheriffs. For example, in *Crowder v. Barbati*, 987 So.2d 166 (Fla. 4th DCA 2008), the Sheriff of Martin County issued a press release that labeled Plaintiff Barbati and others as "deadbeat parents" for failing to pay court-ordered child support. *Crowder* at 167. The press release described the sheriff's annual "Grinch Roundup," and sought to bring parents up to date with their child support obligations before deputies began to execute warrants for their arrests. *Id*.

Barbati sued for defamation, alleging that the statements made by the sheriff about him were false. *Id*. The sheriff moved to dismiss the case on the grounds of absolute immunity. The trial court denied the motion, and the sheriff appealed.

The Fourth District Court of Appeals found that the Sheriff's statements, whether true or false, were absolutely privileged. "In the instant case, the act of issuing a press release concerning the official duties of the sheriff was 'within the scope' of the office of the sheriff. The purpose of the release was to induce delinquent parents to pay their child support, a proper government function." *Id*. at

168. The Fourth District Court of Appeals found that the trial court had "departed from the essential requirements of law by failing to give a broad enough interpretation of 'scope of duty,'" and remanded the case to be dismissed. *Id.*

Similarly, a sheriff is absolutely immune from suit for defamation if he chooses to make public statements accusing a community member of committing a crime, even if those statements are alleged to be false or malicious. In *Knight v. Starr*, 275 So.2d 37 (Fla. 4th DCA 1973), the plaintiff sued the sheriff of Orange County, Florida, alleging that after a heinous and highly publicized crime occurred, the defendant-sheriff, acting maliciously and without any warrant or other authority of law, and without any reason to believe Starr was in any manner associated with the crime, seized and imprisoned him. *Id.* at 38. After the arrest, the sheriff was alleged to have "willfully, falsely, and maliciously" given recorded interviews with television stations, accusing him of committing the crimes, knowing that the statements were false and that they would be widely distributed, causing him injury. *Id.* at 39.

The trial court granted the sheriff's motion to dismiss the defamation count, and the Fourth District affirmed, stating that "it appeared from the face of the pleading that the alleged statements made by the defendant-sheriff were absolutely privileged," as they were in the scope of his duties as Sheriff. *Id.*

Even where allegedly false or malicious statements are distributed to the news media for broad consumption by the public, Florida courts unanimously hold that government actors are absolutely immune from suit for defamation. *See Danford v. City of Rockledge*, 387 So. 2d 967, 968 (Fla. 5th DCA 1980); *Tucker v. Resha*, 634 So. 2d 756, 759 (Fla. 1st DCA 1994), approved, 670 So. 2d 56 (Fla. 1996); *Stephens, supra*, at 523.

It is important to recognize that in each of these cases, the court undertook no analysis into the underlying merits of the criticism of the statements. It is immaterial whether the statements were true or false, whether they were motivated by malice or ill-will, or whether they were made with reckless disregard for the truth. As long as the statements were made in the scope of the officer's duties, the privilege "effectively bars further inquiry into either the accuracy of the information released or the motives for releasing it." *Mueller v. The Florida Bar,* 390 So. 2d 449, 452 (Fla. 4th DCA 1980).

A plaintiff may not avoid the question of whether a statement was made in the scope of an officer's duties through conclusory pleading. As the Third District Court of Appeals noted:

> [A]bsolute immunity of such an official operates to relieve him from the necessity of being subjected to trial of an action based on his privileged conduct, notwithstanding that a complaint for libel which is filed against him <u>may allege, as a conclusion, that he is without such immunity or was acting beyond the scope of his duty or office</u>, where, as in this case, the complaint and its exhibits disclose the action of the

> official was taken in the interest of the public good and thereby within the scope of his duties and responsibilities, *notwithstanding the allegations in the complaint to the contrary.*
>
> *Johnsen v. Carhart*, 353 So. 2d 874, 876–77 (Fla. 3d DCA 1977) (emphasis added).

Finally, to the extent that Plaintiff argues that the Sheriff could not have been acting within the scope of his duties in seeking to enforce a warrant after the State had dismissed the underlying charges, there is "no statute, rule, or policy that prevents law enforcement officials from remaining involved in matters where the state has ceased prosecution… [S]uch activities still fall within a Florida law enforcement officer's duties." *Gordon v. Beary*, 608-CV-73-ORL-19KRS, 2008 WL 3258496, at *8 (M.D. Fla. Aug. 6, 2008). Again, the accuracy of the statement or the intent behind it does not affect the immunity.

In this case, the allegedly defamatory statements were made by Defendant Sheriff Ivey within the boundaries of his statutory obligation to execute such warrants as may come into his hands. They were made for the express purpose of "encourag[ing] citizens to help capture the alleged fugitives," (Complaint, ¶. 10), which is a proper governmental function. It is, at the very least, "within the outer perimeter of [the official's] line of duty." *Barr, supra*, 360 U.S. 564, 575 (1959). As a result, the statements are absolutely privileged from suit for defamation, and all counts alleging defamation must be dismissed, with prejudice.

IV. SHERIFF IVEY IS IMMUNE FROM SUIT FOR INTENTIONAL AND RECKLESS INFLICTION OF EMOTIONAL DISTRESS

Similarly, Florida law provides Defendant Ivey with absolute immunity from suit for Intentional Infliction of Emotional Distress ("IIED") or Reckless Infliction of Emotional Distress ("RIED"). This is because the sole basis for the claims of IIED and RIED is the same series of privileged statements that form the basis of the defamation claims.

The Florida Supreme Court explained this in detail in *Fridovich v. Fridovich*, 598 So. 2d 65 (Fla. 1992). In *Fridovich*, the plaintiff alleged that his family members had falsely accused him of the first-degree murder of his father in order to strip him of the right to administer his father's estate. He sued on theories of both defamation and IIED. The Florida Supreme Court found that the statements, made during the course of a judicial proceeding, were absolutely privileged from suit for defamation. *Id*. at 66.

The Court went on to dismiss the IIED claims as well, holding that to allow a plaintiff who has not overcome a defamation privilege to proceed with a claim for IIED would defeat the purpose of the privilege. The Court stated:

> It is clear that a plaintiff is not permitted to make an end-run around a successfully invoked defamation privilege by simply renaming the cause of action and repleading the same facts. Obviously, if the sole basis of a complaint for emotional distress is a privileged defamatory statement, then no separate cause of action exists.

Id. at 69. The Court concluded, "We thus find that the successful invocation of a defamation privilege *will* preclude a cause of action for intentional infliction of emotional distress if the sole basis for the latter cause of action is the defamatory publication." *Id*. at 70 (emphasis in original).

This was addressed in the context of law enforcement in *Weeks v. Town of Palm Beach*, 252 So. 3d 258 (Fla. 4th DCA 2018), under circumstances similar to those of the case at bar. In *Weeks*, the trial court dismissed the plaintiff's complaint for defamation on the grounds of absolute immunity. Weeks then filed an amended complaint which, instead of including a claim for defamation, asserted a claim for common law fraud. The court found that since the fraud claim relied on the same facts as the defamation claim, "the re-labeling of the defamation claim was simply a poisoned apple." *Id*. at 262.

Similarly, in *Anderson v. Rossman & Baumberger*, P.A., 440 So.2d 591, 593 (Fla. 4th DCA 1983) *review denied*, 450 So.2d 485 (Fla.1984), the Court found no liability under an IIED theory, since the primary conduct relied upon for IIED was a privileged, allegedly defamatory, statement.

This principle is known as the "single publication / single action rule." *Orlando Sports Stadium, Inc. v. Sentinel Star Co*., 316 So. 2d 607, 609 (Fla. 4th DCA 1975). "The single publication/single action rule… does not permit multiple actions when they arise from the same publication upon which a failed defamation

claim is based." *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 208 (Fla. 4th DCA 2002). "Florida courts have held that a single wrongful act gives rise to a single cause of action, and that the various injuries resulting from it are merely items of damage arising from the same wrong." *Easton v. Wier*, Fla.App., 167 So.2d 245. "Florida law has established that a plaintiff cannot state a separate and independent cause of action based solely on allegations supporting a defamation claim." *Fletcher v. S. Florida Sun-Sentinel*, 34 Media L. Rep. 1952 (Fla. Cir. Ct. 2006). "If the defamation count fails, the other counts based on the same publication must fail as well because the same privileges and defenses apply." *Clark v. Clark*, 21 Media L. Rep. 2082 (Fla. Cir. Ct. 1993), aff'd, 641 So. 2d 866 (Fla. 1st DCA 1994).

Even where a privilege is not asserted, it is proper to dismiss a claim of IIED or RIED where the basis for those claims is merely a defamatory statement characterized as "outrageous" in the pleadings. A complaint alleging damages for emotional distress must "set forth an *independent* tort for the recovery of damages for emotional distress." *Boyles v. Mid-Florida Television Corp.*, 431 So. 2d 627, 636 (Fla. 5th DCA 1983), *approved*, 467 So. 2d 282 (Fla. 1985) (emphasis in original).

In *Boyles*, the Fifth District Court of Appeals held that where the allegations of "outrageous conduct" simply describe an act of defamation or libel, they are

“merely an imperfect repetition” of the defamation or libel allegations, and must be dismissed. *Id*. Importantly, there was no assertion of any sort of privilege to the allegedly defamatory statements in *Boyles*. The Fifth District Court of Appeals held simply that where an IIED or RIED claim pleads the same facts as a defamation claim, the IIED or RIED claim must be dismissed. The Florida Supreme Court has held the same: “In short, *regardless of privilege*, a plaintiff cannot transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as ‘outrageous.’” *Fridovich*, *supra*, at 70 (emphasis in original).

The IIED and RIED claims against Defendant Ivey are based on exactly the same conduct as the defamation claims in Counts 1-8 of the Complaint. The only additional “facts” asserted in Counts 9-12 are the conclusory allegation that the actions were “extreme and outrageous” (Complaint,¶ 119, 124, 129, and 134). The allegation that the conduct was “intentional” (Complaint, ¶ 120 and 125) or “reckless” (Complaint, ¶ 130 and 135) is already alleged in the various defamation counts (*see e.g*. Complaint, ¶ 53: “…the defamatory false statement was made with malice and/ or ill will – arguably amounting to <u>intentional</u> misconduct or gross negligence – because IVEY published it with knowledge of the falsity and/ or with <u>reckless</u> disregard…” (emphasis added)).

Since the conduct alleged in the emotional distress counts is precisely the same conduct alleged in the defamation counts, and since the statements are protected by absolute immunity, all claims for IIED and RIED must be dismissed, with prejudice.

V. PLAINTIFF HAS NOT ALLEGED FACTS TO OVERCOME § 768.28(9)(a) IMMUNITY AS TO ANY INDIVIDUAL CAPACITY CLAIM

Above, the Defendants establish why all claims, brought against the Sheriff in all capacities, should be dismissed, with prejudice. In addition, to the extent that any claim is brought against Sheriff Ivey in his individual capacity for a state law tort in any of these counts, Defendant Ivey is entitled to immunity from suit under § 768.28(9)(a), Fla. Stat. That statute provides in relevant part that:

> No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

At the motion to dismiss stage, to overcome the immunity, the Plaintiff must allege facts showing that the individual committed a tortious act and that it was done in bad faith, with malice, or with wanton and willful disregard of human rights, safety, or property. *Boggess v. Sch. Bd. of Sarasota County*, 2008 WL 564641, at *5 (M.D. Fla. Feb. 29, 2008) (Jenkins, J.) ("In applying Section 768.28(9)(a) on a

motion to dismiss, Florida courts look to see whether the face of the complaint alleges bad faith or malicious purpose on the part of the governmental actor.").

As to the defamation claims, Plaintiff does make the conclusory allegation that Defendant Ivey acted "with malice and/or ill will" (Complaint, ¶ 53, 62, 71, and 80). But such a conclusory statement is not sufficient to state a cause of action where it is not supported by *factual* allegations. *Barrett v. City of Margate,* 743 So.2d 1160, 1162 (Fla. 4th DCA 1999) (citing *Messana v. Maule Indus.,* 50 So.2d 874, 876 (Fla. 1951)).

The only factual basis on the face of the Complaint for the Plaintiff's allegations of malicious purpose is the allegation that Defendant Ivey "published it with knowledge of the falsity and/ or with reckless disregard for whether the statement was false or not." (Complaint, ¶ 53, 62, 71, and 80). This is insufficient to satisfy the high burden imposed by Florida law for a finding of malicious intent. *See Eiras v. Florida*, M.D.Fla.2017, 239 F.Supp.3d 1331 (Under Florida law, bad faith for purposes of immunity of state officers, employees, or agents under the sovereign immunity statute is equivalent to "actual malice"; while legal malice may be inferred from circumstances, actual or subjective malice, sometimes called malice in fact, requires the subjective intent to do wrong.); *Turner v. Phillips*, 547 F. Supp. 3d 1188, 1209 (N.D. Fla. 2021), aff'd, 21-12370, 2022 WL 458238 (11th Cir. Feb. 15, 2022) ("Bad faith has been equated with the actual malice standard.").

With regard to the defamation claims, the Complaint alleges no facts from which the Court can conclude that Defendant Ivey acted with actual malice toward Plaintiff, or with the "subjective intent to do wrong" required to pierce the immunity offered by § 768.28(9)(a), Florida Statutes. And with regard to the emotional distress claims, Plaintiff does not even make these conclusory allegations.

As a result, Defendant Ivey in his individual capacity is entitled to immunity as a matter of law on the facts alleged, and the claims against him should be dismissed, with prejudice.

WHEREFORE Defendant BCSO and Defendant Ivey respectfully request that all claims in the Complaint be dismissed, with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 2023, the foregoing is being filed and served via the Florida Courts E-Filing Portal to the following: Jessica J. Travis, Esq. (*Jessica@DefendBrevard.com, eservice1@DefendBrevard.com and eservice2@DefendBrevard.com*), 1370 Bedford Drive, Suite 104, Melbourne, Florida 32940.

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