**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF FLORIDA**
**PENSACOLA DIVISION**

| | | |
|---|---|---|
| **JOSEPH GLOVER,** | ) | |
| | ) | |
| **PLAINTIFF,** | ) | |
| | ) | |
| **V.** | ) | **CIVIL ACTION NO.:** |
| | ) | **3:16-cv-00697-RV/CJK** |
| **CITY OF PENSACOLA, et al.,** | ) | |
| | ) | |
| **DEFENDANTS.** | ) | |

**PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT**
**OF WILLIAMS "RUSTY" WELLS**
**AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Comes now Plaintiff and moves to strike from the record the Affidavit of William "Rusty" Wells, which was submitted as Exhibit #X by Defendants in support of their Motion for Summary Judgment. (Doc. 25-24). As grounds for the this motion, Plaintiff states as follows.

Mr. Wells is employed with the City of Pensacola and according to Defendant Mayor Hayward, served as city attorney during the relevant portion of this case. (Ex. 1, Hayward Depo., pp.13-14). Wells' affidavit contains testimony of meetings and conversations he had in January 2016 related to Plaintiff Joe Glover, including

Glover's performance, administrative leave, and the investigation against him. Wells' Affidavit should be stricken for several reasons.

## I. WELLS' AFFIDAVIT IS DUE TO BE STRUCK BECAUSE HE WAS NEVER DISCLOSED AS A WITNESS PURSUANT TO FRCP 26(a)

First, Wells was not identified or disclosed, as required by Federal Rules of Civil Procedure 26(a)(1)(A)(I), by Defendants (or Plaintiff), as a person likely to have discoverable information that Defendants may use to support their claims or defenses (Ex. 2). At no time during the pendency of discovery did Defendants supplement their Initial Disclosures to include Wells.

In response to Plaintiff's discovery requests, Defendant City of Pensacola and Defendant Mayor Hayward also failed to identify Wells as having the meetings and conversations set forth in the affidavit. Plaintiff's Interrogatory #4 requested all discussions with city staff, management, or agents regarding issues relevant to Glover's employment, leave, termination, etc. . . (Ex. 3). In its response, the only mention of Wells was that he was present at a meeting on January 29, 2016. None of the matters, meetings, or conversations in paragraphs 4, 5, 6, 7, and 10 of the affidavit were disclosed. (*Id.).* Interrogatory #5 requested the identity of persons who had communicated with Russell Van Sickle. None of the conversations in paragraphs 6 and 7 were disclosed. (*Id.*). Defendants also failed to mention Wells

in its responses to Interrogatory #21 and #28, which requested the names of witnesses.[1] (*Id*.) Despite not disclosing Wells in its Initial Disclosures and discovery responses, Defendants now attempt to explain away conduct and decisions using Wells as a key witness in support of its defense in this case. Given the nature of matters discussed in Wells' Affidavit, it would be impossible for Defendants to now claim they did not know that Wells had information relevant to their defense, especially since the Affidavit contains conversations with Defendants' attorney, Larkin, the City Administrator and Representative, Olson, and Defendant Hayward.

The sanction for violations of Rule 26(a)and (e) are self-executing under Rule 37(c)(1) and preclude use of the evidence on a motion or at trial. Rule 37(c)(1) provides, in part:

> (1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

FED. R. CIV. P. 37(c)(1). Here, Defendants not only failed to identify in discovery witnesses which it now seeks to use to obtain summary judgment, but affirmatively failed to provide the information and conversations relied upon in the affidavit and in their motion in direct response to interrogatory questions and its own

[1]See also, Hayward's responses to discovery #3 and #17. (Ex. 4).

witnesses who were disclosed and deposed. Therefore, Wells' affidavit should be stricken. *Wright v. Hyundai Motor Mfg. Ala., LLC* , Case No.2:08CV61–SRW, 2010 WL 4729486 at *2-*4 (M.D. Ala., Nov. 16, 2010)(granting defendant's motion to strike the declarations of two witnesses not disclosed by plaintiff and introduced in opposition to defendant's motion for summary judgment).

## II. DEFENDANTS SHOULD NOT BE ALLOWED TO HIDE EVIDENCE RELATED TO WELLS' INVOLVEMENT BY USING ATTORNEY-CLIENT PRIVILEGE AS BOTH A SWORD AND SHIELD DURING DISCOVERY

In addition, to failing to disclose Wells and the communications set forth in his affidavit, Defendants asserted attorney-client privilege regarding any conversation between Wells and Rob Larkin and Wells and other city officials, if Mr Larkin was present. (Ex. 5, Sisson, Depo., pp.28-29).

> Q: Did you discuss with Olson, or in any discussions where Mr. Olson was present, in which issues at the fire department needed to be investigated after -- prior to January 1, 2016?
>
> Larkin: To the extent that any of those conversations occurred with me and you and Eric --
>
> Calamusa: And depending on who else was present.
>
> Larkin: And depending on who else was present, but if it was just you, me, and Eric or the city attorney or the mayor or **Rusty Wells** or Dick Barker --

> Calamusa: No. Now we're getting way outside the bounds, but go ahead.
>
> Larkin: -- the CFO.

(*Id*. pp. 28-29). Now, through the affidavit, Defendants offer conversations between Wells and Larkin and others which it earlier claimed privileged. (See Wells' affidavit paragraphs 4, 5, 7, and 8).

Courts have routinely held that the attorney-client privilege cannot be used as both a shield and a sword as Defendants attempt to do here. As the name indicates, the sword-and-shield doctrine prevents a party from using privileged information to prove a claim or defense while simultaneously hiding behind the shield of privilege to prevent the opposing party from effectively challenging such evidence. *Cox v. Administrator United States Steel & Carnegie,* 17 F.3d 1386, 1417-19 (11th Cir. 1994); *Bradfield v. Mid-Continent Cas. Co.*, 15 F. Supp. 3d 1253, 1257 (M.D. Fla. 2014); *Allstate Ins. Co. v. Levesque,* 263 F.R.D. 663, 667 (M.D. Fla. 2010) (citing *GAB Bus. Servs., Inc. v. Syndicate* 627, 809 F.2d 755, 762 (11th Cir. 1987)); *Motely v. Marathon Oil Co.*, 71 F.3d 1547, 1552 (10th Cir. 1995). See, *Frontier Refining, Inc. v. Gorman-Rupp Co*, 136 F.3d 695, 704 (10th Cir. 1998)("a litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged [information or documents] to prove a point but then invoking the privilege to prevent

an opponent from challenging the assertion."); *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444,446 (S.D.Fla.1980). See also *Berckeley Inv. Group Ltd. v. Colkitt*, 455 F.3d 195, 222 (3rd Cir. 2006); *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 537 (3d Cir. 1996). In determining the limits of what information a party may claim privilege for, the overriding concerns for the Court is fairness to the other party. *Cox* at 1417-19.

Here, during discovery, Defendants hid behind the privilege and did not allow inquiry and testimony as to conversations between Larkin and Wells, that it now seeks to offer in support in of summary judgment. Through Larkin's and Wells' declarations, Defendants set forth conversations which it earlier claimed privilege and attempt to use their attorneys, Larkin and Wells, to explain away conduct and reasons for decisions which they previously claimed were privileged and which are different or not testified to by the witnesses Defendants did disclose and were disposed. Wells' Affidavit conveniently fills in the blanks and in some cases even changes testimony of previous witnesses, including Hayward and Olson, in ways designed to benefit Defendants. Now that discovery is over, the Court should recognize the manifest unfairness caused by Defendants' conduct and strike Wells' Affidavit.

Plaintiff's requested remedy is in line with the ruling of another court in this Circuit when presented with a similar situation. In *Immuno Vital v. Telemundo*

*Group, Inc.,* 203 F.R.D. 561, 564 (S.D. Fla. Oct. 1 2001), the district court struck a defendant's "advice of counsel" defense and all evidence associated with it based on the defendant's litigation choice to claim attorney-client privilege of relevant communications during discovery. *Id.* During discovery, when witnesses were asked about conversations with counsel on particular topics, the defendant objected claiming privilege. *Id.* Later, after discovery had ended, the defendant moved to amend its Answer to add the affirmative defense of "advice of counsel." *Id.* Plaintiff objected and moved to exclude any evidence associated with the defense. *Id.* The Court found that the defendant had impermissibly attempted to use the attorney-client privilege as both a sword and shield. *Id.* It denied the defendant's motion to amend and excluded "any evidence about the advice Defendants received from counsel in this issue." *Id.* Plaintiff submits that the same remedy is due to be enforced in the instant case. Wells' testimony should not now be allowed and the affidavit should be stricken.

## III. WELLS' AFFIDAVIT IS DUE TO BE STRICKEN BECAUSE IT CONTRADICTS THE TESTIMONY OF DEFENDANTS REPRESENTATIVES WHO WERE DEPOSED

Finally, Wells' affidavit should be stricken because it completely contradicts the testimony of Defendants' witnesses, who were disclosed and deposed.

For example, paragraph 8 of the affidavit is counter the testimony of Hayward, Olson, and Van Sickle. In fact, Hayward specifically testified that the briefing on the issues at the January 29th meeting came from Olson, Sisson, and Larkin (Ex. 1 pp.29,33-34,35,36); that he did not recall Wells giving any input (*Id.* p.39); and the recommendation to place Glover on leave and investigate came from Olson and Larkin (*Id*. pp.28-29). There was absolutely no mention of Wells and the items set forth in Wells' affidavit.

Wells' affidavit also contradicts the testimony of Russell Van Sickle. Van Sickle testified that Wells contacted him and invited him to a meeting on January 29, 2016; told Van Sickle they had an issue and wanted him to come talk with them about it; Van Sickle knew nothing more than it dealt with the Fire Department; and that prior to walking in meeting on January 29, 2016, Van Sickle had not been told that EEOC charges had been filed. (Compare paragraphs 6 and 7 with Ex. 7, Van Sickle Depo., pp. 12,13-14,26, 27,29-30,31,36).

Eric Olson, City Administrator and individual who signed the discovery requests on behalf of the City, does not mention any conversations with Wells related to Glover. Such testimony is contrary to Wells' affidavit paragraphs 5, 7, and 8. Olson also testified that he was unaware of who hired Russell Van Sickle, which is

completely contrary to Wells paragraph 5, 7, and 8. (Ex.6, Olson Depo., pp. 52-61,63).

Edward Sisson, HR Director, testified that he too had no conversations with Wells or Barker related to Glover. (Ex. 5, pp.61-62). However, Wells' affidavit states that he was aware of issues related to the January 26, 2016 hiring procedure when Larkin called him. (Wells' paragraph 4). Such information would have only come from Olson or Sisson and both testified they did not speak with Wells.

In addition, none of the communications in paragraphs 4, 5, 6, 7, and 9 were provided in the sworn interrogatory responses by the City or the Mayor. (Ex. #3 and 4).

Defendants are bound by the sworn deposition testimony of its Mayor, City Administrator, and Human Resource Director and bound by its sworn interrogatories testimony. Defendants cannot now, after the close of discovery, submit an affidavit by an individual, who was not disclosed and which is inconsistent to the previous sworn testimony by their representatives. *Junkins and Assoc., Inc. v.U.S. Industries, Inc*., 736 F.2d 656, 657 (11th Cir., July 17, 1984) (affirming summary judgment holding a district court may find an affidavit, which contradicts testimony on deposition, a sham when the party merely contradicts its prior testimony without giving any valid explanation); *Liebman v. Metro. Life Ins. Co.*, 708 F. App'x 979,

982-83 (11th Cir. 2017); *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1300, n. 6 (11th Cir. 2012)(A district court may disregard an affidavit as a sham when a party to the suit files an affidavit that contradicts, without explanation, prior deposition testimony on a material fact); *Strickland v. Norfolk Southern Ry. Co.,* 692 F.3d 1151, 1161 (11th Cir. 2012) (same); *McCormick v. City of Fort Lauderdale, et al.*, 333 F.3d 1234,1240 (11th Cir. 2003); *Murphy-Brown v. ADTRAN, Inc*., 2015 U.S. Dist. LEXIS 108631, 5-6 (N.D. Ala. Aug. 18, 2015). *See Rosenruist-Gestao E Servicos LDA v. Virgin Enters*., 511 F.3d 437, 445 (4th Cir.Va. 2007); *W.G. Yates &Sons Constr. Co. v. Zurich Am. Ins*. Co., 2008 U.S. Dist. LEXIS 1816, 7-8 (S.D. Ala. Jan. 8, 2008) *citing Evans v.Stephens,* 407 F.3d 1272, 1278 (11th Cir. 2005)(Defendant is bound on summary judgment by the responses in its sworn interrogatory answers even if Defendant's other witnesses provide, or provided testimony more to its liking.). Therefore, paragraphs #4, 5, 6, 7, 8, and 9 of Wells' Affidavit should be stricken.

**CONCLUSION**

Based on the foregoing, Wells' affidavit should be stricken from the record and he should be precluded from testifying in this matter. If the Court allows the affidavit and testimony by Wells, Plaintiff requests the right to depose Mr. Wells at Defendants' cost, and be allowed to supplement the record with relevant testimony.

Dated: April 17, 2018.

Respectfully submitted,

*/s/ Rocco Calamusa, Jr.*
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2018, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel identified on the below service list, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic filing.

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