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

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff(s),

vs.

SCOTT ROTHSTEIN, individually,
BRADLEY J. EDWARDS, individually, and
L.M., individually,

Defendant(s).
_____/

EDWARDS' MOTION IN LIMINE TO STRIKE THE JUNE 30, 2017 AFFIDAVIT OF JEFFREY EPSTEIN AND TO EXCLUDE EVIDENCE AS TO WHICH DISCOVERY WAS WITHHELD UNDER CLIAMS OF PRIVILEGE WITH INCORPORATED MEMORANDUM OF LAW

After consistently asserting the privilege against self-incrimination and invoking attorney-client privilege to deny discovery sought by Counter-Plaintiff, BRADLEY J. EDWARDS, after repeatedly declining based on privilege to substantively respond to interrogatories, requests for production, and deposition questions, and weeks before the agreed discovery cut-off in this 8 year old lawsuit, Counter-Defendant, JEFFREY EPSTEIN, has sought to support a renewed Motion for Summary Judgment with a personal affidavit alleging facts about which discovery had been previously withheld on claims of privilege.

Counter-Plaintiff files this motion to preclude EPSTEIN from using that which he has consistently refused to produce throughout the litigation. EPSTEIN'S attempt, at this late stage,

to selectively abandon his privilege objections and essentially start the discovery process over again would cause Counter-Plaintiff substantial and unavoidable prejudice. To preserve Counter-Plaintiff's right to a fair and prompt trial, the Court must reject EPSTEIN'S strategic maneuver.

THE FACTS: EPSTEIN'S PRIVILEGE ASSERTIONS, EDWARDS' DISCOVERY EFFORTS

Epstein filed a lawsuit intending from the outset to refuse to allow any real discovery about the merits of his case. Instead, when asked direct questions about whether he had any basis to support his claims against Bradley Edwards, Epstein hid behind the Fifth Amendment and assertions of attorney-client privilege. As a result, under the "sword and shield doctrine" widely recognized in Florida case law, his suit could not have been legitimately prosecuted. He then consistently declined to provide information directly relevant to the central issues in this litigation, including issues he now seeks to address by way of an affidavit filed in support of his motion for summary judgment.

"[T]he law is well settled that a plaintiff is not entitled to both his silence and his lawsuit." *Boys & Girls Clubs of Marion County, Inc., v. J.A.*, 22 So. 3d 855, 856 (Fla. 5th Dist. Ct. App. 2009) (Griffin, J., concurring specially). Thus, "a person may not seek affirmative relief in a civil action and then invoke the Fifth Amendment to avoid giving discovery, using the fifth amendment as both a 'sword and a shield.'" *DePalma v. DePalma*, 538 So.2d 1290 (Fla. 4th Dist. Ct. App. 1989) (*quoting DeLisi v. Bankers Insurance Co.*, 436 So.2d 1099 (Fla. 4th

Dist. Ct. App. 1983)). Put another way, "[a] civil litigant's fifth amendment right to avoid self-incrimination may be used as a shield but not a sword. This means that a plaintiff seeking affirmative relief in a civil action may not invoke the Fifth Amendment and refuse to comply with the defendant's discovery requests, thereby thwarting the defendant's defenses." *Rollins Burdick Hunter of New York, Inc. v. Euroclassic Limited, Inc.,* 502 So.2d 959 (Fla. 3rd DCA 1983); *see also Zephyr Haven Health & Rehab Center, Inc. v. Hardin ex rel. Hardin*, 122 So.3d 916, 923 (Fla. 3rd DCA 2013) (where claimant asserted privilege over attorneys' fees arrangement while simultaneously seeking attorneys' fees, "[t]his attempt to use the [fee] arrangement as both a sword and shield must fail").

Highlighted copies of Epstein's deposition transcripts together with various discovery responses are attached as an Appendix to this motion.

Here, Epstein's suit against Edwards purported to do precisely what the "well settled" law forbids. Specifically, he ostensibly sought to obtain "affirmative relief"—i.e., forcing Edwards to pay money damages—while simultaneously precluding Edwards from obtaining legitimate discovery at the heart of the allegations that formed the basis for the relief Epstein claimed to be seeking. Those same assertions of privilege stood as a wall blocking every inquiry by Edwards into whether Epstein had any reasonable basis to support the claims of tortious and criminal wrongdoing he raised against Edwards.

Now, by way of his affidavit, he seeks to leave the wall standing but to toss over selected assertions that remain completely shielded from cross-examination and the test of other related discovery.

Epstein asserted his privilege against self-incrimination over 90 times during his depositions and refused to answer such basic questions as:

- "Specifically what are the allegations against you which you contend Mr. Edwards ginned up?" [3/17/20 Deposition of Epstein, Pg. 20] Appendix Exhibit 1
- "What specific discovery proceedings did Mr. Edwards engage in which you contend form the basis of your lawsuit"" [Deposition Pg. 21]
- "Well, which of Mr. Edwards' cases do you contend were fabricated?" [Deposition Pg. 23]
- "Are you now telling us that there were claims against you that were fabricated by Mr. Edwards?" [Deposition Pg. 22]
- "Is there anything in L.M.'s Complaint that was filed against you in September of 2008 which you contend to be false?" [Deposition Pg. 73]
- "I would like to know whether you ever had any physical contact with the person referred to as Jane Doe in that [federal] complaint?" [Deposition Pg. 24]
- "Did you ever have any physical contact with E.W.?" [Deposition Pg. 26]
- "What is the actual value that you contend the claim of E.W. against you has?" [Deposition Pg. 26]

- "Describe in your own words all interactions you have had with the individual identified in this action as L.M., including but not limited to the dates, places, participants in, witnesses to, and a description of all sexual activity involving L. M." [10/18/10 Objections to Interrogatories]. Appendix #3 and 4.

The legitimacy of the sexual molestation claims prosecuted by Edwards against Epstein addressed in these questions were the central focus of Epstein's claims against Edwards and the mirror image issues on which Edwards' claims against Epstein are based. Epstein's refusal to answer these and literally every other substantive question put to him in discovery deprived Edwards of even a basic understanding of the evidence alleged to support claims against him. Moreover, by not offering any explanation of his allegations, Epstein deprived Edwards of any opportunity to conduct third party discovery and any opportunity to challenge Epstein's allegations.

It is the clear law that "the chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush," *Scipio v. State,* 928 So.2d 1138 (Fla. 2006), and "full and fair discovery is essential to these important goals," *McFadden v. State*, 15 So.3d 755, 757 (Fla. 4th Dist. Ct. App. 2009). Accordingly, it is important for the Court to insure "not only compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules in both the criminal and civil context." *McFadden*, 15 So.3d at 757. Epstein repeatedly blocked "full and fair discovery," and clearly

never intended to provide the discovery that would have been essential to any intended legitimate, good faith prosecution of his claims and which is also critically relevant to his attempt to assert a good faith basis for his maliciously prosecuted claims against Edwards.

EDWARDS IS ENTITLED TO ADVERSE INFERENCES FROM EPSTEIN'S INVOCATION OF THE FIFTH AMENDMENT

Epstein's repeated invocations of the Fifth Amendment raise adverse inferences against him that leave no possibility that a reasonable fact finder could ever have reached a verdict in his favor and which are in direct contradiction to the assertions in his Affidavit. He cannot claim to have relied on press reports or the allegations in someone else's Complaint if he had personal knowledge that the reports and allegations were inaccurate. And so for example, Epstein could not reasonably rely on allegations in the "Sherer Complaint" about exaggerated claims against Epstein, if Epstein knew the claims were accurate. Neither can he deny their accuracy, if he precludes discovery into their accuracy.

In ruling on a summary judgment motion, the court was obliged to fulfill a "gatekeeping function" and ask whether "a *reasonable* trier of fact could possibly" reach a verdict in favor of the plaintiff. *Willingham v. City of Orlando*, 929 So.2d 43, 48 (Fla. 5th Dist. Ct. App. 2006) (emphasis added). Given all of the inferences that are to be drawn against Epstein, no reasonable finder of fact could conclude that Epstein was somehow the victim of improper civil lawsuits filed against him. Instead, a reasonable finder of fact could only find that Epstein was a serial molester

of children who was being held accountable through legitimate suits brought by Edwards and others on behalf of the minor girls that Epstein victimized—suits that were vigorously, ethically, and legitimately prosecuted by the victims' lawyers, including Edwards.

"[I]t is well-settled that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976); *accord Vasquez v. State*, 777 So.2d 1200, 1203 (Fla. App. 2001). The reason for this rule "is both logical and utilitarian. A party may not trample upon the rights of others and then escape the consequences by invoking a constitutional privilege – at least not in a civil setting." *Fraser v. Security and Inv. Corp.*, 615 So.2d 841, 842 (Fla. 4th Dist. Ct. App. 1993). And, in the proper circumstances, "'Silence is often evidence of the most persuasive character.'" *Fraser v. Security and Inv. Corp.*, 615 So.2d 841, 842 (Fla. 4th Dist. Ct. App. 1993) (*quoting United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149, 153-154 (1923) (Brandeis, J.).

In the circumstances of this case, a reasonable finder of fact would have "evidence of the most persuasive character" from Epstein's repeated refusal to answer questions propounded to him. To provide but a few examples, here are questions that Epstein refused to answer and the reasonable inference that a reasonable finder of fact would draw:

- Question not answered: "Specifically what are the allegations against you which you contend Mr. Edwards ginned up?" Reasonable inference: No allegations against Epstein were ginned up.

- Question not answered: "Well, which of Mr. Edwards' cases do you contend

were fabricated?" Reasonable inference: No cases filed by Edwards against Epstein were fabricated.

- Question not answered: "Did sexual assaults ever take place on a private airplane on which you were a passenger?" Reasonable inference: Epstein was on a private airplane while sexual assaults were taking place.

- Question not answered: "How many minors have you procured for prostitution?" Reasonable inference: Epstein has procured multiple minors for prostitution.

- Question not answered: "Is there anything in L.M.'s Complaint that was filed against you in September of 2008 which you contend to be false?" Reasonable inference: Nothing in L.M.'s complaint filed in September of 2008 was false – i.e., as alleged in L.M.'s complaint, Epstein repeatedly sexually assaulted her while she was a minor and she was entitled to substantial compensatory and punitive damages as a result.

- Question not answered: "I would like to know whether you ever had any physical contact with the person referred to as Jane Doe in that [federal] complaint?" Reasonable inference: Epstein had physical contact with minor Jane Doe as alleged in her federal complaint.

- Question not answered: "Did you ever have any physical contact with E.W.?" Reasonable inference: Epstein had physical contact with minor E.W. as alleged in her complaint.

- Question not answered: "What is the actual value that you contend the claim of E.W. against you has?" Reasonable inference: E.W.'s claim against Epstein had substantial actual value.

Without repeating each and every invocation of the Fifth Amendment that Epstein has made and the reasonable inferences to be drawn from those invocations of privilege, the big picture is unmistakably clear: No reasonable finder of fact could rule in Epstein's favor on his claims against Edwards or on his defense against Edwards' claim for malicious prosecution. Accordingly, Edwards was entitled to summary judgment based on the Fifth Amendment inferences that the

jury would draw because Epstein has effectively conceded through invocation of the Fifth Amendment and by his later voluntary dismissal that all allegations against him were both reasonably based and true. Those same privilege assertions preclude the consideration of Epstein's Affidavit. But even if the Affidavit were not to be stricken, the adverse inferences that arise from Epstein's privilege assertions rebut his Affidavit and require denial of his Motion for Summary Judgment.

THE LAW REGARDING WITHDRAWAL OF PRIVILEGE OBJECTIONS

To the extent Epstein's affidavit is an effort to recede from his assertion of privilege, it comes far too late. The question of withdrawing privilege objections arises often, but not exclusively, in the context of the Fifth Amendment privilege against self-incrimination. [1] The applicable law has been summarized in the Criminal Practice Manual: "Generally, a litigant may not assert the privilege and then seek to withdraw it in order to gain a tactical advantage." The Fifth Amendment - Withdrawal, 1 Crim. Prac. Manual § 16:12 (2008) (collecting cases).

The best known and most cited case on point is United States v. Certain Real Property and Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y., 55 F.3d 78 (2d Cir. 1995). The

[1] See also Cahaly v. Benistar Prop. Exch. Trust Co., Inc., 2001 WL 35836851, p. 10 (Mass. Super. Ct. 2001) (striking affidavit submitted after assertion of spousal privilege); Vaughn v. Michelin Tire Corp., 756 S.W. 2d 548, 563 (Mo. Ct. App. 1988) (Holstein, J., concurring) (approving exclusion of evidence in light of defendant's invocation of trade secret privilege during discovery).

government therein followed a drug conviction with a civil forfeiture action against property owned by the defendant. The defendant (Tapia-Ortiz) asserted his Fifth Amendment privilege in refusing to answer interrogatories about drug dealing activities. Six months later, the government moved for summary judgment, asserting that the property was used for drug deals and pointing out the defendant had refused to provide any information on that topic. The defendant responded that he would like to withdraw his privilege objections and revise his interrogatory answers. See 55 F.3d at 81.

The district court refused the defendant's request to withdraw his privilege objections, ruled that the defendant could not submit any materials in opposition to the motion for summary judgment that he had previously claimed to be privileged, and entered summary judgment for the government. Id. On appeal, the defendant conceded that, absent his withdrawal of privilege of submission of an affidavit, he had no evidence to defeat the summary judgment motion. "Consequently, the only issue we face on this appeal is whether the District Court erred when it prevented Tapia-Ortiz from opposing the Government's motion for summary judgment with affidavits involving matters previously claimed to be within his Fifth Amendment privilege." Id. at 82.

The Second Circuit Court of Appeals began by discussing a litigant's right to invoke privilege, the "substantial problems" that privilege claims can pose for the adverse party's search for truth, and a trial court's need to strike a balance that accommodates both parties' interests. Id. at 82-84. The court then directly addressed the issue of withdrawal:

> In some instances, however, a litigant in a civil proceeding who has invoked the Fifth Amendment may not seek any accommodation from the district court, and may instead simply ask to withdraw the privilege and testify. In other cases, a litigant may ask to give up the privilege rather than accept the accommodation that the court has offered. The district court should, in general, take a liberal view towards such applications, for withdrawal of the privilege allows adjudication based on consideration of all the material facts to occur. The court should be especially inclined to permit withdrawal of the privilege if there are no grounds for believing that opposing parties suffered undue prejudice from a litigant's later-regretted decision to invoke the Fifth Amendment.
>
> This does not mean that withdrawal of the claim of privilege should be permitted carelessly. Courts need to pay particular attention to how and when the privilege was originally invoked. Since an assertion of the Fifth Amendment is an effective way to hinder discovery and provides a convenient method for obstructing a proceeding, trial courts must be especially alert to the danger that the litigant might have invoked the privilege primarily to abuse, manipulate or gain an unfair strategic advantage over opposing parties. If it appears that a litigant has sought to use the Fifth Amendment to abuse or obstruct the discovery process, trial courts, to prevent prejudice to opposing parties, may adopt remedial procedures or impose sanctions. [S]ee *Wehling [v. Columbia Broadcasting System*], 608 F.2d [1084,] 1089 [(5th Cir. 1979)] (stressing that courts must be "free to fashion whatever remedy is required to prevent unfairness"). **In such circumstances, particularly if the litigant's request to waive comes only at the "eleventh hour" and appears to be part of a manipulative, "cat-and-mouse approach" to the litigation, a trial court may be fully entitled, for example, to bar a litigant from testifying later about matters previously hidden from discovery through an invocation of the privilege.**
>
> As courts and commentators have noted, opposing parties will frequently suffer prejudice (at the very least from increased costs and delays) when a litigant relies on the Fifth Amendment during discovery and then decides to waive the privilege much later in the proceeding.

4003-4005 5th Ave., 55 F.3d at 84-86 (other citations omitted) (emphasis added).

Applying these principles, the Second Circuit held that the district court did not abuse its discretion in refusing the defendant's attempt to belatedly waive the privilege. The

defendant had persisted in his privilege objections for six months, changing his position only after the government had moved for summary judgment. "On these facts, the District Court was entitled to conclude that Tapia-Ortiz ought not to be allowed to block the Government's action through such means, and especially ought not, without sanctions, to be allowed to use the Fifth Amendment to further his obstructionist purposes." Id. at 86.

Less than two weeks after *4003-4005 5th Avenue* was decided, the Southern District of New York entered a similar order in SEC v. Grossman, 887 F. Supp. 649 (S.D.N.Y. 1995), addressing a circumstance nearly identical to that presented by EPSTEIN'S current effort to support his summary judgment motion with his own affidavit. The order of the *Grossman* Court prevented the defendants (the Hirschbergs) from offering exculpatory evidence in opposition to a summary judgment motion, which evidence they had previously refused to disclose during discovery. "The Hirschbergs decided not to provide discovery to the Commission, choosing to let stand their prior refusal to provide information based on their Fifth Amendment privilege against self-incrimination. Having done so, the Hirschbergs cannot now complain that they are precluded from offering evidence on the very issues for which they have declined to provide discovery for several years." 887 F. Supp. at 660. The court noted that, during those several years, the burden lay with the defendants to come forward if they wished to change their position on privilege. Id.; see also *SEC v. Zimmerman*, 854 F. Supp. 896, 899 (N.D. Ga. 1993) ("By waiting, the defendant has made his decision.").

The trial court's decision in Grossman was affirmed on appeal under the name *SEC v. Hirshberg,* 173 F.3d 846 (Table), 1999 WL 163992 (2d Cir. 1999). The Second Circuit held that the Hirschbergs had engaged in "precisely the type of 'eleventh hour' and 'manipulative, cat-and-mouse approach' to the use of privilege that we warned in *4003-4005 5th Ave.* would justify a district court's decision to preclude testimony with respect to matters shielded from discovery through the assertion of the privilege." 1999 WL 163992, *2. The court turned to the question of prejudice, focusing on the tactical advantage that would be gained by the defense:

> Moreover, on the circumstances of this case, we believe that the SEC would have suffered prejudice had the District Court considered the defendants' submissions… Alan Hirshberg, having waited four years to respond to the SEC's motion, could simply tailor his affidavit to create an issue of fact requiring a trial.

Id. at *3.

In *United States v. Private Sanitation Industry Assoc. of Nassau/Suffolk, Inc.,* 914 F. Supp. 895 (E.D.N.Y. 1996), the court cited *4003-4005 5th Avenue* when rejecting a defendant's effort to withdraw his privilege objection and submit testimony in opposition to a motion for summary judgment. "Mr. Ferrante's attempt to testify comes after more than two years of repeatedly invoking his Fifth Amendment rights in response to lengthy deposition questions posed to him by the government. His repeated assertion of the Fifth Amendment has greatly extended this litigation and has undoubtedly given him a 'strategic advantage' over his opposing party." 914 F. Supp. at 900.

In *SEC v. Softpoint, Inc.,* 958 F. Supp. 846, 856-57 (S.D.N.Y. 1997), the SEC simultaneously filed a motion for summary judgment and a motion to preclude the defendant from introducing any evidence that he previously withheld on a claim of privilege made six months earlier. The court granted the preclusion order, holding that a defendant may not invoke privilege to impede discovery efforts and then seek to wave the privilege when faced with the consequences of his decision. Id. at 857. "By asserting and waiving the privilege when convenient, [defendant] has engaged in the type of conduct that the Second Circuit described as `a manipulative cat and mouse approach to the litigation' — the type of conduct that warrants barring a defendant's testimony in opposition to summary judgment." Id. In finding actual prejudice to the SEC, the court noted that the defendant's tactics would "delay the resolution of this litigation," "put the SEC to enormous and unnecessary expense," and "provide him an unfair strategic advantage in this litigation, allowing him to effectively ambush the SEC with evidence, defenses, and denials that he concealed until after the government moved for summary judgment." Id. [2] The Second Circuit concluded, "for substantially the same reasons set forth in the district court's thoughtful opinion and order, that [defendant's] affidavit was properly precluded and that in the absence of this affidavit,

[2] The defendant relied upon *SEC v. Graystone Nash, Inc.,* 25 F.3d 187 (3d Cir. 1994), in which the appellate court reversed a preclusion order that flowed from the assertion of privilege during deposition. The district court in *Softpoint* distinguished *Graystone Nash* on two key grounds. First, the defendants in *Graystone Nash* appeared *pro se,* and were not presumed to know the consequences of asserting privilege. Second, the *Graystone Nash* court found an inadequate showing of prejudice to the SEC, unlike the clear showing of prejudice in *Softpoint. See* 958 F. Supp. at 856; see also Christopher V. Blum, *Self-Incrimination, Preclusion, Practical Effect and Prejudice to Plaintiffs: The Faulty Vision of SEC v. Graystone Nash, Inc.,* 61 Brook. L. Rev. 275 (Spring 1995).

summary judgment was appropriately entered for the SEC." 159 F.3d 1348 (Table), 1998 WL 537522, *1 (2d Cir. 1998) (citation omitted).

SEC v. Merrill Scott & Assocs., Ltd., 505 F. Supp. 2d 1193 (D. Utah 2007), provides one of the most thoughtful, analyses of the prejudice inherent in a long-delayed waiver of privilege. The defendant therein (Mr. Brody) invoked privilege in refusing for three years to answer deposition questions, but then sought to waive the privilege and offer an affidavit in opposition to a motion for summary judgment. The court held that, although the defendant properly invoked his Fifth Amendment privilege three years earlier, "the timing and context within which Mr. Brody waived his privilege is troubling. Mr. Brody did not submit his sworn 'testimony' until approximately one year after the period for fact discovery had concluded. More importantly, he waived the privilege after the SEC had moved for summary judgment, and, consequently, had an **opportunity to tailor his response** to the motion." 505 F. Supp. 2d at 1209 (emphasis added). The court specifically noted that the defendant's offer to submit to another deposition "is not sufficient to remedy the problems created by his 'eleventh hour' waiver," id. at 1210 n. 13, as the SEC would face having to completely reopen its case in light of the new deposition testimony:

> This case has been pending for over five years. SEC has taken over seventy depositions throughout the United States and Canada.... The SEC no doubt incurred significant costs and expenses in connection with that discovery. Indeed, arguably the SEC took more depositions as a result of Mr. Brody's refusal to testify in 2003. But SEC took many of the depositions without the benefit of Mr. Brody's version of events. While the SEC developed its own case, it did not have the opportunity to rebut Mr. Brody's newly presented case. It certainly would be prejudicial to the

> SEC to allow Mr. Brody to testify at trial without first being deposed. And it would be prejudicial to require SEC to rely on discovery that was developed without the benefit of knowing Mr. Brody's assertions.... To allow SEC the opportunity to rebut Mr. Brody's case through additional discovery would not only open a Pandora's box but would result in substantial additional costs and delay.

505 F. Supp. 2d at 1211.

Because Mr. Brody waited over three years from the date of his deposition to waive the privilege and offer evidence in his defense, never previously indicated that he intended to waive the privilege, and allowed the SEC to build its case based upon his refusal to testify, the court struck his response in order to avoid prejudice to the SEC. 505 F. Supp. 2d at 1211-12. The court wrote that "[o]ther courts have done the same in similar circumstances," then described the holdings in *4003-4005 5th Avenue* and six other published decisions. Id. at 1210.

In another published decision on preclusion, *SEC v. Brown*, 579 F. Supp. 2d 1228 (D. Minn. 2008), the court addressed a slightly different factual setting. In *Brown,* the defendant had provided broad interrogatory responses, but thereafter invoked his Fifth Amendment privilege, thus preventing the SEC from exploring his answers in deposition. 579 F. Supp. 2d at 1234-35. The court held that, "in order to prevent unfairness to the SEC," the defendant could not rely on his interrogatory responses in opposing the SEC's motion for summary judgment. The court cited a number of cases analyzing the consequences of privilege assertions in civil cases, including *SEC v. Benson,* 657 F. Supp. 1122, 1129 (S.D.N.Y. 1987) (defendant prevented from offering evidence in support of positions on which he had invoked the Fifth Amendment), and *In re Edmond,* 934

F.2d 1304, 1308 (4th Cir. 1991) (approving the striking of a self-serving affidavit where a party had invoked privilege to prevent a deposition). [3]

FLORIDA LAW: THE BINGER TEST

There is no Florida authority directly addressing the consequences of raising, and then belatedly attempting to waive, a claim of privilege. But in *Binger v. King Pest Control,* 401 So. 2d 1310 (Fla. 1981), and its progeny, Florida courts have similarly focused on prejudice and fairness when considering the appropriate sanction for violation of a pretrial order.

In *Binger*, the plaintiff attempted to call an expert witness to testify at trial who had not been identified on a court-ordered witness list. The trial court permitted the expert witness to testify, but the Fourth District Court of Appeal reversed. The Florida Supreme Court, approving the district court decision, wrote:

> [A] trial court can properly exclude the testimony of a witness whose name has not been disclosed in accordance with a pretrial order. The discretion to do so must not be exercised blindly, however, and should be guided largely by a determination as to whether use of the undisclosed witness will prejudice the objecting party. Prejudice in this sense refers to the surprise in fact of the objecting party, and it is not dependent on the adverse nature of the testimony. Other factors which may enter into the trial court's exercise of discretion are: (i) the objecting party's ability to cure the prejudice or, similarly, his independent knowledge of the existence of the witness; (ii) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (iii) the possible disruption of the orderly and efficient trial of the case (or other cases). If after considering these factors, and any others that are relevant, the trial court concludes that use of the undisclosed witness will

[3] "The trial court in *Edmond* referred to the defendant's maneuvering as trying to "have peanut butter on both sides of his bread." 934 So. 2d at 1307. "Although such a statement is somewhat simplistic, it properly and succinctly explains the rationale for striking the affidavit." *Cahaly v. Benistar Prop. Exch. Trust Co., Inc.,* 2001 WL 35836851, p. 10 n.20 (Mass. Super. Ct. 2001).

> not substantially endanger the fairness of the proceeding, the pretrial order mandating disclosure should be modified and the witness should be allowed to testify.

401 So. 2d at 1313-14 (footnotes omitted).

Many subsequent decisions have applied these so-called "*Binger* factors" to avoid trial by ambush. For example, in *HSBC Bank Mortg. Corp. (USA) v. Lees,* 201 So.3d 699 (Fla. 4th DCA 2016), the Fourth District affirmed a trial court judge's decision to strike a key witness whose existence had been disclosed by the defendant bank only shortly before trial. The Fourth District recounted *Binger's* admonition that the primary factor to consider in such circumstances is "whether use of the undisclosed witness will prejudice the objecting party." Id. at 702. The Fourth District concluded that "the bank's failure to disclose its witnesses in a manner that was in compliance with the pre-trial order constituted surprise in fact, and thus, under the facts of this case, prejudiced the homeowner." Id. at 703.

Similarly, in *Cascanet v. Allen,* 83 So.3d 759 (Fla. 5th DCA 2011), the appellate court found it was error to allow a defense expert witness to offer a new theory that minimizing the plaintiff's injury to his leg – a theory not disclosed in the expert's report. The Court explained that the plaintiff's attorney "could not have been prepared to rebut or effectively cross-examine the doctor on his new theory for the leg pain or to attack the 'many studies'" purportedly supporting the doctor's opinion.

In *Metropolitan Dade County v. Sperling,* 599 So. 2d 209, 210-11 (Fla. 3d DCA 1992), the appellate court cited *Binger* in affirming the exclusion of an expert witness who was disclosed

before trial, but 25 days after the court-ordered deadline for listing witnesses. The court specifically rejected the argument that any prejudice could be cured by deposing the expert before trial. "Although a deposition might have been possible, [defendant's] counsel would not have had adequate time to prepare. *See Gustafson v. Jensen,* 515 So. 2d 1298, 1301 (Fla. 3d DCA 1987) ('While a hastily scheduled deposing of the husband's surprise expert may have been possible, the time frame for assimilation and analyzation of refuting testimony and documents was too highly compressed to allow the wife a fair presentation.')."

In *Florida Marine Enterprises v. Bailey,* 632 So. 2d 649, 651-52 (Fla. 4th DCA 1994), the Fourth District Court of Appeal applied *Binger* in affirming the trial court's decision to strike an expert witness who was untimely listed. "[T]he trial judge's chief concern was to afford the parties an opportunity for the fair, orderly and efficient preparation and trial of the lawsuit." 632 So. 2d at 652. The appellants argued that a continuance of the trial obviated any prejudice, but the Fourth District made clear that a trial delay is itself prejudicial:

> Where, as here, a party without good cause improperly discloses witnesses, and by virtue of the improper disclosure gains an unfair advantage over the opposing party who is in compliance with the pretrial order, *Binger* gives the trial court discretion to strike those witnesses to prevent the objecting party from being forced to choose between frantic last-minute discovery and an unjustified delay of her trial. This is not a fair manner in which to "cure the prejudice" caused by the defendants' failure to timely prepare their case, and we hold that *Binger* does not require such a result here.
>
> In the instant case, the trial court properly found that unfair prejudice to Plaintiff existed because she would be unable to counter testimony offered so late in the

> game. See *Grau v. Branham,* 626 So.2d 1059, 1061 (Fla. 4th DCA 1993) ("Neither side should be required to engage in frantic discovery to avoid being prejudiced by the intentional tactics of the other party.").
>
> *Binger* does not mean that trial courts are obligated to automatically grant last minute continuances to parties who choose not to timely prepare their cases for trial. The trial court's discretion under Binger includes the power to appropriately enforce pretrial orders, as the court below did in this case.

632 So. 2d at 652.

In *Menard v. University Radiation Oncology Associates, LLP,* 976 So. 2d 69, 72-74 (Fla. 4th DCA 2008), the Fourth District Court of Appeal reversed a trial court decision to allow a party to change the position that it had taken throughout discovery regarding basic factual issues. In so doing, the court revisited, and reaffirmed, the notions of fundamental fairness upon which the *Binger* line of cases is based. The court reviewed in detail three of its post-*Binger* decisions: *Department of Health and Rehabilitative Servs. v. J.B.,* 675 So. 2d 241 (Fla. 4th DCA 1996); *Grau v. Branham,* 626 So. 2d 1059 (Fla. 4th DCA 1993); and *Office Depot, Inc. v. Miller,* 584 So.2d 587 (Fla. 4th DCA 1991). *"J.B., Grau* and *Office Depot* all stand for the proposition that it is an abuse of discretion to allow a party at trial to change, in this manner, the substance of testimony given in pretrial discovery." 976 So. 2d at 71. In discussing *Office Depot,* the Fourth District quoted Judge Anstead's closing observation that the trial court decision to exclude testimony "sends out a strong message to those who do not adhere to the code of fair play advanced by *Binger,"* then added: "Our warning, issued more than 15 years ago, has never been withdrawn." Id. at 73. The

court also noted that "our holding is in the nature of an estoppel, which in fact is the real principle underlying the holdings in *J.B., Grau* and *Office Depot."* 976 So. 2d at 74 n.3.

ANALYSIS: PREJUDICE, FAIRNESS, AND ESTOPPEL

Both the federal cases regarding the consequences of invoking privilege, and the Florida cases regarding violation of pretrial orders, turn on considerations of prejudice, fairness, and reliance upon an existing set of circumstances. Applying these fundamental principles to the instant case, it is clear that EDWARDS would suffer extreme, and incurable, prejudice if EPSTEIN were permitted to selectively withdraw his privilege assertions and support a defense to the pending claim against him with a self-serving affidavit or any other evidence as to which relevant and material discovery has been foreclosed by his consistent assertion of the privilege against self-incrimination. Among other reasons, EDWARDS would obviously be prejudiced as a result of his inability to challenge – or even explore – the claims that EPSTEIN seeks to advance at the 11th. hour to support his dispositive motion.

CONCLUSION

EPSTEIN made a conscious decision to adopt, and adhere to, a hard-line position on privilege for eight years. EPSTEIN bet on Counter-Plaintiff's inability to carry his burden of proof past the roadblock of his many privilege objections. EPSTEIN'S need to rely on his own affidavit in an effort to support his motion for summary judgment makes clear that EPSTEIN is

about to lose his bet. Faced with the near certainty of an adverse finding on liability, EPSTEIN wants to "take a Mulligan" and begin the case over, with full knowledge of EDWARDS' litigation strategy. However, the advantages EPSTEIN would gain by permitting such a reversal at this stage of the proceedings, and the disadvantages that EDWARDS would suffer in the lengthy delays and enormous added expenditures of effort and money inherent in a "do-over", create a kind and degree of prejudice for which there is no practical cure.

In the words of the Second Circuit, this case has reached its "eleventh hour", and EPSTEIN is attempting to play "cat and mouse" with the privilege. *4003-4005 5th Ave.,* 55 F.3d at 86. This Court has every right and a clear obligation to reject EPSTEIN'S ploy.

WHEREFORE, EDWARDS asks that this Court grant its motion in limine, strike Epstein's affidavit, preclude EPSTEIN from using any documents, testimony, or other evidence previously withheld on the basis of privilege, and grant such further relief as may be just.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 25th day of Sept., 2017.

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