

1 IN THE CIRCUIT COURT
2 OF THE FIFTEENTH JUDICIAL CIRCUIT
3 IN AND FOR PALM BEACH COUNTY, FLORIDA
4 CASE NO. 502009CA040800XXXXMBAG
5

6 JEFFREY EPSTEIN,

7 Plaintiff,

8 -vs-

9 SCOTT ROTHSTEIN, individually,
10 BRADLEY J. EDWARDS, individually,
11 and L.M, individually,

12 Defendants.

13 HEARING HELD BEFORE
14 THE HONORABLE DAVID F. CROW

15
16 Monday, September 16, 2013
17 3:30 p.m. - 4:05 p.m.
18

19
20 205 North Dixie Highway
21 West Palm Beach, FL 33401
22

23
24 Reported By:
25 Pamela Pittman Gunn, FPR
Notary Public, State of Florida

1 APPEARANCES:

2 On behalf of the Plaintiff:

3 TONJA HADDAD COLEMAN, ESQ.
4 TONJA HADDAD, P.A.

5 [REDACTED]
6 [REDACTED]

7 On behalf of the Defendant Bradley J. Edwards:

8 JACK SCAROLA, ESQ.
9 SEARCY, DENNEY, SCAROLA, BARNHART &
10 SHIPLEY, P.A.

11 [REDACTED]
12 [REDACTED]

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1 P R O C E E D I N G S

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3 Hearing taken before Pamela Pittman Gunn, Court
4 Reporter and Notary Public in and for the State of
5 Florida at Large, in the above cause.

6 - - -

7 THE COURT: Okay, this is the Epstein
8 versus Rothstein case. It's the plaintiff --
9 excuse me, counter plaintiff's motion to
10 determine entitlement to adverse inferences and
11 also prohibit the induction of evidence. I
12 read the response. I read the motion and
13 response. Counsel just hand delivered
14 something to me today that evidentially I have
15 never seen before. It was a supplemental
16 memorandum I received.

17 MS. COLEMAN: Your Honor, Mr. Scarola
18 filed it at 10:30 this morning. I haven't had
19 a chance to review it. I was in court on
20 another matter. I haven't reviewed it either.

21 THE COURT: Let me ask a question before
22 we begin so I get my perspective back again. I
23 entered an order some time ago in this case and
24 I guess dealing with some of the privileged
25 objections. Do y'all recall that?

1 MS. COLEMAN: Yes.

2 THE COURT: And I think I asked for some
3 kind of privilege log. Is there anything I'm
4 supposed be doing or is that on appeal?

5 MR. SCAROLA: I believe there are
6 outstanding privileges as you said, Your Honor,
7 that is still not yet determined.

8 THE COURT: Okay, because I didn't know
9 that. I thought I was waiting for something
10 from you guys.

11 MR. SCAROLA: I don't think so.

12 THE COURT: I'm going to have to have a
13 status conference and figure everything because
14 I went back and looked at it and something's
15 wrong. Okay. Good enough.

16 MR. SCAROLA: To put that in context, Your
17 Honor.

18 THE COURT: What is that, ma'am?

19 MS. COLEMAN: I'm sorry?

20 THE COURT: What did you say?

21 MS. COLEMAN: Nothing, Judge. I was
22 speaking -- I was just coming up to be part of
23 it.

24 THE COURT: Go ahead.

25 MR. SCAROLA: Your Honor may recall that

1 there have been multiple privileges asserted
2 with regard to a variety of issues. And we
3 have over the course of these proceedings been
4 attempting to narrow valid privileged
5 assertions and distinguish them from invalid
6 privileged assertions. That primarily means
7 that while we have acknowledged that
8 Mr. Epstein has a valid Fifth Amendment
9 privilege because he does clearly remain in
10 jeopardy with regard to the underlying criminal
11 activity that resulted in both a state
12 prosecution and a Federal non-prosecution
13 agreement.

14 We believe that other privileges were
15 invalid. And the practical implications of
16 making that distinction are that we cannot draw
17 an adverse inference from the assertion of, for
18 example, an attorney/client privilege. But we
19 are under the case law clearly permitted to
20 draw an adverse inference from the assertion
21 of the Fifth Amendment, the right to remain
22 silent.

23 So we need to eliminate the invalid
24 assertion, assertions of privilege from our
25 perspective. Leave in place the valid

1 assertion of privilege, which then permits us
2 to draw an adverse from the valid assertions of
3 privilege. Your Honor has under consideration
4 some of those challenged privileged assertions.
5 That's by way of an answer to Your Honor's
6 question. It doesn't have anything to do with
7 today's motion.

8 Because today's motion relates only to
9 those circumstances where the only privilege
10 asserted by Mr. Epstein is a Fifth Amendment
11 privilege, his right to remain silent pursuant
12 to the Fifth, Sixth and Fourteenth Amendments
13 of the US Constitution that have been
14 repeatedly asserted by him throughout the
15 discovery in this case and in response to
16 request to production and in response to
17 interrogatories. And dozens and dozens and
18 dozens of times in response to questions posed
19 during the course of his deposition.

20 What we are seeking today, by way of what
21 really is a motion in limine is, in fact, a
22 determination that where the only privilege
23 asserted by Mr. Epstein is, the only valid
24 privilege asserted by Mr. Epstein, is a Fifth
25 Amendment privilege assertion. That we are

1 entitled to a jury instruction that will inform
2 the jury that the assertion of that privilege
3 allows them to draw an adverse inference. That
4 is that had an answer been given, those answers
5 would be unfavorable to Mr. Epstein. We have
6 not laid out the precise wording of that jury
7 instruction and if that's necessary at this
8 point. But we are simply looking for a
9 confirmation of that basic principal.

10 The second part of this motion is that as
11 to those matters as to which Mr. Epstein has
12 over the course of four years that, almost four
13 years that this case has been prosecuted,
14 consistently asserted a Fifth Amendment
15 privilege. He is not going to be able to get
16 up there during the course of trial and change
17 his position and suddenly begin testifying
18 about matters in which he has consistently
19 refused to provide information in pretrial
20 discovery.

21 So those are two parts. That's what we're
22 asking for. We don't want to be surprised by
23 Mr. Epstein coming and attempting to take the
24 witness stand and to give testimony that he has
25 consistently withheld.

1 THE COURT: Is this matter set for trial?

2 MR. SCAROLA: We are set for trial, yes,
3 sir. We're getting to the point now where --

4 THE COURT: When is it set?

5 MS. COLEMAN: We're on calendar call,
6 Judge, October 18 for the trial commencing
7 October 28th.

8 THE COURT: Yeah, that sounds right.
9 Okay.

10 MR. SCAROLA: Now the principal response
11 that we have gotten to this motion is that the
12 Baxter (phonetics) case, which we have cited in
13 support of our position is a case that arose in
14 a context where an individual took the witness
15 stand and asserted his Fifth Amendment
16 privilege in the presence of the jury.

17 And the contention in the
18 counter-defendant's response is we would be
19 required to call Mr. Epstein to the witness
20 stand. He would be obliged to assert his Fifth
21 Amendment privilege in the presence of the jury
22 before we would be entitled to any adverse
23 implication instruction. That simply is wrong.
24 And it's wrong because Rule 1.330(a) renders
25 that distinction meaningless. Rule 1.330(a) is

1 the rule of civil procedure that talks about
2 the use of depositions at trial. And it
3 provides expressly that at trial a deposition
4 may be used, in this case, against an opposing
5 party as though the witness were then present
6 and testified.

7 So we already have the basis upon which to
8 draw the adverse inference. It isn't necessary
9 that either we or Mr. Epstein -- call
10 Mr. Epstein to the witness stand and have him
11 repeat what he has already consistently said
12 and that is that he refuses to answer these
13 questions. So the distinction that they
14 attempt to draw that this is procedurally
15 premature because he has not yet taken the
16 stand in front of the jury is rendered moot by
17 virtue of Florida Rules of Civil Procedure
18 which requires that his deposition testimony be
19 treated in the same manner as trial testimony
20 would be. That's basically our position, Your
21 Honor.

22 THE COURT: Okay. Yes.

23 MS. COLEMAN: Good afternoon, Judge. To
24 address the issues with which Mr. Scarola has
25 discussed I would point out the following to

1 the Court. First, this motion is premature at
2 best for several reasons. First of which is
3 Mr. Epstein is now set for deposition by
4 counter plaintiff on October 21st and I presume
5 will be asked further questions to which he may
6 or may not assert the Fifth Amendment. So to
7 preemptively presume that he will assert it or
8 not assert it and make a ruling based on an
9 adverse inference on something that hasn't yet
10 happened is inapplicable.

11 Second, Judge, with respect to discovery
12 that has gone on in this case over the past
13 four years there are many, many, many questions
14 sadly which are not spelled out in the bulk of
15 this motion. Questions that have been posed to
16 Mr. Epstein that irrefutably have absolutely
17 nothing to do with this case. All that is
18 evident from everything that has been filed in
19 this case, that the parties, the counter
20 plaintiff, would like to re-litigate the cases
21 that were being prosecuted by him against
22 Mr. Epstein several years ago. This is a
23 simple abuse of process and malicious
24 prosecution case, Judge. So with respect to
25 the negative or adverse inference to which

1 counter plaintiff may or may not be entitled,
2 this Court needs to conduct a far more detailed
3 analysis into those questions and answers other
4 than the blanket assertion made by this motion.

5 Judge, for example, to be entitled to a
6 negative inference, the party seeking it must
7 prove that the information cannot be benefited
8 or received from obtaining -- I'm sorry, let me
9 start that sentence over. The inference may
10 not be drawn unless there's a substantial need
11 for the information and there is not another
12 less burdensome way of obtaining that
13 information. That's the first step. And I
14 appreciate this is not fully -- this is like I
15 received their memo this morning and I was
16 under the misguided conception we were arguing
17 the two cases he cited but I will lay this out
18 for the Court anyway since we're here. The
19 Court has discretion --

20 MR. SCAROLA: I don't mean to interrupt
21 but that's all I have argued. I have not
22 argued the supplemental memo at all.

23 MS. COLEMAN: The rule to which he
24 referred is not cited in his motion with
25 respect to the use of the deposition. But what

1 this Court has to do before it can determine --

2 THE COURT: Let me ask a basic question.

3 MS. COLEMAN: Yes, you can.

4 THE COURT: There is bunch of cases where
5 someone has waived Fifth Amendment and it
6 happens all the time in DUI cases and then in
7 civil lawsuits. I've never had anybody ask me
8 for an actual jury instruction like you do in a
9 spoliation case. What they do is they ask the
10 question, the person denies it or -- excuse me,
11 they take the Fifth Amendment. And says
12 weren't you drunk on the night of the accident,
13 and they answer I refuse on the basis of
14 incrimination. Then they argue to the jury, he
15 admitted it and --

16 MS. COLEMAN: That's exactly my point,
17 Judge.

18 THE COURT: I've never seen a case where
19 it says you're entitled to an actual
20 instruction. In the cases you cited, the two
21 cases cited, at least I didn't see that in the
22 case you cited. Is there actually a case in
23 Florida where if you take the Fifth Amendment,
24 you're entitled to an adverse inference
25 instruction like a spoliation case where

1 there's specific instruction approved by the
2 Fourth District?

3 MS. COLEMAN: It's his motion, Judge,
4 but --

5 THE COURT: I didn't see anything like
6 that.

7 MS. COLEMAN: No, I didn't see anything
8 either but again my understanding is, as I
9 said, all the cases to which counter plaintiff
10 referred clearly states that the witness is
11 available, he's coming. He's listed on both
12 witness lists. He's the defendant. He'll be
13 here. He'll be testifying.

14 In every case that I've read, state and
15 Federal, indicates that it occurs at trial. We
16 don't know what questions are going to be
17 asked. We don't know what's going to happen.

18 THE COURT: The jury can draw an adverse
19 inference since nobody is pleading the Fifth
20 Amendment and --

21 MS. COLEMAN: Only if you base your
22 findings on a particular set of information
23 delineated. For example, should Mr. Epstein --
24 I'm hypothetically speaking -- take the stand
25 and answer a question to which he's previously

1 asserted the Fifth, you can strike that answer.
2 And then, and only then, would the issue of the
3 negative inference become applicable. At this
4 point we respectfully feel the plaintiff has
5 the cart before the horse because we're not at
6 trial. I don't think even Mr. Scarola can
7 determine what evidence is going to come out at
8 trial. I've never seen a jury instruction
9 drafted before discovery is even finished.
10 He's taken Mr. Epstein's deposition.

11 THE COURT: Only time I have ever done --
12 sorry to interrupt you. I've never given a
13 written one in the context of the Fifth
14 Amendment. It's always been in the context of
15 discovery violations or failure to comply with
16 discovery requests or spoliation issues. And
17 then we drafted instructions under -- I can't
18 remember the name of the case.

19 MS. COLEMAN: It's Rule 1.380.

20 THE COURT: Actually, a case where you
21 approve a specific, it's not a presumption,
22 it's an inference. You give the presumption
23 it's irrelevant, not to say stupid, something
24 like that. I'm not really sure what you want
25 me to rule to be honest with you.

1 MR. SCAROLA: There are two things I want
2 you to rule, Your Honor. I want you first to
3 rule that Mr. Epstein will not be permitted to
4 give testimony or to produce evidence that he,
5 himself, has withheld as a consequence of his
6 consistent assertion of the Fifth Amendment
7 privilege during the course of the four years
8 that this matter has been in pretrial
9 discovery. He should not be permitted after
10 having refused to give that evidence in
11 pretrial discovery, to present that evidence at
12 trial. That's part one.

13 Part two, we should be entitled to an
14 instruction after we publish Mr. Epstein's
15 deposition testimony to the jury in which he
16 has refused to answer questions, that his
17 silence may be held against him.

18 Now I can't tell Your Honor that I have at
19 hand a Florida case that approves a specific
20 form of instruction. But the law is quite
21 clear that we are entitled to jury instructions
22 that support our theory of the case. And it is
23 a proper statement of the law, that a statement
24 -- excuse me -- that an assertion of privilege
25 in the context of a civil case may be used by

1 the jury to draw an adverse inference,
2 inference against the person who refuses to
3 testify.

4 Now the common experiences of jurors who
5 watch TV and read magazines and read books is
6 that you may not hold an individual's right to
7 remain silent against him. Because jurors are
8 generally educated about such matters in the
9 context of criminal proceedings. So to
10 disabuse jurors who may believe that it is
11 improper to hold an assertion of Fifth
12 Amendment privilege against someone, we should
13 be entitled to an instruction that says what
14 the law is.

15 And the law is that you may indeed hold
16 the assertion of the right to remain silent in
17 the context of a civil case against the person
18 who is making that assertion. There are very
19 strong statements in support of that position
20 in the cases that we have cited to Your Honor.
21 Including the United States Supreme Court that
22 has talked about the probative value of an
23 assertion of a right to remain silent in the
24 context of civil cases.

25 So it is on that basis that we are asking

1 the Court to do those two things. Tell us
2 right now that since Mr. Epstein's refused to
3 give evidence pretrial, he's not going to be
4 permitted to recede from that. And secondly,
5 tell us that the jury will be informed of the
6 basic legal principle that the assertion of the
7 right to remain silent in the context of a
8 civil case can be used against the person
9 asserting that right to remain silent.

10 THE COURT: Okay, you get the last word.

11 MS. COLEMAN: Thank you, Judge. I was
12 unable to address section two or part two of
13 Mr. Scarola's motion in which he asks that we
14 be precluded at offering certain evidence at
15 trial. First, Judge, I would submit that we
16 had filed weeks ago our trial exhibit list and
17 witness list. And if there's specific items
18 contained on our exhibit list in which
19 Mr. Scarola takes issue, he should bring it up
20 at the proper time and object to it, which
21 we're required to do pursuant to your Court
22 order. If there is something listed on our
23 exhibit list that violates what he's asking
24 for, that's the proper time to raise it.

25 Furthermore, Judge, your order

1 specifically delineates, I believe in paragraph
2 H, that if we haven't provided it to opposing
3 counsel, we can't use it. It's that simple.
4 Obviously, if we tried to submit evidence that
5 we have not provided to the plaintiff in this
6 case, we wouldn't be permitted to use it.

7 THE COURT: So there's a difference under
8 the Binger analysis. There's two different
9 things there. One I can -- certainly I don't
10 have to do Binger analysis and the sanction. I
11 want to know what I haven't done, okay.
12 Because I've evidentially missed something
13 along the way. Because I entered an order
14 basically saying I required you to file
15 privilege logs which identify each document,
16 what the privilege is to that document and so I
17 can look at them and determine which ones more
18 I have to look at. I don't recall. Did I get
19 that?

20 MS. COLEMAN: No, what happened, Judge,
21 what we did we amended our answers to --

22 THE COURT: I must be losing my mind.

23 MS. COLEMAN: We amended our answers to
24 all that discovery and only asserted the Fifth
25 Amendment to those that we were asserting a

1 privilege. So there was no other privilege
2 raised.

3 THE COURT: What am I supposed to be
4 ruling on?

5 MS. COLEMAN: Right now? His motion.

6 THE COURT: No. No, I thought -- again,
7 I'm sorry, guys I'm confused. I thought there
8 was things out -- Mr. Scarola said there are
9 things outstanding.

10 MS. COLEMAN: But there's still our issue
11 with the privilege log filed by Mr. Edwards
12 with respect to our discovery requests as well.

13 THE COURT: I'm talking about with regard
14 to Mr. Epstein. Is there anything I need to
15 rule on with him?

16 MS. COLEMAN: No.

17 MR. SCAROLA: That wasn't my understanding
18 but quite frankly, Your Honor, I didn't
19 specifically review that for purposes of
20 responding to that question.

21 THE COURT: I'm sorry for interrupting
22 you. The only reason I did that is to prepare
23 for today's hearing. I looked at the file and
24 one of the last things I did was that order I
25 entered on where I determined that I will

1 require you to file the detailed privileged log
2 so I can determine based on Mr. Scarola's
3 argument on the Fifth Amendment you can't get
4 but the other stuff, you know, can be
5 sanctionable. I thought I was kind of waiting
6 because I didn't hear anything. You're telling
7 me there is not a privileged log out there or
8 there is one that I need to rule on?

9 MS. COLEMAN: No, your order said that you
10 needed to be able to rule on the other
11 non-fifth amendment privilege which we raised.
12 Every other privilege we raised has now been
13 withdrawn and all the discovery has been
14 amended. Anywhere we asserted a privilege, we
15 asserted the Fifth along with other privileges.
16 All the other privileges were taken out. So
17 it's only the Fifth Amendment. So there's
18 nothing to review.

19 THE COURT: Some of the case law I read in
20 Federal court says even the Fifth Amendment
21 sometimes the court can look at in-camera to
22 determine if it's --

23 MS. COLEMAN: If you would like us to
24 do --

25 THE COURT: No, I never asked for

1 in-camera inspection if I don't need to do one.
2 I'm just asking what it is I need to do that I
3 haven't done in regards to the privilege log in
4 regard to Mr. Epstein. We're just dealing with
5 this.

6 MR. SCAROLA: I will accept Ms. Coleman's
7 representation on the record that all of the
8 discovery that has been withheld has been
9 withheld solely on the basis of the Fifth
10 Amendment privilege.

11 THE COURT: There's been a privilege log
12 filed or not?

13 MS. COLEMAN: No, Judge. The answer it's
14 all net-worth discovery. The discovery that
15 was at issue is the net-worth discovery for the
16 punitive damages.

17 THE COURT: This is probably unfair to you
18 guys. I'm asking questions because it concerns
19 me if there's something out there I'm supposed
20 to be ruling on and I might have to do that.
21 Is there something pending on me that I'm
22 supposed to rule on?

23 MR. SCAROLA: Not if the only privilege
24 that's being asserted is a Fifth Amendment
25 privilege. Your Honor may recall that what you

1 did talk about at the time of that last hearing
2 was that some of the financial information that
3 was requested was corporate financial
4 information. And you correctly observed a
5 corporation has no Fifth Amendment privilege.
6 So I don't know -- Your Honor asks the
7 rhetorical question. I don't know how you can
8 be asserting a Fifth Amendment privilege with
9 regard to the corporate records.

10 THE COURT: It has to be testimonial even
11 if it's an individual. I remember that.

12 MR. SCAROLA: Correct. And those were the
13 concerns that Your Honor expressed. And it was
14 my understanding that that shifted the burden
15 back to the counter defendant to provide
16 something else to Your Honor with regard to
17 those matters. But I will repeat, if the
18 position of the counter defendant is that
19 everything that has been withheld in discovery
20 has been withheld on the basis of the Fifth
21 Amendment privilege, I'll accept that
22 representation.

23 THE COURT: I'm asking you. I don't want
24 to get --

25 MS. COLEMAN: That is not what I said,

1 Judge.

2 THE COURT: Hang on. I'm going to set a
3 status conference. You guys can talk about
4 this. See what the status of discovery is at.
5 What I need you to do is I need that fairly
6 quickly. Probably next week or so you all are
7 coming up on trial here. And see what I need
8 to get done before you all walk into the
9 courtroom. You said there's also stuff and so
10 are you waiting for me to rule on --

11 MS. COLEMAN: Judge, you were taking -- it
12 was quite a while back. That we had a motion
13 with respect to the privileged log filed by
14 Mr. Edwards first from (inaudible) then from
15 Farmer Jaffe. There is some documents that
16 were alleged by them to be confidential, just
17 communications, such as communication with the
18 press and the government that have not yet been
19 ruled on. The hearing was supposed to be
20 continued.

21 THE COURT: I don't recall. I have
22 nothing in here, at least that I know, that
23 hasn't been ruled on.

24 MS. COLEMAN: I'll refile the motion,
25 Judge.

1 THE COURT: Or reschedule it or whatever.
2 I don't have any in-camera that I haven't done
3 so far.

4 MS. COLEMAN: If you're not making a
5 ruling right now on this motion, we would like
6 to be afforded the opportunity to respond to
7 the thirteen-page memorandum that Barnhart,
8 Scarola provided a couple of hours ago.

9 THE COURT: How quickly can you respond?

10 MS. COLEMAN: Judge, the hearing was set
11 -- he set this hearing on July 17th and it was
12 given to me today. A week?

13 THE COURT: You think you can do it a
14 little early? Can you have it by Friday?

15 MS. COLEMAN: No, Judge, I have to be in
16 Tavernier and Marathon on Thursday and Friday.

17 THE COURT: Do you know who would love to
18 be in the Keys?

19 MS. COLEMAN: Not on this case, Judge.
20 I'm back here at 8:45 tomorrow morning in
21 front of you again on this case.

22 THE COURT: You know I'm joking. I
23 apologize, guys.

24 MS. COLEMAN: It's unfair for a five-day
25 requirement.

1 MR. SCAROLA: I have no problem.

2 MS. COLEMAN: Five day.

3 THE COURT: Next week. How about next
4 Monday, next Tuesday?

5 MS. COLEMAN: Next Tuesday would be good.

6 THE COURT: Next Tuesday by 5 p.m. Tell
7 you what I want you to do to make it easy.
8 Call my JA or have someone call my JA and get
9 an address. You can e-mail, maybe emailing it
10 to me and the same to Mr. Scarola so I get it
11 on Tuesday. Can you do that?

12 MS. COLEMAN: Yes.

13 MR. SCAROLA: Will it be necessary for me
14 to resubmit what I hand delivered?

15 THE COURT: No, I'll take what I got and
16 wait for her. Okay, I'll get an order out as
17 soon as I receive a response.

18 MR. SCAROLA: Thank you very much.

19 THE COURT: I want you guys to sit down
20 and talk about what you need to do. I'm going
21 to schedule a conference to see what needs to
22 be done. I got an easy feeling that things
23 need to be done before this October 28. Thank
24 you.

25 (The hearing was concluded at 4:05 p.m.)

1 C E R T I F I C A T E

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3 STATE OF FLORIDA

4 COUNTY OF PALM BEACH

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7 I, Pamela Pittman Gunn, Court Reporter, State
8 of Florida at large, certify that I was authorized
9 to and did stenographically report the foregoing
10 hearing, pages 1-25; proceedings were held on
11 September 16, 2013 and that the transcript is a true
12 and complete record of my transcription.

13 Dated this 23rd day of October, 2013.

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Pamela Pittman Gunn, Court Reporter

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