

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE 15-000072

BRADLEY J. EDWARDS and
PAUL G. CASSELL,

Plaintiffs/Counterclaim Defendants,

vs.

ALAN M. DERSHOWITZ,

Defendant/Counterclaim Plaintiff.

_____ /

**DEFENDANT/COUNTERCLAIM PLAINTIFF ALAN M. DERSHOWITZ'S
MOTION FOR AN ORDER (1) DIRECTING PLAINTIFFS TO MAKE A FINAL
DETERMINATION REGARDING THE ASSERTION OF ANY APPLICABLE
PRIVILEGES AND PROTECTIONS; AND (2) RULING THAT PLAINTIFFS WILL BE
IRREVOCABLY BOUND BY THEIR DETERMINATION,
REGARDLESS OF ANY FUTURE ATTEMPTS AT VOLUNTARY WAIVER**

Defendant/Counterclaim Plaintiff ALAN M. DERSHOWITZ ("Dershowitz") respectfully moves this Court for the entry of an Order that (a) directs Plaintiffs BRADLEY J. EDWARDS ("Edwards") and PAUL G. CASSELL ("Cassell") (together, "Plaintiffs") to make, within ten (10) days of the entry of the Order, a final determination as to whether Plaintiffs will continue to assert the attorney-client privilege, the work product doctrine, and/or the common interest/joint defense doctrine to withhold any evidence that is responsive to Dershowitz's discovery requests or is otherwise relevant to any claims or defenses in this action; and (b) rules that Plaintiffs will be irrevocably barred from introducing or otherwise relying on at trial any documents and testimony as to which Plaintiffs continue to assert the attorney-client privilege, the work product doctrine, and/or the common interest/joint defense doctrine as of ten (10) day

after the entry of the Order, notwithstanding any future attempts by Plaintiffs or their clients to waive voluntarily the applicable privileges and/or protections. In support of this motion, Dershowitz states as follows:

1. Plaintiffs filed this defamation action against Dershowitz on January 6, 2015. In their Complaint, Plaintiffs allege that Dershowitz defamed them by “initiat[ing] a massive public media assault on the reputation and character of [Edwards] and [Cassell] accusing them of intentionally lying in their filing [on behalf of their client, ██████████ (“██████”)], of having leveled knowingly false accusations against [Dershowitz] without ever conducting any investigation of the credibility of [██████] accusations, and of having acted unethically to the extent that their willful misconduct warranted and required disbarment” – even though Dershowitz “knew [the pleading containing the false and outrageous allegations about Dershowitz by ████████] to be an entirely proper and well-founded pleading.” Compl. ¶ 17.

2. In February 2015, Dershowitz propounded several sets of discovery requests on Plaintiffs seeking information that falls within the scope of discovery permitted by the Florida Rules of Civil Procedure. In response, Plaintiffs raised a number of objections, including that some or all of the information sought by Dershowitz is protected by the attorney-client privilege, the work product doctrine, and/or the common interest/joint defense doctrine.

3. On September 8, 2015, Dershowitz file a motion to compel Plaintiffs’ production of documents and complete responses to interrogatories (the “Motion to Compel”). Among other arguments raised in his briefs in support of the Motion to Compel, Dershowitz asserted that:

- Plaintiffs have waived the attorney-client privilege belonging to ████████ by bringing this defamation action against Dershowitz and placing at issue both

the veracity of ██████ allegations against Dershowitz and Plaintiffs' investigation into those allegations.

- ██████ herself has waived the attorney-client privilege by making repeated and voluntary statements about her allegations about being a "sex slave" who was purportedly sexually trafficked as a minor by Jeffrey Epstein, as well as by disclosing the substance of her communications with Plaintiffs, including through her disclosure of and reliance on a 2011 interview with Edwards and John Scarola ("Scarola"), Plaintiffs' counsel in this action, that was labeled "Privileged . . . and/or Work Product."
- Plaintiffs have waived their right to rely on the work product doctrine by bringing this defamation action and making voluntary disclosures of, among other things, the transcript of ██████ 2011 interview with Edwards and Scarola. In any event, Dershowitz has met his burden to overcome Plaintiffs' assertion of the work product protection by establishing that (a) he has a need for the materials that are encompassed by his discovery requests; and (b) such materials cannot be obtained by other means.

4. After Dershowitz filed the Motion to Compel, the initial session of Cassell's deposition was held. In response to questions about the factual basis for including ██████ outrageous and false allegations against Dershowitz in the pleading in the federal action, Cassell testified about a very small number of phone calls he had with ██████ as well as his review of the transcript of ██████ interview with Edwards and Scarola – confirming again that Plaintiffs will necessarily rely on their communications with ██████ to support their defamation claim. At the same time, however – and consistent with Plaintiffs' assertions of privilege in response to

Dershowitz's written discovery requests – Cassell asserted the attorney-client privilege, the work product doctrine, and the common interest/joint defense doctrines as to the substance of his communications with ██████ as well as his communications with other clients. Thus, Cassell identified certain communications but entirely refused to testify as to the substance of those communications.

5. On November 12, 2015, the Court issued an order sustaining Plaintiffs' objections to Dershowitz's discovery requests and denying the Motion to Compel in full.¹

6. The parties are currently scheduling a host of party and non-party depositions to be taken across the country and potentially across the world. Given the number of parties and non-parties involved in this matter, each deposition requires extensive coordination among counsel. As the Court is aware, the depositions of Dershowitz and Cassell have already lasted two days each, and are expected to continue for several additional days. Many of the non-party depositions are also likely to last for several days, and may also involve out-of-state commissions and accompanying subpoenas *duces tecum* for the production of documents. It is also likely that further motions practice may be needed with respect to the scope of third-party discovery.

7. In light of Cassell's testimony at his first deposition session and the Court's order of November 12, 2015, Dershowitz reasonably expects that Cassell will continue to assert the attorney-client privilege, the work product doctrine, and/or the common interest/joint defense doctrine in response to Dershowitz's questions and that Edwards will do the same when his deposition takes place. Dershowitz also anticipates that ██████ will likewise assert privilege at

¹ The Court separately ordered Plaintiffs to provide an itemized privilege log.

her deposition, as her counsel was present when Cassell refused to answer questions about his communications with ██████ and has otherwise asserted privilege in this case.

8. Given that pre-trial discovery in this case will be both time-consuming and expensive, it would be fundamentally unfair and an abuse of discretion to permit Plaintiffs to choose at some later date to waive the work product doctrine in order to introduce testimony and/or documents at trial that they previously withheld from Dershowitz.

9. It would also be fundamentally unfair and would constitute reversible error to permit ██████ to waive the attorney-client privilege or the common interest/joint defense doctrine at some later point as the date of trial approaches, with the result of allowing Plaintiffs to introduce or otherwise rely on the substance of the communications between ██████ and any of her various lawyers in support of their defamation claim against Dershowitz. The same unfairness and prejudice would result if any of Plaintiffs' other clients were to waive their respective attorney-client privileges and/or the common interest/joint defense doctrine at some later date.

10. In some cases, one possible way to remedy the prejudice and unfairness that would result by Plaintiffs' and/or their clients' late waiver of privilege would be to re-open fact discovery, including by allowing Dershowitz to reopen any party and non-party depositions that might be impacted by the disclosure of the previously withheld information. In this case, however, that remedy is not viable. Re-opening discovery and allowing the parties to re-depose certain key witnesses would be enormously expensive and would unnecessarily waste judicial resources.

11. Moreover, the "remedy" of allowing discovery to be re-opened would also be an ineffective cure for the prejudice suffered by Dershowitz. If Plaintiffs or their clients were

permitted to waive privilege voluntarily after the close of discovery or even after the significant depositions in this case have taken place, Plaintiffs could plan their trial strategy with the benefit of not only knowing the substance of any withheld evidence but also knowing precisely when that evidence will be disclosed. Dershowitz, by contrast, would be completely left in the dark and could potentially be forced to reformulate his trial strategy at a late date and under time pressure.

12. In light of these circumstances, the only proper remedy is for the Court to issue a pre-trial ruling to preclude any attempt by Plaintiffs to wield the attorney-client privilege, the work product doctrine, and/or the common interest/joint defense as both a sword and a shield. Florida law gives trial courts wide authority to manage pre-trial proceedings to control the orderly progress of a civil proceeding. *See generally* Rule 1.200. The only way to ensure the orderly progress of this action is by issuing an Order that is twofold:

- *First*, the Court should direct Plaintiffs to make a final and binding determination as to whether they will continue to assert the attorney-client privilege, the work product doctrine, and/or the common interest/joint defense doctrine to withhold any evidence that is responsive to Dershowitz's discovery requests or otherwise relevant to any claims or defenses in this action. This determination should be made promptly (*i.e.*, within ten (10) days of the entry of the Court's Order), before additional depositions proceed and before there is any possibility that the parties might have to re-do work unnecessarily.
- *Second*, the Court should further rule that – notwithstanding any later decision by ██████ or any of Plaintiffs' other clients to waive their respective

privileges – Plaintiffs will be irrevocably precluded from introducing any evidence at trial as to which Plaintiffs assert the attorney-client privilege, the work product doctrine, and/or the common interest/joint defense doctrine as of ten (10) days after entry of the Court’s Order requested in this motion.

13. To preclude litigants from using waiver as a surprise tactic, courts – including courts in Florida – routinely require a party who intends to waive privilege at trial to either submit to discovery on that subject or be precluded from relying on the privileged evidence at trial. *See, e.g., Int’l Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 186 (M.D. Fla. 1973) (“Fundamental fairness and justice requires that if the defendant intends to waive the privilege at trial by the introduction of evidence within that privilege, then the defendant will be required to allow discovery with regard to matters material to that testimony.... [T]he failure of a party to allow pre-trial discovery of confidential matter which that party intends to introduce at trial will preclude the introduction of that evidence.”); *Fox v. Cal. Sierra Fin. Servs.*, 120 F.R.D. 520, 530 (N.D. Cal. 1988) (“Defendants cannot conceal such information from discovery and expect to spring it upon plaintiffs in the midst of trial for the sake of obtaining a tactical advantage in litigation. Such selective disclosure constitutes a waiver of the attorney-client privilege If the holder intends to consent to waiver of the attorney-client privilege at trial, such intention must be disclosed during the discovery stage and any information as to which the privilege will be waived must be made available to the opposing party through discovery so as not to afford the one party an unfair advantage at trial.”) (internal citations omitted).²

² *Cf. Chicago Park Dist. v. Richardson*, 581 N.E.2d 97, 101 (Ill. App. Ct. 1991) (trial court correctly precluded defendant’s affidavit submitted in opposition to plaintiff’s summary judgment motion; “[the defendant] had numerous opportunities throughout the discovery stage of this action to waive the privilege. He chose not to do so. It was only after the [plaintiff’s] discovery efforts were exhausted and the case was presented to the court for resolution that [the

14. Declining to issue an Order as outlined above would be reversible error, as it would effectively provide Plaintiffs with free reign to use attorney-client privilege and work product protection as both a sword and a shield. It likewise would constitute reversible error to reserve a ruling on Dershowitz's request until some later date. The prejudice facing Dershowitz is imminent and will not be curable if Plaintiffs are allowed to proceed on the present course.

WHEREFORE, Defendant / Counterclaim Plaintiff ALAN M. DERSHOWITZ respectfully requests this Honorable Court enter an Order that (a) directs Plaintiffs BRADLEY J. EDWARDS and PAUL G. CASSELL to make, within ten (10) days of the entry of the Order, a final determination as to whether Plaintiffs will continue to assert the attorney-client privilege, the work product doctrine, and/or the common interest/joint defense doctrine to withhold any evidence that is responsive to Dershowitz's discovery requests or otherwise relevant to any claims or defenses in this action; (b) rules that Plaintiffs will be irrevocably barred from introducing or otherwise relying on at trial any documents and testimony as to which Plaintiffs continue to assert the attorney-client privilege, the work product doctrine, and/or the common interest/joint defense doctrine as of ten (10) day after the entry of the Order; and (c) grants such other and further relief as this Court deems just and proper.

CERTIFICATE OF CONFERRAL

Pursuant to the Court's Rules and Florida Rules of Civil Procedure, the undersigned counsel certifies that he has made a good [REDACTED] attempt to resolve this matter with opposing counsel prior to filing this motion.

defendant] asserted his desire to waive the privilege by way of an affidavit which would be impervious to scrutiny or challenge by the [plaintiff.]"); *Refuse & Env'tl. Sys., Inc. v. Indus. Servs. of Am.*, 120 F.R.D. 8, 12 (D. Mass. 1988) ("If defendants wish to retain the right to offer the [privileged] communications as evidence, they must abandon the attorney/client privilege and permit a full inquiry [during the pre-trial deposition of the party].").

Respectfully submitted,

/s/ Thomas E. Scott
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail (email) at email address: [REDACTED], [REDACTED], [REDACTED] to: **Jack Scarola, Esq.**, Searcy Denney Scarola Barnhart & Shipley, P.A., Counsel for Plaintiff, 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409, as well as [REDACTED] to: **Joni J. Jones, Esq.**, Assistant Utah Attorney General, Counsel for Plaintiff Cassell, 160 East 300 South, Salt Lake City, Utah 84114, and I electronically filed the foregoing with the Clerk of Broward County by using the Florida Courts eFiling Portal this 24th day of November, 2015.

By: s/Thomas E. Scott
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