IN THE SIXTH JUDICIAL CIRCUIT COURT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

MELVIN SEMBLER,
Petitioner,

vs

UCN: 522003CA006649XXCICI
Ref. No.: 03-6649-CI-013

RICHARD BRADBURY,
Respondent.
_____/

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL AND IN OPPOSITION TO PLAINTIFF'S OBJECTION TO THIRD PARTY DISCOVERY

COMES NOW Richard Bradbury by and through his undersigned counsel and files this memorandum in support of his motion to compel, answers to interrogatories duly noticed for hearing for November 5, 2004 and states:

Two causes of action set forth by the Plaintiffs are Intentional Infliction of Emotional Distress and Invasion of Privacy.

I
INTENTIONAL INFLICTION

The elements of Intentional Infliction of Emotional Distress are: a) The wrongdoer's conduct was intentional or reckless; b) the conduct was outrageous;

c) the conduct caused emotional distress; and d) the distress was severe. See, *Williams v. Worldwide Flight Services, Inc.*, 877 So 2d 869 (Fla 3rd DCA 2004). Having put this tort into play, the Plaintiffs are thus required to prove that the Defendant's action not only caused them emotional distress but that the emotional distress they suffered was severe. It is with that understanding that the Defendant has made inquiry into whether or not the Plaintiffs can prove these claims, and if so the extent to which the Plaintiffs may or may not have had any pre-existing conditions which could break the causal relationship between the Defendant's alleged actions and the emotional distress they claim. Indeed the issue of a pre-existing condition is set forth in the Thirteenth Defense to the Complaint.

Whether the Plaintiffs seek one dollar or one million dollars is not relevant to their need to prove the elements of this tort, and the Defendant has the right to make appropriate inquiry. In the preparation of the defense, interrogatories were propounded to the Plaintiffs about their past and present mental conditions. On April 8, 2004, the Plaintiffs provided unsworn answers to interrogatories (which were subsequently sworn to in identical form).

Interrogatory number ten asks whether either Plaintiff has sought any kind of psychiatric, psychological, or other mental health care or prescriptions for the mental distress they claim to have suffered at the hands of the Defendant. Their

answer is " Objection. This interrogatory is irrelevant and not calculated to lead to the discovery of any evidence admissible for use at trial. This is a stalking case based on outrageous conduct independent of any health care received by us. Because the Defendant is a stalker this information should not be disclosed to him."

Interrogatory eleven seeks the identities of said health care providers. The Plaintiffs proffered an answer identical to the one in Interrogatory ten.

Interrogatory twelve seeks information of mental health counseling from 1980 to the present. The purpose of this is to determine the existence of any pre existing condition. Again the answer to it is identical to the answer to interrogatories ten and eleven.

Interrogatory thirteen seeks the identities of these health care providers, and again the answer is identical to the others.

Interrogatory fourteen seeks information of previous medication for depression or insomnia (Mrs. Sembler claims in Interrogatory number nine that as a result of the Plaintiff's alleged actions she has trouble sleeping). Once again the identical answer is proffered.

II

INVASION OF PRIVACY

Regarding the Invasion of Privacy claim, it is necessary that the Plaintiffs prove the Defendant made public private information about the Plaintiffs which previously was private, in a wrongful way. In *Cason v. Baskin,* 20 So. 2d 243 (Fla. 1945) this state first recognized the tort of invasion of privacy. Setting forth what constitutes actionable invasion of privacy the Court held that there has to be a showing of "The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Id* at 210,211.

Putting aside for the sake of argument the fact that the device the Defendant is said to have publicized was placed into the public domain by the Plaintiffs or by someone acting on their behalf, the Defendant has tried without success to make inquiries into what information was or was not truly private as of the time the Plaintiff claims invasion of privacy.

Again the Plaintiffs refused to allow the validity of their claims to be tested. The Plaintiffs allege that the reason for the existence of the medical device in question is that Mr. Sembler is a survivor of prostate cancer. As this Court is well aware, it is common knowledge that one of the sequelae of prostate cancer is a

condition commonly called "erectile dysfunction." To determine what salient information is the result of the Plaintiffs making information public, the Defendant has propounded interrogatories and he has sought information from one third party source.

As is the case with the Intentional Infliction count, the Plaintiff has also blocked these efforts.

The Plaintiffs were asked to identify all persons (other than physicians and medical health care providers) to whom Mr. Sembler's medical condition was ever made known (Interrogatory number seven). The Plaintiff's answer was: "Objection. Irrelevant, not calculated to lead to lead to discovery of evidence admissible at trial. This case is not about my medical condition, but about the Defendant stalking me and my wife."

Recently, the Defendant sought to obtain information from a non-profit organization called "The Florida Prostate Cancer Institute" (hereinafter "FPCN"). FPCN is a charitable organization a primary mission of which is to provide the public with "education, programs, and forums, printed materials on cancer, and support groups for cancer patients and their families." It has a website, and it actively seeks out donations, has a corporate gift matching plan, and it sponsors fund-raising dinners. It also gives out a recurring award named for Gen. Norman

Schwartzkopf, himself a prostate cancer survivor, to worthy recipients. Copies of information about FPCN is attached and marked Defendant's composite Exhibit A.

In its non-party discovery request, the Defendant asked for documents showing whether or when either or both of the Plaintiffs made donations to FPCN; became members of FPCN; participants in FPCN fund-raisers or other events, recipients of awards, commendations or citations by FPCN; whether they were ever board members, committee members, or office holders of FPCN, whether either or both of the Plaintiffs made Mr. Sembler's medical condition public, with the FPCN; and for the date when either or both of the Plaintiffs first had contact with FPCN.

The Plaintiffs objection to this discovery was that none of these documents have any relevance to this case, and that they would not lead to the discovery of admissible evidence. The Plaintiffs also inaccurately claim that they had previously objected to providing medical records to the Defendant. In truth the Plaintiff has consistently excluded medical records from his discovery requests.

Finally the Plaintiffs claim, without supporting evidence, that the information requested is protected by HIPPA.

In fact, FPCN is an organization that does not provide medical care, and in Exhibit A there is a disclaimer about its provision of medical care. On the contrary, the whole point of FPCN is to publicize issues about prostate cancer, and to give public praise to philanthropic survivors of prostate cancer. The documents sought all have to do with whether the Plaintiffs have publicized some or all of the information relating to matters forming the core of this lawsuit.

Under the existing Rules of Civil Procedure, Florida Courts have uniformly held that discovery should be afforded "broad and liberal treatment to effectuate their purpose" that trials should not "be carried on in the dark." *See, Allstate Insurance Company v. Boecher,* 733 So. 2d 993, 995 (Fla 1999) quoting *Hickman v. Taylor,* 329 U.S.495 (1947).

Here, the Defendant has merely asked the Plaintiffs to back up with factual information that which they must prove to a trier of fact. It was the Plaintiffs who put their mental conditions and their privacy into issue, and because they have, the Defendant has an absolute right to determine the accuracy of their claims.

III
ATTORNEYS FEES

The Defendant seeks attorneys fees for having to bring this before the Court. This request is made with the full awareness that the Courts of this

jurisdiction are reluctant to award fees on first time discovery motions, and that such issues are usually reserved for the end of the case. Here, however, the Defendant respectfully requests that this Court take notice of what is becoming a very troublesome pattern of conduct by the Plaintiffs in of this case.

When it comes to their conduct of discovery their approach has been aggressive, and has already pushed the envelope in extraordinary ways. They subpoenaed the undersigned as a witness, and when a motion to quash was filed they were quick to strike a bargain to limiting the scope of the deposition to matters outside the scope of attorney client privilege. When they deposed the undersigned, they broke that promise and sought to ask questions that went well beyond that exception. They have sought to depose a member of the press. Again after a motion to quash was filed, a deal was struck limiting the scope of their questioning. In the deposition of reporter Robin Guess, her attorney, James Yacavone, Esq., had to make five objections relating to conduct. He pointed out the scope of questioning was outside the parameters of the ground rules (Guess depo. p. 6- ll 16 et seq); he had to point out an intrusion into privilege (Guess depo. p 7-ll 14 et seq.); he pointed out the deposition was being conducted was breaking the rules of the agreement to allow a reporter to testify (Guess depo. p. 13- ll 13-45) and after some colloquy between counsel about whether or not the

Plaintiffs' lawyer was trying to jog the witness' memory Mr. Yacavone observed, "I don't think its jogging anyone's memory." (Guess depo. p. 14- ll21); and finally, "Let's get down to business here. We are here voluntarily and you know, I don't want to have to move for a protective order and go back to the judge." (Guess depo. p 15-ll1-4).

Even though the Plaintiffs, who have placed into issue their mental conditions and their privacy, and even though they refuse to answer any discovery directly related to those issues, they are not deterred from engaging in abusive discovery against the Defendant. When they learned he was seeking counseling after the filing of this case, they have sought to subpoena those records, and the Defendant's objection to this subpoena is pending before the Court.

Faced with a notice of trial and an order that mediation take place in a time certain, combined with ongoing requests that the Plaintiffs make themselves available for depositions, the Plaintiffs sought and obtained without objection from the Defendant, an agreed order deferring mediation entered by the Court in August.

This deferral was sought for two reasons the principal one being that on August 10, 2004 the Plaintiffs filed a pleading in this Court representing that the Plaintiffs "are not expected to be in the United States for the *next several*

months." (Emphasis added).

It turned out that the Plaintiffs were not only in the United States within a few weeks of that pleading , according to individuals whose affidavits are in the Court file. Thereafter, pursuant to requests for admissions, the Plaintiffs directly tell us that not only were they in the United States in late August or early September of 2004, but that they were in Pinellas County, Florida during those dates; that there were here on personal business; and that most significantly that they had an expectation they would be here as of August 10, 2004, the very day this Honorable Court was being told something quite different.

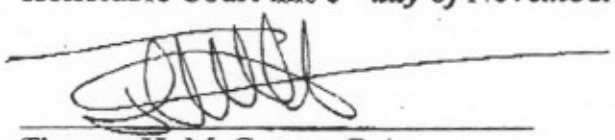
On the heels of all this, the Plaintiffs have now sought to muddy the waters further by declaring the second "emergency" in this case and demanding that Bradbury's deposition go forward forthwith.

It is imperative that this Honorable Court put a stop to this pattern and serve notice that more of it will not be tolerated by awarding attorneys fees here and now.

Wherefore Defendant prays this Honorable Court grant the Defendant's Motion to Compel, overrule the Plaintiff's Objection to third party discovery award the Defendant costs, attorneys fees and such other relief as the Court deems appropriate and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via hand delivery November 4th 2004, to Ana-Marie Carnesoltas, Esq. and Leonard S. Englander, Esq., 721 First Avenue North, St Petersburg, FL 33701. A courtesy copy of the foregoing and applicable case law is also hand delivered to this Honorable Court this ***5th day of November.***



Thomas H. McGowan, P.A.
FBN: 0234052 SPN: 98632
150 Second Avenue North, Suite 870
St Petersburg, FL 33701
ph: 727-821-8900 fax: 727-821-3117