

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,

v.

ALAN M. DERSHOWITZ,

Defendant / Counterclaim Plaintiff.

**DEFENDANT / COUNTERCLAIM PLAINTIFF ALAN DERSHOWITZ'S
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HIS POSITION THAT JANE
DOE NO. 3 MUST BE DEPOSED AND PRODUCE DOCUMENTS BEFORE HE IS
DEPOSED OR REQUIRED TO PRODUCE REBUTTAL DOCUMENTS
AS A MATTER OF DUE PROCESS AND FUNDAMENTAL FAIRNESS**

Defendant / Counterclaim Plaintiff Alan Dershowitz ("Dershowitz") respectfully submits this Supplemental Memorandum in support of his position that Jane Doe No. 3 must be deposed and produce documents before he is required to be deposed or to produce rebuttal documents, as a matter of fundamental fairness and due process.¹ This issue will be heard by the Court at the hearing set for June 5, 2015, pursuant to the Court's order of April 15, 2015 requiring additional argument regarding the timing and scope of discovery from Dershowitz. Jane Doe No. 3's motion to quash the deposition and document subpoena served on her is set for May 22, 2015, so

¹ As set forth in Dershowitz's memoranda in opposition to the motions to quash filed by non-parties Jane Doe No. 3 and Boies Schiller & Flexner, LLP, Jane Doe No. 3 has no right to proceed anonymously as she has been identified publicly on several occasions and has made public statements to the media using her own name. Nonetheless, Dershowitz will refer to her "Jane Doe No. 3" until the Court orders otherwise.

the Court will have decided whether (and to what extent) Jane Doe No. 3 must participate in discovery in this action before the June 5 hearing.

The issue of who should go first in discovery, Jane Doe No. 3 or Dershowitz, is as clear-cut as any issue can be. Dershowitz has compelling reasons why Jane Doe No. 3 should go first and will suffer immense prejudice if that order is not followed. By contrast, there is no legitimate reason why Dershowitz should go first, and Jane Doe No. 3 will suffer no prejudice if she is required to testify and produce documents first.

Plaintiffs Bradley J. Edwards and Paul G. Cassell (together, "Plaintiffs") allege in this case that Dershowitz defamed them by saying that Plaintiffs knew that Jane Doe No. 3's allegations about Dershowitz are false, or would have known they are false if they had done an adequate investigation. Plaintiffs specifically allege in their complaint that Jane Doe No. 3's allegations were "well-founded." Although Jane Doe No. 3 is not a party to this case, she is, at bottom, the accuser making allegations of criminal misconduct, which Plaintiffs contend are true and which Dershowitz contends are complete fabrications. Thus, Plaintiffs have put the truth or falsity of Jane Doe No. 3's allegations at the very core of this defamation case.

Jane Doe No. 3 has publicly accused Dershowitz of the type of heinous and felonious conduct that, if proven true, can and should result in the perpetrator going to jail (and being disbarred, if the perpetrator is a lawyer). Dershowitz categorically denies those allegations and maintains that they are a complete fabrication by Jane Doe No. 3, who he contends asserted them in an effort to generate publicity for herself and her lawyers.

Judge Marra of the United States District Court for the Southern District of Florida has already held that Jane Doe No. 3's allegations against Dershowitz should never have been included in the federal court filings in which they were made. Judge Marra chastised the lawyers

who filed those pleadings (*i.e.*, Plaintiffs) and ordered the allegations to be stricken from the record as a sanction. Before Jane Doe No. 3 made her allegations in the pleadings Judge Marra held should never have been filed, Dershowitz had enjoyed an unblemished reputation as a legal scholar and lawyer for 50 years. There is no excuse for what Jane Doe No. 3 and her lawyers did in filing those improper pleadings.

In our system of justice, the accuser must – as a matter of due process and fairness – provide specifics of her allegations before the accused is called upon to answer the charges. That is how it works in the federal criminal system. *See* U.S. CONST. amend. VI (“the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation”); Fed. R. Crim. P. 7(f) (providing a mechanism for criminal defendants to obtain additional details about the nature of the allegations against them). That is also how it works in the Florida criminal system. *See* FLA. CONST. art. I, § 16 (establishing an accused’s right to “be informed of the nature and cause of the accusation”); Fla. R. Crim. P. 3.140(n) (a criminal defendant can seek a “statement of particulars” to “enable the defendant to prepare a defense”). Indeed, that is how it generally works in civil litigation, even where no criminal conduct is alleged. The plaintiff makes her allegations, and the defendant has procedures to obtain additional details regarding the nature of those allegations before he must respond. *See* Fed. R. Civ. P. 12(e) (“A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.”); Fla. R. Civ. P. 1.140(e) (“If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, that party may move for a more definite statement before interposing a responsive pleading.”).

If Dershowitz had been criminally charged with the acts alleged by Jane Doe No. 3, he would have a fundamental right under both the U.S. Constitution and the Florida Constitution to know when and where the alleged criminal acts took place before being called upon to respond. The same is true in this civil case in which the allegations of criminal conduct are directly at issue, as framed by Plaintiffs' own complaint

Requiring Dershowitz to go first would not only violate fundamental due process requirements but would also create a substantial and entirely unnecessary risk of perjury. Jane Doe No. 3 has alleged that Dershowitz had sex with her in certain locations. She has not, however, specified when the alleged acts took place at any of those locations. Dershowitz travels extensively and keeps detailed records of his activities. If he is required to produce records showing every time he was in one of the locations that Jane Doe No. 3 has specified during the entire four-year period when Jane Doe No. 3 allegedly was a "sex slave" for Jeffrey Epstein before Jane Doe No. 3 is deposed, Jane Doe No. 3 could tailor her testimony to fit with Dershowitz's whereabouts. For example, if Dershowitz were to produce records and testify that he was in Palm Beach on certain dates during the four-year period, Jane Doe No. 3 could "recall" that Dershowitz had sex with her at Epstein's Palm Beach residence during the same time period.

It is possible, of course, that Jane Doe No. 3 will claim to have no recollection of the dates or even the months or years in which the alleged acts took place, notwithstanding that she has provided precise details in other respects about the alleged acts. Such testimony would go directly to the credibility of her allegations. If she, in fact, does not remember the dates or even approximate dates, she should be required to so swear before she and her lawyers have access to Dershowitz's timeline. If her recollection "improves" when she sees Dershowitz's timeline, she

could be impeached with her prior testimony. But if Dershowitz goes first, there will be no such check on her ability to give false testimony.

One need not presume that Jane Doe No. 3 will commit perjury to recognize that fundamental fairness requires her to testify and produce her documents first. Jane Doe No. 3 does not need any information from Dershowitz to testify truthfully. If she is telling the truth, she need only testify as to her best recollection of what happened, where, and when. The point is that there is a risk that Jane Doe No. 3's accusations could be bolstered by perjurious testimony if Jane Doe No. 3 had the opportunity to adjust her testimony to fit Dershowitz's records. Due process requires avoiding that risk, especially where there is no prejudice to her in doing so.

There is no corresponding risk that Dershowitz could alter his evidence to fit Jane Doe No. 3's testimony. Dershowitz has been collecting all available records of his travel and whereabouts. Travel receipts and similar documents show what they show. If Dershowitz was in Palm Beach or any other location when Jane Doe No 3 alleges he had sex with her as a minor, the documents will show that to be the case. It is impossible for Dershowitz to change the records to fit Jane Doe No. 3's testimony.

Dershowitz (and the Court) also need Jane Doe No. 3's testimony – a bill of particulars, so to speak – in order to determine what records are properly within the scope of discovery. It would be grossly unfair and burdensome to require Dershowitz to produce all of his records regarding all of his activities during a four-year period when most of that personal and confidential information is irrelevant. Jane Doe No 3's specifications regarding her allegations will define the scope of relevance. For example, if Jane Doe No. 3 testifies that she had sex with Dershowitz at Epstein's private island in the Caribbean on a particular day or in a particular month or year, Dershowitz can reasonably be required to produce documents regarding when

during that time period he was or was not on the island. But Dershowitz cannot reasonably be required to produce all records of his whereabouts at all times during the four-year period because Jane Doe No. 3 has not, to the best of her ability, provided the specifics regarding when and where.

Here again, Jane Doe No. 3, unlike Dershowitz, faces no added burden in determining what documents and other evidence are relevant if she goes first. If she is telling the truth, she knows when and where the alleged acts took place. She does not need any discovery from Dershowitz to testify truthfully about what happened and where and when it happened, to the best of her recollection.

The principles at issue here are ancient and fundamental. As noted above, it is a bedrock principle of due process under both Florida and federal law that the accuser must provide specific allegations before the defendant is called to answer. Florida, like most jurisdictions, also has a rule calling for the exclusion of witnesses at trial to prevent witnesses from tailoring their testimony to match that of other witnesses. *See Fla. Stat. Ann. § 90.616* (outlining the circumstances in which a witness may be excluded from a court proceeding). This concept actually dates back to Biblical times. The Book of Daniel relates the story of Susanna and the Elders, in which Susanna was falsely accused of a sexual crime by two elders. *See Daniel 13:1-64* (New Jerusalem). Daniel demanded that each of the accusers be questioned separately and not be told the details of the other accuser's account, to prevent the elders from conforming their testimony to one another's story. The inconsistencies in the two elders' respective stories established the falsity of their accusations against Susanna, whose life was saved as result.

Jane Doe No. 3 must be required to be deposed and to present the specifics of her allegations before Dershowitz is deposed or is required to produce rebuttal evidence of his

whereabouts. Holding otherwise would be not only an abuse of discretion, but also a violation of Dershowitz's constitutional due process rights under Florida and federal law. There is no harm or prejudice to Jane Doe No. 3 (or to the Plaintiffs, who wrongfully put her now stricken allegations on the public record) if she is required to go first. In contrast, Dershowitz faces enormous and irreparable prejudice if he must go first. There are no competing interests to balance. Fairness and due process require that Jane Doe No. 3 testify and produce her information before Dershowitz is deposed or is required to produce rebuttal documents.

Dated: May 15, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-mail on **May 15, 2015** to: Jack Scarola, Esquire, Searcy Denny et al jsx@searcy.com and

mep@searcylaw.com, counsel for Plaintiffs, and to Sigrid McCawley, Esquire, Boies Schiller & Flexner, counsel for Jane Doe No. 3, at smccawley@bsflp.com.

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