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

Case No. 50-2009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

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

Defendants/Counter-Plaintiff.
_____/

COUNTER-DEFENDANT JEFFREY EPSTEIN'S RESPONSE IN OPPOSITION TO EDWARDS' MOTION TO STRIKE EPSTEIN'S MOTION FOR *IN CAMERA* INSPECTION OF 30 E-MAILS

Counter-Defendant Jeffrey Epstein ("Epstein") responds in opposition to Counter-Plaintiff Bradley J. Edwards' ("Edwards") November 13, 2018, Motion to Strike Epstein's Motion for *In Camera* Inspection of 30 E-Mails and states:

INTRODUCTION

Edwards knows only one path: hide and deflect from the truth. Pursuant to long-established Florida Supreme Court precedent, Epstein is required to articulate his "specific legal argument" in order to properly preserve it for appeal to the Fourth District Court of Appeal. This preservation is particularly necessary in light of this Court's recent ruling striking 126 of Epstein's trial exhibits, many of which were public records or already in Edwards' possession and which Epstein specifically identified and provided to Edwards more than eight months ago. With regard to the 30 e-mails for *in camera* review and this Court's ruling on procedure at the November 2, 2018 hearing, Epstein fully complied with this Court's oral ruling and written order – in both the

spirit and letter of the law – by filing a motion for *in camera* inspection of a "generic quality" and leaving the "substantive discussion of those e-mails…under seal by way of memorandum." This is precisely what was accomplished by Epstein. Disappointingly, Edwards prefers that Epstein be silenced from making any appellate record – which simply is not the law. Edwards' unmeritorious Motion to Strike must be denied.

EPSTEIN'S COMPLIANCE WITH THE COURT'S NOVEMBER 2, 2018, HEARING

After ruling that Epstein would not be allowed to use certain exhibits identified since March 2018 on his Clerk's Trial Exhibit List under a *Binger*[1] analysis, this Court raised the pending issue of the 47 e-mails that Edwards claims are privileged and Epstein's pending request for an *in camera* review. As to those documents, the Court found:

> … I think that they do have a bit of a different connotation and import as it relates to whether or not late-filed, because if they were contained in the 2010 [sic-2011] privilege log, it's very difficult to suggest that there would be prejudice as to knowledge on the part of those documents being potentially utilized.

(11/2/18 Hearing Tr., 115:5-12.)[2]

The Court then instructed the parties to submit briefing on the issue:

> So what I will need is the emails sent to my office under seal. I will be the only one to review those emails. What I then would need from you is the motion that's filed, and I don't know how there can be a viable discussion without discussing the contents of the emails in a setting that the memoranda is sent under seal, and for attorneys' eyes only.
>
> ***
>
> I think the best approach would be for a motion to be filed of a generic quality that does not mention any contents of these emails, but simply tees it up, so to speak, with the understanding on this record today that any substantive discussion of those emails will be done under seal by way of memorandum, and that will be done under seal and

[1]*Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981).
[2]Excerpts of the November 2, 2018, Hearing Transcript are attached as **Exhibit A.**

> will continue to be under seal, and will be filed under seal in case of a need for appellate review. So that is going to be the direction of the Court, that the motion be filed, but that the memorandum be sent under seal to this Court, hand-delivered to me, sealed. And the same response memorandum be sent to be under seal by Mr. Edwards' counsel a week later.

(11/2/18 Hearing Tr., 120:17-25; 122:22-123:14.)

This Court only limited Epstein to a motion "generic in nature" to the extent that the motion could not specifically quote any of the e-mails or specifically discuss their contents, which the motion most certainly did not do. However, this Court also recognized the need for Epstein's motion to "tee up" the argument and then provide the specific references to the e-mails in the sealed memorandum. The Court's oral ruling was reduced to a proposed written Order by Epstein's counsel, with one minor change by Edwards' counsel, and remained consistent with the oral ruling that any "specific" citations and references to the e-mails would be in the memorandum filed under seal. There can be no legitimate dispute – Epstein complied with the sealing of the memorandum that specifically cited to and quoted the e-mails.

Edwards seems to take issue with the fact that Epstein fully (20 pages) and specifically (as required by the law) raised his legal arguments in the motion. Edwards' flawed argument avoids the obvious – Epstein never once cited or quoted a specific e-mail, despite how compelling a public argument each e-mail presents for relevance, and for no privilege or protection in light of Edwards' defective and misleading privilege log and Edwards' sworn testimony in this lawsuit. Rather, Epstein complied with Florida law by articulating his specific legal arguments as to why the e-mails are relevant, never had any attorney-client privilege, no longer have protection of work-product given Edwards' noncompliance with Florida Rules of Civil Procedure and a defective, if not worse, privilege log, as well as producing all of the 27,542 e-mails to an adversary, issue

injection (Edwards' sworn testimony) and the crime fraud exception found in the Florida Evidence Code.

FLORIDA SUPREME COURT REQUIRES SPECIFIC LEGAL ARGUMENT FOR APPELLATE PRESERVATION

Edwards' trial counsel knows the law, having been involved in at least one appeal addressing this legal tenet. *See Eagleman v. Korzeniowski*, 924 So. 2d 855, 860 (Fla. 4th DCA 2006)("In order to be preserved for appellate review, the **specific** argument made on appeal must have been raised when the party objected in the trial court.") In fact, the Fourth District Court of Appeal concluded that, "[i]t defies logic for a party to expect to be able to take no position on an issue in the trial court and then take whatever position is most advantageous to it on appeal; a party must take some position below in order for this court to review how the trial court ruled on that position." *Id.* at 859. In Edwards' view of the law, Epstein should be darned if he does, darned if he does not. Had Epstein not articulated the specific legal bases in his motion, Edwards would have claimed "lack of preservation" on appeal! *See Diaz v. Wells Fargo Bank, N.A.*, 189 So. 3d 279, 282 (Fla. 5th DCA 2016)("To preserve an issue for appellate review, "the specific legal ground upon which a claim is based must be raised at trial....") *citing Aills v. Boemi,* 29 So. 3d 1105, 1109 (Fla. 2010); *Cadavieco v. Castle Key Ins. Co.,* 246 So. 3d 501 (Fla. 3d DCA 2018)(affirmed citing civil cases holding that in order to be preserved for appellate review, issue must be presented to lower court and the specific legal argument raised).

Accordingly, Epstein complied with this Court's Order – and Florida law – by making his specific legal argument and being "generic" in his reference to the e-mails. Not once did Epstein quote or specifically reference an e-mail in his motion. In addition, Epstein did not say anything in his motion that has not already been said multiple times before in public filings.

EDWARDS COMMITTED THE PRECISE FOUL HE CLAIMS AGAINST EPSTEIN

Edwards himself has repeatedly emphasized in his own multiple public filings the complained of references by Epstein to the e-mails:

D.E.	Date	Document
D.E. 1257	03/06/18	Edwards' Response to Epstein's Motion for Court to Declare Relevance and Non-Privileged Nature of Documents, etc.
¶ 5 – "In his Notice of Filing Appendix, Epstein, through counsel, includes privileged materials under a section titled 'Edwards' Direct Involvement in Rothstein's Ponzi Scheme.' If nothing but consistent, Epstein, through counsel, then sprinkles throughout the Motion for Court to Declare Relevance direct accusations and implicit insinuations that, regardless of whether Epstein had probable cause to institute or continue his malicious lawsuit against Edwards, it turns out that Edwards was secretly involved in the Ponzi scheme after all! For example, Epstein claims that the emails are "evidence that shows [Edwards'] direct participation with Rothstein to avoid the structured settlement statute for an Epstein case" and questions whether these e-mails "were turned over to the U.S. Attorney."		
D.E. 1318	04/03/18	Edwards' Motion for Sanctions for Violation of Court Order (**withdrawn**) – ***quoting Epstein's statements:***
¶ 12 - "Second, the alleged eight-year-old "confidential" information to which Edwards refers is 47 exhibits comprised of a series of communications between Edwards and other attorneys, including Scott Rothstein, that eviscerate Edwards' case against Epstein in its entirety . . . Moreover, on their face, all of these eight-year-old communications clearly show that Edwards' claims of work product simply do not apply. These inculpatory communications cannot constitute work-product. They directly relate to issues that Edwards himself has made central to this case and their content provides independent grounds to reject work product protection, including both the crime fraud exception and potential unprofessional conduct . . . the trial court refused to evaluate these issues, choosing instead to exclude the communications on the basis of what the Court believed was Epstein's untimely request to identify them on his Exhibit List." ¶ 14 - "Included among those issues to be perfected at the trial court is Edwards' errant claim of 'privilege' which remains a cloud below preventing the admission of crucial evidence that Epstein maintains is dispositive of this case. That evidence must be reviewed in camera by the trial court while the appellate issues are under review. Consistent with this Court's interest in 'fairness' and 'efficient use of the trial court's time and resources,' Epstein will be narrowing his request for in camera review down from 27,000 pages to a readily manageable fraction, 47 exhibits numbering approximately 100 pages." ¶ 15 - "In fact, Edwards' counterclaim is thoroughly disproved by direct documentary evidence of Edwards' own misconduct and credibility that Epstein is currently asking the trial court to review for presentation to the jury when this case is tried."		

D.E.	Date	Document
¶ 17 - "Recent events (appeal and stay) and the discovery of e-mails that totally eviscerate Counter-Plaintiff Bradley J. Edwards' ("Edwards") claims and shines a light on his true motivation have prompted unprofessional behavior from Edwards and his counsel evidenced by the unilateral setting of hearings, certificates of conferring that never happened and intentional *ex parte* attendance at a hearing despite knowing of Epstein's counsel's unavailability."		
[redacted]		
4th DCA	04/03/18	Edwards' Motion to Strike All References to the Alleged Contents of Material Which Epstein and His Counsel Unlawfully Possessed – – ***quoting Epstein's statement*** **(Denied by the 4th DCA)**
¶ 7 - "In fact, Edwards' counterclaim is thoroughly disproved by direct documentary evidence of Edwards' own misconduct and credibility that Epstein is currently asking the trial court to review for presentation to the jury when this case is tried."		

Edwards cannot complain about Epstein's "generic" references when Edwards himself has repeatedly highlighted and emphasized those statements multiple times in his own publicly filed documents!

EDWARDS' RECOGNITION OF WAIVED WORK PRODUCT

More likely than not, Edwards makes this desperate "striking" attempt to again hide the truth by claiming Epstein disregarded this Court's rulings and the "sacrosanct nature of a privilege assertion" because Edwards knows he is in trouble. Despite his belated claims of sacrosanct privilege (which the Court can plainly see does not exist in any one of the e-mails), Edwards clearly waived any work-product protection he may have had by – among other compelling reasons -- his complete failure to comply with Florida Rule of Civil Procedure 1.280(b)(6). With Epstein's citation in his motion to the Fourth District Court of Appeal's controlling case of *General Motors Corp v. McGee,* 837 So. 2d 1010 (Fla. 4th DCA 2002), Edwards is about to suffer the same fate as GM based on his Rule 1.280-noncompliant privilege log and the central issues to Edwards' lawsuit that the e-mails implicate. As the trial judge in the GM case, this Court cannot:

> as suggested by Counsel [asserting the privilege], simply forget about these documents and continue on with this trial as though they

> don't exist. This Court still adheres to the belief that: "We who labor here seek only truth."

Id. at 1025.

In fact, *McGee* establishes the very legal basis why Epstein had to articulate Edwards' deliberate attempt to "conceal" the e-mails in a misleading privilege log, falsely assert attorney-client privilege where none existed between an attorney and client, issue injection given his deposition testimony in this lawsuit as recently as November 2017, and the crime-fraud exception found in section 90.502, Florida Statutes. In truth, there is nothing violative of this Court's order to argue that the e-mails are "case-ending." That is argument, not specific citation to the content of the e-mails.

CONCLUSION

Edwards' Motion to Strike must be seen for what it is – yet another attempt to divert those "who labor here seek[ing] only truth." Epstein complied with this Court's ruling and Florida law in filing a motion for *in camera* review of 30 e-mails, not once citing or specifically referencing the e-mails' content, but raising "specific legal argument" as required by law. Epstein next followed both the spirit and letter of the law in filing under seal his memorandum which quoted and cited the specific 30 e-mails which never were protected by attorney-client privilege, have no arguable work product cloak given Edwards' actions with waiver and a non-compliant privilege log designed to deceive the recipient – Epstein. Edwards' attempt to hide the truth must be denied and the e-mails be illuminated by the light of this courtroom.

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the attorneys listed on the Service List below on November 14, 2018, through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1).

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EXHIBIT A

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

JEFFREY EPSTEIN,

Petitioner/Counter-Defendant,

vs. No. 50-2009CA040800XXXXMBAG

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

Defendants/Counter-Plaintiff.

West Palm Beach, Florida

November 2nd, 2018

10:25 a.m. - 1:06 p.m.

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Plaintiff/Counter-Defendant Epstein's Motion to Allow Amendment to Exhibit List, et al.

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The above-styled cause came on for hearing before the Honorable Donald W. Hafele, Presiding Judge, at the Palm Beach County Courthouse, West Palm Beach, Palm Beach County, Florida, on the 2nd day of November, 2018.

defense challenge to that privilege log.

MR. LINK: That's correct.

MR. SCAROLA: And while -- well, I don't want to get too deep into these arguments.

THE COURT: Let's not get too deep into them, because I think that they do have a bit of a different connotation and import as it relates to whether or not late-filed, because if they were contained in the 2010 privilege log, it's very difficult to suggest that there would be prejudice as to knowledge on the part of those documents being potentially utilized. So, what I would like you to do then is -- we're getting dangerously close on time --

MR. VITALE: Your Honor, just a clarification for the record.

Along with the disk, there was a folder containing 32 hard copies of materials that Fowler White printed from the disk.

If my memory serves me correctly, 22 of those documents were listed on Mr. Edwards' privilege log, one of them had handwritten notations. So in terms of the discovery issue, I just wanted the record to reflect that hard copies were, in fact, in possession of

say. Not a magistrate, special master.

MR. SCAROLA: After which Judge Crow made it very clear that he would be ruling on issues of privilege with regard to any privilege assertions in a case in which the subpoena was issued over which he was presiding. So Judge Carney never made --

MR. LINK: We don't disagree, Judge Hafele.

MR. SCAROLA: Judge Carney never made any privilege --

THE COURT: No, I'm not suggesting he did. That wasn't really my intent at all. And even if he did, I don't think that it would be any way, shape or form binding here.

MR. LINK: We agree you're the person.

THE COURT: So what I will need is the emails sent to my office under seal. I will be the only one to review those emails.

What I then would need from you is the motion that's filed, and I don't know how there can be a viable discussion without discussing the contents of the emails in a setting that the memoranda is sent under seal, and for attorneys' eyes only.

attorneys'-eyes-only documents that were handed over that do not include the documents that are listed on the privilege log. And that's what we're talking about here. We're talking about privileged documents. The fact that they obtained those documents improperly does not give them any greater right, if anything it gives them a lesser right, to challenge, at this point, the assertion of privilege.

THE COURT: Well, that may be. That may be fine for legal argument, but I want to get to the practical aspects of trying to -- for my own purpose, be able to adequately review the legal arguments in connection with the emails at issue. And at least from the attorneys' standpoint, and Mr. Epstein's standpoint, as I understand it, the cat is out of the bag in that regard. So, I can't undo what's already been done, and that's been years ago.

MR. SCAROLA: So we don't want to aggravate the problem.

THE COURT: And I agree. That's why I'm saying that I think the best approach would be for a motion to be filed of a generic quality that does not mention any contents of these

emails, but simply tees it up, so to speak, with the understanding on this record today that any substantive discussion of those emails will be done under seal by way of memorandum, and that will be done under seal and will continue to be under seal, and will be filed under seal in case of a need for appellate review.

So that is going to be the direction of the Court, that the motion be filed, but that the memorandum be sent under seal to this Court, hand-delivered to me, sealed. And the same response memorandum be sent to me under seal by Mr. Edwards' counsel a week later.

MR. LINK: And shared with each other, though?

THE COURT: Absolutely, for attorneys' eyes only.

MR. LINK: Understood.

THE COURT: Okay? And Mr. Edwards, I understand, is co-counsel, so he has the right to look at them. But it's not to be distributed to anyone else --

MR. LINK: Understand. It's very clear.

THE COURT: -- until I issue an order of