

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT SITKA

BREANNA WAMPLER,

Plaintiff,

vs.

RICHARD W. McGRATH, CITY AND
BOROUGH OF SITKA ALASKA,

Defendants.

FILED
CLERK OF THE TRIAL COURTS
STATE OF ALASKA
SITKA

MAY 18 2021

Clerk of the Trial Courts
By CS Deputy

Case No. 1SI-20-140 CIV

PLAINTIFF'S OPPOSITION TO STAY

In 2018, Defendant McGrath used his position to abuse this and other patients while employed as a physician at Sitka Community Hospital. Plaintiff brought suit against him in October 2020 under theories of sexual assault, medical malpractice and others. Plaintiff also brought suit against the City and Borough of Sitka ("CBS") under theories of negligent hiring, *respondeat superior*, vicarious liability, master-servant, agency and others.

Both Defendants now seek a stay of discovery. Defendant McGrath asserts a tension between his 5th Amendment rights and his right to fair proceedings in the present case as the basis for this stay. Defendant CBS does not recite any grounds for a stay of discovery from it; CBS merely filed a non-opposition to the motion for stay.

To the extent that Defendant McGrath asks the court to vary from the normal operation of the Civil Rules, the burden is on him to support this proposed departure.

Defendant McGrath has pending criminal charges in the superior court, related to sexual assault allegations involving this Plaintiff, the Plaintiff in a paralleling civil action and other

victims. Defendant McGrath was indicted in April 2019. A jury trial has been scheduled for him on the following dates:

- The week of June 10, 2019
- The week of December 2, 2019
- The week of March 9, 2020
- The week of July 6, 2020
- The week of December 14, 2020
- The week of May 3, 2021
- The week of September 7, 2021

Counsel for Defendant McGrath told this court during the most recent scheduling hearing in the instant case that he anticipated that the criminal trial would be further put off until sometime in 2022.

Trial in this civil case will not be held this year.

Trial in this civil case will not be held next year.

Trial is scheduled now for this time in 2023.

STAY AS TO CBS

As a preliminary matter, the arguments in the pending motion provide no basis for a discovery stay as to CBS. Plaintiff would like to initiate discovery immediately from CBS. It is anticipated that CBS has files related to hiring, employment, investigation, discipline and termination of Defendant McGrath and patient files regarding Plaintiff. CBS has no direct stake in the pending criminal proceedings involving Defendant McGrath, so it would have no 5th Amendment right to resist discovery of its files. CBS's responding to discovery would not involve Defendant McGrath's making any admission, denial or other statement that could be

used against him in his criminal case. Thus, he would have no basis for objecting to this discovery.

Further, allowing discovery to proceed against CBS would likely bring focus to the discovery that will eventually commence with Defendant McGrath, reducing delay in the handling of this case after the conclusion of the criminal prosecution.

STAY AS TO DEFENDANT MCGRATH

Plaintiff opposes the stay as to Defendant McGrath.

It is clear from the applicable case law that there is no one-size-fits-all rule that is applicable here. The controlling Alaska authority on this topic is McCracken v. Corey, 612 P.2d 990 (Alaska 1980), where the Court examined the issue in the context of a parolee's claim that providing testimony in parole proceedings would require that he waive his 5th Amendment privilege as to expected new criminal proceedings related to the same facts.

Reviewing the case law in this area, the Court said,

Lefkowitz affirmed the teaching of a long line of cases that the state cannot condition the exercise of the privilege against compulsory self-incrimination upon the forfeiture of another constitutionally protected right. **In all of these cases, the "penalty" imposed for the assertion of the privilege against self-incrimination was the automatic loss of a tangible benefit, such as a job or a contract.**

McCracken v. Corey, 612 P.2d 990, 993-4 (Alaska 1980)(footnote omitted)(emphasis added).

Here, by contrast, Defendant McGrath asserts a more indirect "penalty" – that he might state a fact in the civil proceeding that might later hurt him in his criminal case. While his concern in this regard is understandable, it is not controlling. Our Supreme Court notes that this falls into the category of tough decisions that face litigants.

A subsequent Supreme Court decision, McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), has cast doubt on the continued validity of this language in Simons. [11] That case involved a challenge to Ohio's procedure of having a single trial on the issues of guilt and punishment. **In rejecting the defendant's contention that this procedure presented an intolerable tension between his due process right to address his sentencer and his privilege against self-incrimination, the Court noted that the choice was analogous to many other difficult choices which criminal defendants and their attorneys routinely face.** "The threshold question," the Court concluded, "is whether compelling the election (between the exercise of constitutional rights) impairs to an appreciable extent any of the policies behind the rights involved." [12] Id. at 212, 91 S.Ct. at 1470, 28 L.Ed.2d at 729.

McCracken v. Corey, 612 P.2d 990, 994 (Alaska 1980)(footnote omitted)(emphasis added).

The Ninth Circuit makes the same point.

The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. Federal Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir.1989); Securities & Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1375 (D.C.Cir.), cert. denied, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980). "In the absence of substantial prejudice to the rights of the parties involved, [simultaneous] parallel [civil and criminal] proceedings are unobjectionable under our jurisprudence." Dresser, 628 F.2d at 1374. "Nevertheless, a court may decide in its discretion to stay civil proceedings ... 'when the interests of justice seem[] to require such action.' " Id. at 1375 (quoting United States v. Kordel, 397 U.S. 1, 12 n. 27, 90 S.Ct. 763, 769 n. 27, 25 L.Ed.2d 1 (1970)).

* * *

A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. Not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding. Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S.Ct. 1551, 1557, 47 L.Ed.2d 810 (1976).

In deciding whether to proceed with the hearing, the extent to which the defendant's Fifth Amendment rights are implicated is a significant factor for the ALJ to consider, but it is only one consideration to be weighed against others. Molinaro, 889 F.2d at 902.

Keating v. Office of Thrift Supervision, 45 F.3d 322, 326 (9th Cir. 1995)(emphasis added).

Indeed, as noted by Defendant McGrath, Keating suggests factors that may be considered in weighing the present issue.

(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Keating at 903.

(1) *Interest of Plaintiff in expeditious proceedings.* Perhaps it is coincidental that the interests of the Plaintiff are listed first among the analytical criteria. Or perhaps the Keating court saw this as the most important of the criteria. In any case, one would not have to ponder the issue very long to conclude that Plaintiff has a overwhelming interest in having the issues raised by this case resolved as soon as possible. The trial is now set almost five years after the incidents of abuse that led to this litigation. The prejudice to Plaintiff from delay should be obvious – the longer the case drags on, the longer she must live with these shocking and disturbing events. Defendant McGrath may counter that the pending motion does not propose a delay in the trial, but just a stay in discovery. But, as the court knows, discovery battles themselves often result in trial delays. So, the sooner the discovery commences, the sooner discovery hurdles can be crossed.

(2) *Burden on Defendant McGrath.* Here, just as in Keating, the time frame for the parallel proceedings is sufficiently generous that Defendant McGrath will not be subjected to any significant disadvantage by having to proceed with both cases simultaneously.

(3) *The Convenience of the Court*. This factor does not seem to play in either direction as to this motion.

(4) *Interests of persons not parties to the civil litigation*; and (5) *Interest of the public in the pending civil and criminal litigation*. The criminal prosecution has received prominent news coverage. It is to be expected that the public will continue to be informed as that case goes forward. The parallel civil cases have received little attention.

In short, the Keating factors do not drive a decision here with any vigor. To the extent that they are applicable at all, only the first factor has any weight – and that bears toward denial of the motion.

If a discovery stay were to be ordered, Plaintiff opposes a full stay. While this Defendant may be resistant to testimonial discovery – *his* deposition, and *his* answers to interrogatories that may bear directly on the facts of his alleged assaultive behavior, there is a broad range of topics that do not approach the area of self-incrimination, or only do so marginally. For example, it would advance the discovery process, without involving self-incrimination, if Plaintiff could secure listings of this Defendant's past employment situations, licensures, places of residence, disciplinary proceedings, criminal histories and past associates.

So, if a stay is ordered, Plaintiff asks that it be tailored strictly to testimonial discovery from this Defendant. As discovery proceeds, such an order might need refinement. But these parties could approach the court for further guidance over the next two years, as the case

proceeds, if they cannot agree what is and what is not open for discovery under the court's order.

Dated May 17, 2021.


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CERTIFIED: A copy of this document was, on the above date, sent by email to Howard Lazar at hal@delaneywiles.com, Brittany R. Murray at BRM@delaneywiles.com, John Cashion at john@cashiongilmore.com and Jennifer Witaschek at jennifer@cashiongilmore.com.

