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KING COUNTY
SUPERIOR COURT

6
7 **IN THE SUPERIOR COURT OF WASHINGTON**
8 **IN AND FOR THE COUNTY OF KING**

9 In re the Detention of

10 **TERRY LAWLESS**

11 Respondent.

No. 06-2-29166-2 SEA

RESPONDENT'S MOTION TO STRIKE
PLEADING

Honorable Richard Eadie

14 **I. RELIEF REQUESTED**

15 Terry Lawless, Respondent in the above entitled action, moves the court 1) to strike the
16 portion of Petitioner's pleading with respect to any allegation of the "recent overt act," or in the
17 alternative, 2) to strike any allegation of Terry Lawless allegedly having sex with a 14 year old in
18 Florida as a potential "recent overt act," or 3) in the alternative to exclude any mention of the
19 "transcripts" of phone conversations by Jonna Simmons and Heather Johnson, attached as
20 **Exhibits 13 AND 12**, respectively, to Declaration of Counsel in Support of Motion to Strike
21 Pleading, filed herewith (hereinafter simply "**Exhibit**").
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23
24
25

**RESPONDENT'S MOTION TO STRIKE
PLEADING- 1**

COPY

THE DEFENDER ASSOCIATION

810 THIRD AVENUE, SUITE 800
SEATTLE, WASHINGTON 98104
TEL: 206-447-3900
FAX: 206-447-3956

1 This motion is filed simultaneously with Respondent's Motion for Summary Judgment
2 on Recent Overt Act. These motions may overlap in the remedies requested. Since, however,
3 the motions are based upon separate legal grounds, they are filed separately.

4 II. STATEMENT OF FACTS

5 On September 6, 2006, the State of Washington filed the instant petition to commit Mr.
6 Terry Lawless indefinitely as a "Sexually Violent Predator" (SVP) under the RCW 71.09.
7 **Exhibit 1.** As a matter of law in this particular case, Petitioner must allege and prove not only
8 that Mr. Lawless otherwise meets the definition of SVP, but that he has committed a "recent
9 overt act."¹ Petitioner did in fact allege that Mr. Lawless committed a "recent overt act" in its
10 petition. However, no specific act or acts were delineated as the "recent over act" in the
11 petitioner. **Exhibit 1.** The basic procedural history is shown in the Declaration of Counsel in
12 Support of Motion to Strike, and the content of the declaration is hereby incorporated. However,
13 a brief synopsis of the facts are contained in the following.

14 In order to discover the specifics of the recent over act allegation, Mr. Lawless attempted
15 take all the available discovery means: 1) interrogatory and requests for production; 2) notice of
16 deposition; and 3) finally request for production. Petitioner rejected all such efforts and ignored
17 the discovery requests so far.

18 Mr. Lawless' interrogatory specifically designed to discover the specifics of the recent
19 overt act, **Exhibit 2**, were not answered and objected on the grounds of work product. **Exhibit 3.**
20 Mr. Lawless moved for an order compelling the answer, and the court granted the majority of the
21 motion to compel. **Exhibit 4.** During the oral argument on the motion to compel, the court was
22

23
24 ¹ "Recent over act" is statutorily defined as "any act or threat that has either caused harm of a sexually violent nature
25 or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and
mental condition of the person engaging in the act." RCW 71.09.020(10).

1 very specific about the Petitioner's duty to disclose. Honorable Judge Dubuque specifically
2 stated:

3 [Respondent's counsel] asks for the time, place, and nature of the act or acts, time,
4 place, nature of the threat or threats. He's accepting your referencing him to
5 specific page ranges within that. To the extent that is not a complete answer, be
6 forewarned then if he shows that it was incomplete, that may redound to your
7 detriment.

8 **Exhibit 5, 28:8 – 28:15.**

9 Despite the fact that the court had specifically warned about the Petitioner's discovery
10 duty, and order to disclose all information within its control, the Petitioner failed time and time
11 again to do so. Petitioner, in response to the court's order, provided the response which
12 consisted of various bates' number references, organized in no particular manner, repeated five
13 times. Respondent answered all of the subsections of the interrogatory with the following series
14 of numbers.

15 Requested information contained in Bates pages: 1846, 1664, 1385, 1243-1301,
16 455-458, 34-42, 1046-1047, 398-400, 388, 866-1044, 814-861, 679-777, 366-476,
17 29-133, 2150-2152, 2119-2149, 2112-2114, 2082-2111, 1698-1709, 1711-1712,
18 1717-1723, 1736-1749, 1752-1786, 1788, 1790, 1792-1800, 1805-1806, 1810-
19 1811, 1813-1816, 1820-1822, 1825, 1827-1828, 1830-1833, 1835-1838, 1840-
20 1842, 1847-1853, 1856-1891, 1893-1894, 1898-1899, 1901, 1905, 1921-1922,
21 1927-1939, 1942-1945, 1948-1962

22 **Exhibit 6.** These pages totaled 879 pages, essentially one third of all the documents produced by
23 the Petitioner in this case. In order to translate this into plain English, that is, to do the job that
24 the Petitioner should have done, Mr. Lawless' counsel went through all 879 pages and created all
25 the potential allegations of the "recent overt act," regardless of whether such an allegation may
or may not stand scrutiny, and summarized in a list. The list was attached as the Attachment A
to the Requests for Admission that was served on January 2, 2008. **Exhibit 7.** The Requests for

1 admission asked two questions, which in essence asked the Petitioner to admit that the list
2 contained all the recent overt act allegations 1) as referenced by the answers that Petitioner's
3 counsel provided in number format as shown above; and 2) that in fact that is all the "universe"
4 of the potential recent overt act allegations. **Exhibit 7.**

5 Once again, Petitioner refused to give a straight answer, and instead provided the
6 following legal prevarications.

7 Answer: **Deny.** "The entirety of the potential allegations of recent overt acts" are the subject of
8 ongoing discovery, including but not limited to outstanding discovery such as respondent's
9 deposition (unscheduled), receipt of respondent's expert report (due 4/30/08), receipt of
10 respondent's witness list (due June 11, 2008) and other continuing investigations by the state and
11 assumedly by the defense.

12 **Objection:** Overbroad, vague, ambiguous. The request for admission sought is
13 potentially subject to numerous interpretations and discovery is still in progress. Further
14 discovery may lead to information that sheds a different light on the state's response to
15 interrogatories. It is too early in the discovery process for the state to admit or deny this request
16 for admission.

17 **Objection:** Work Product. The request seeks information that involves impressions and
18 theories of the attorneys in violation of CR 26 (b).

19 **Exhibit 8.** The same response is repeated for both requests. In a normal course of action, this
20 non-response would have resulted in further motion to compel. However, the Petitioner failed to
21 serve the response within the 30 day period. Instead the response was served after 35 days on
22 February 26, 2008. Petitioner so far has not moved for a leave of the court for an extension
23 according to the civil rules. Without such an order the requests are deemed to be admitted. CR
24 36(b). Petitioner's non-response and its failure to seek further relief under CR 36 is
25 contradictory and inexplicable.

Petitioner's non-compliance does not end there. One of the potential allegation is that
Mr. Lawless had sex with a 14 year old while he absconded to Florida between late 2003 and

1 early 2004. This allegation is denied by Mr. Lawless. In fact, when this allegation first surfaced,
2 this was investigated by the Department of Corrections and the Department concluded that there
3 wasn't "enough for the AGO (the Attorney General's Office) to work with as far as a ROAR
4 (recent overt act referral)" **Exhibit 15**. It is still not entirely clear whether or not the Petitioner
5 intends to allege this as a possible "recent overt act." However to the extent that they are, they
6 must provide all information as requested in the respondent's interrogatory, as it was ordered by
7 this Court to do so. Petitioner completely and willfully failed to do so.

8 Even though as early as March 8, 2008 (see **Exhibit 13**), Petitioner's counsel still to this
9 date refuses to disclose the contact information of the witnesses that they know about, preventing
10 Mr. Lawless' attorneys from proper independent investigation of whatever potential allegations
11 the Petitioner may put forth during the trial. (Paragraph 34 and the foregoing paragraphs of
12 Declaration of Counsel).

13
14 Not only did Petitioner's counsel willfully refused to answer written discovery, and
15 subsequently failed to follow the court order, mandating such response, Petitioner has also
16 willfully failed to show up to a party's own deposition. Mr. Lawless noted a deposition of
17 Petitioner's CR 30(b)(6) deposition, and provided a plenty of time for the Petitioner to select
18 appropriate agents for the deposition. Instead of either appearing for the deposition or asking for
19 a protective order, Petitioner's counsel's reaction to all this was simply that it does not have to
20 comply with the notice as Petitioner's counsel self-determined that the rule does not apply to
21 Petitioner. (See Paragraphs 17 to 18, page 6, of Declaration of Counsel).

22 **III. STATEMENT OF ISSUES**

23 When a party has willfully refused to provide discoverable information regarding a major
24 allegation its petition (which in this case is an allegation that Respondent committed a recent
25

1 overt act and that one of such alleged overt act included having a sex with a 14 year old in
2 Florida), and then subsequently willfully refused to comply with a court order requiring such a
3 disclosure, and failed to show up for its own deposition, which of the following remedy is
4 appropriate:

- 5 1. Striking of the portion of the petition;
- 6 2. Striking the specific allegation the pertains to the discovery, that is, striking the
7 allegation that Mr. Lawless had sex with a 14 year old; and/or
- 8 3. Striking the unsworn telephone transcripts of two alleged witnesses contact
9 information has been withheld to Petitioner.

10 IV. EVIDENCE RELIED UPON

11 Declaration Of Counsel Respondent's Motion To Strike Pleading, and previous motions
12 and declarations and other pleadings and documents in court file.

13 V. AUTHORITY

14 A trial court's decision on a motion to strike and the admissibility of evidence is reviewed
15 on the basis of abuse of discretion. O'Neill v. Farmers Ins. Co., 124 Wn.App. 516, 521, 125 P.3d
16 134 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or
17 based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775
18 (1971).

19 CR 37(b)(2) allows the trial court a broad range of sanctions if a party fails to comply
20 with a discovery order. The possible sanctions include:

- 21 (A) An order that the matters regarding which the order was made or any other
22 designated facts shall be taken to be established for the purposes of the
23 action in accordance with the claim of the party obtaining the order;

- 1 (B) An order refusing to allow the disobedient party to support or oppose
2 designated claims or defenses, or prohibiting him from introducing
3 designated matters in evidence;
- 4 (C) An order striking out pleadings or parts thereof, or staying further
5 proceedings until the order is obeyed, or dismissing the action or
6 proceedings or any part thereof, or rendering a judgment by default against
7 the disobedient party;
- 8 (D) In lieu of any of the foregoing orders or in addition thereto, an order
9 treating as a contempt of court the failure to obey any orders except an
10 order to submit to physical or mental examination;
- 11 (E) Where a party has failed to comply with an order under rule 35(a)
12 requiring him to produce another for examination such orders as are listed
13 in sections (A), (B), and (C) of this subsection, unless the party failing to
14 comply shows that he is unable to produce such person for examination.

15 CR 37(b)(2). This list is not exclusive. Furthermore, if party fails to attend its own
16 deposition, the Civil Rules provide that the court may place similar sanctions.

17 If a party or an officer, director, or managing agent of a party or a person
18 designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails;
19 (1) to appear before the officer who is to take his or her deposition, after
20 being served with a proper notice ... the court in which the action is
21 pending on motion may make such orders in regard to the failure as are
22 just, and among others it may take any action authorized under sections
23 (A), (B), and (C) of subsection (b)(2) of this rule.

24 CR 37(d).

25 **1. Petitioner failed to appear for its own deposition.**

It is absolutely clear in this case that Petitioner failed to appear for its own deposition.
Based upon this fact alone, the Civil Rules provide the trial court the power to 1) establish a fact;
2) disallow a claim or defense; 3) or strike a pleading. CR 37(d). In this case, it is clear that
Petitioner willfully refused to appear to its own deposition. It did not bother to seek the court's
interpretation of the Civil Rules, if there is any disagreements as to the interpretation. It simply

1 chose to interpret the Rules all by itself, and determined that it was beyond mere Civil Rules.

2 Petitioner's counsel wrote in his email dated ***:

3 The State of Washington is also not a "governmental agency" of the State of
4 Washington. Simply put, the State of Washington is not an agency of the State of
5 Washington, rather it is the State of Washington itself. Although in certain cases
6 the State of Washington permits you to request a CR (30)(b)(6) deposition with its
7 agencies (e.g. DOC, DSHS, etc.), you are not permitted to depose the State of
8 Washington itself in all its inchoate grandeur.

9 **Exhibit 10.** Apart from a bold declaration that the State of Washington as the Petitioner in this
10 case is beyond the reach of the Civil Rules, Petitioner's counsel did not bother to support the
11 proposition with any authorities. This is unfortunate for the Petitioner, as the existing authorities
12 fully support Mr. Lawless' right to depose the Petitioner in this civil suit.

13 Federal Rules of Civil Procedure, which contains an almost identical language, provides
14 as follows:

15 Notice or Subpoena Directed to an Organization. In its notice or subpoena, a
16 party may name as the deponent a public or private corporation, a partnership, an
17 association, a governmental agency, or other entity and must describe with
18 reasonable particularity the matters for examination.

19 FRCP (30)(b)(6) (emphasis added) (**Exhibit 21**). The FRCP Rule 30 is almost identical to the
20 Washington Civil Rules, except the fact that it contains the catch-all term "other entity." This
21 additional language of "other entity" was added in order to clarify the existing rule, and perhaps
22 to foreclose a baseless argument from a party that it does not belong to any of the specifically
23 listed entity. This is clear when we examine the Advisory Committee's Note on the 2007
24 amendment to FRCP 30(b) made in 2007.

25 2007 Amendment

The language of Rule 30 has been **amended as part of the general restyling of
the Civil Rules to make them more easily understood and to make style and**

terminology consistent throughout the rules. These changes are intended to be stylistic only.

... "[O]ther entity" is added to the list of organizations that may be named as deponent. The purpose is to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization.

FRCP Advisory Committee Note to 2007 Amendment (emphasis added) (**Exhibit 22**). Indeed, there are scores of cases where a government's CR 30(b)(6) deposition was taken without resistance. See Jones v. U.S., 898 F. Supp. 1360, 1368 fn.8 (1995) ("Tinsley was designated as the government's official representative pursuant to Fed. R. Civ. P. 30(b)(6), and the government concedes that he was authorized to make admissions on behalf of the United States") (**Exhibit 23**), The Long Island Sav. Bank, FSB v. U.S. 63 Fed. Cl. 157, 165 fn. 17 (2004) (U.S. Government designating a speaking agent under Rules of the Court of Federal Claims Rule 30(b)(6), which was in essence identical to FRCP Rule 30(b)(6)) (**Exhibit 24**), U.S. v. Boyce, 148 F. Supp. 1069, 1088 (SDCA 2001) (a defendant in income tax collection action deposing FRCP 30(b)(6) agent of the Government) (**Exhibit 25**).

What Mr. Lawless requested here was not a novel discovery. As the Washington courts have decided time and again, this commitment action is a "civil case." Because it is a civil case, the courts have decided that there is no double jeopardy, no ex post facto, and no right to remain silent. Mr. Lawless will be deposed by the Petitioner's counsel in this case and the deposition is currently scheduled, and this is because it is a "civil" case. The civil rules of discovery applies to all parties. The State of Washington is not beyond the reach of the law.

Yet Petitioner willfully refused to appear at the deposition. This willful failure is grounds enough for the striking of the recent overt act allegation in the pleading.

2. Willful Failure to Obey the Court Order.

1 It is not only that the Petitioner failed to appear for its own deposition, Petitioner has now
2 willfully refused to follow the court's order, compelling it to disclose all information, including
3 the identity and contact information of all persons with relevant knowledge, regarding the recent
4 overt act allegation. When Mr. Lawless first requested the details of the recent overt act,
5 Petitioner refused to comply with the discovery obligation. Then this Court compelled the
6 Petitioner to disclose all the details of that information as specified in the Court's order dated
7 September 24, 2007. **Exhibit 4.** This Court made it very clear to Petitioner during the oral
8 argument: "To the extent that is not a complete answer, be forewarned then if he shows that it
9 was incomplete, that may redound to your detriment." **Exhibit 5** 28:12-28:15.

10 Despite that fact, Petitioner supplied Mr. Lawless with list of bates' stamp numbers,
11 which in total consisted of over 800 pages, a one third of all documents produced by Petitioner in
12 this case. Mr. Lawless, instead of complaining about it, did his part and translated that into plain
13 English, and asked Petitioner to admit that it indeed all the possible universe of their allegation.
14 Petitioner once again refused to do that. More importantly, it came to light that Petitioner's
15 counsel had in their possession the contact numbers of persons who might have relevant
16 information as early as March of 2008, when Petitioner finally disclosed unsworn telephone
17 transcript of two such witnesses. They have since than consistently refused to turn over the
18 contact information of either of the two witnesses. It is true that one of them, Ms. Simmons, will
19 be deposed by telephone on August 7, 2008. However, Mr. Lawless' counsel has been deprived
20 of making any independent investigation regarding Ms. Simmons due to Petitioner's refusal to
21 disclose her contact information. Moreover, with respect to the other witness, Heather Johnson,
22 nothing has been disclosed to Mr. Lawless' counsel despite the repeated requests to do so.
23
24
25

1 This is a willful failure to follow this Court's order, compelling the Petitioner to make the
2 disclosure. Mr. Lawless has persistently and politely asked Petitioner's counsel to comply. Mr.
3 Lawless should not be condemned to having to ask the same request over and over and over
4 again when there has been a clear Court Order mandating that he receive what he asked for in
5 simple discovery.

6 The law in this aspect is clear.

7 The sanction of a default judgment is to be used only when there has been a
8 "willful or deliberate refusal to obey a discovery order which substantially
9 prejudices the opponent's ability to prepare for trial" and only after the court has
10 considered lesser sanctions. Snedigar v. Hoddersen, 114 Wash.2d 153, 169-70,
11 786 P.2d 781 (1990); Associated Mortgage Investors v. G.P. Kent Constr. Co., 15
12 Wash.App. 223, 228-29, 548 P.2d 558, review denied, 87 Wash.2d 1006 (1976).
13 A violation is willful and deliberate if it is done without reasonable excuse.
14 Rhinehart v. Seattle Times, Inc., 59 Wash.App. 332, 339, 798 P.2d 1155 (1990).
15 The remedy for failure to comply with a discovery order is a matter within the
16 discretion of the trial court. Snedigar, 114 Wash.2d at 169, 786 P.2d 781;
17 Rhinehart v. KIRO, Inc., 44 Wash.App. 707, 710, 723 P.2d 22 (1986), review
18 denied, 108 Wash.2d 1008 (1987).

19 RCL Northwest, Inc. v. Colorado Resources, Inc., 72 Wn.App. 265, 271-272, 864 P.2d 12,
20 (1993). There is no question in this case that the Petitioner's counsel's refusal to provide the
21 contact information of the witnesses are willful and deliberate. There is a substantial prejudice to
22 Mr. Lawless in his investigation and further discovery regarding the allegations surrounding
23 what may or may not have happened in Florida.

24 3. Appropriate Sanctions.

25 The real question in this motion is not whether a sanction should apply, but which
sanction should apply. Mr. Lawless asks the court for three tier of decreasing severity, and fully
realizes that the first option of striking a pleading is an extraordinary remedy. However,

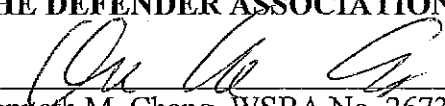
1 considering the magnitude of what is at stake and the persistent nature of Petitioner's failure to
2 comply with discovery justifies the striking of the pleading.

3 In this case, it is not Mr. Lawless who brings this action before the court. Petitioners did.
4 In doing so, Petitioner admittedly acknowledge that without a recent overt act, this action could
5 have never been brought in the first place. Ms. Fox, counsel for Petitioner acknowledged that in
6 her argument during the motion to compel: "We couldn't have filed this case without alleging
7 recent overt acts, which we did." **Exhibit 5**, 17:18-17:20. It is an essential element of this
8 petition, and Petitioner has never articulated what exactly was the allegation that they made
9 because they had to make it. All effort by Mr. Lawless to pinpoint the details of allegation AND
10 perform necessary investigation has been thwarted by Petitioner's intransigence in 1) refusing to
11 answer interrogatory; 2) refusing to appear at the deposition; 3) ignoring the court rules
12 regarding requests for admission; 4) failing to appropriately respond to request for admission;
13 and 5) refusing to provide contact information of witnesses, whose contact information is
14 certainly within their possession.
15

16 We respectfully ask the court to strike the recent overt act allegation in pleading and
17 dismiss this petition. If the Court is disinclined to do so, Mr. Lawless respectfully ask the court
18 for alternate sanctions that the Court deems appropriate by 1) striking the Florida allegation as a
19 potential recent overt act; and/or 2) striking the unsworn telephone transcript as an evidence that
20 experts can rely upon in this case.

21 DATED this 7th day of August, 2008.

22 **THE DEFENDER ASSOCIATION**

23 
24 Kenneth M. Chang, WSBA No. 26737
25 Attorney for Respondent

**RESPONDENT'S MOTION TO STRIKE
PLEADING- 12**

THE DEFENDER ASSOCIATION

810 THIRD AVENUE, SUITE 800
SEATTLE, WASHINGTON 98104
TEL: 206-447-3900
FAX: 206-447-3956

CERTIFICATE OF SERVICE

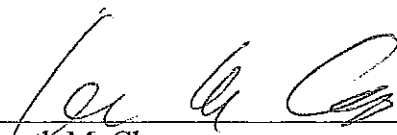
I, Kenneth M. Chang, certify under penalty of perjury under the laws of the State of Washington that I am the counsel for Respondent herein and that on 7/14/08 I caused to be served on the person listed below in the manner shown.

DECLARATION OF COUNSEL IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE PLEADING

Robin Fox and Donald Porter
Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
Sexually Violent Predator Unit
500 Fourth Ave. #900
Seattle, WA 98104

- ☐ United States Mail, First Class _____
- ☒ By Legal Messenger 7/17/08 _____
- ☐ By Facsimile _____
- ☐ By Email Attachment _____

Dated this 14 day of August, 2008



Kenneth M. Chang