

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
C.A. No. PLCV2008-873-B

CHARLES SOLIMINE,)
 Plaintiff)
)
vs.)
)
ANTONIO RESENDES,)
 Defendant)

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR A PROTECTIVE ORDER**

Plaintiff opposes defendant's motion for protective order on the following grounds:

1. This is a case alleging negligence in the operation of an automobile which resulted in severe personal injuries to plaintiff Charles Solimine. On May 9, 2008, Mr. Solimine, a tow truck operator, was in the process of attaching a vehicle to his flat-bed tow truck when he was hit by a Toyota SUV operated by defendant Antonio Resendes and pinned between the two vehicles. Resendes was intoxicated at the time of impact, failed all of the field sobriety tests administered at the scene, and registered a .20 on the breathalyzer examination administered at the Taunton police station immediately after the collision.
2. Resendes was subsequently charged with operating under the influence of liquor with serious bodily injury and reckless operation of a motor vehicle, and the charges are currently pending in the Taunton District Court. The next court date on the criminal docket is a motion hearing on May 1, 2009.
3. Mr. Solimine was pinned between the tow truck and the Resendes vehicle on impact and suffered multiple serious and permanent personal injuries in the collision, including

fractures to his right leg, left leg, ribs, sternum, back, and lungs. He has incurred medical bills in excess of \$330,000.

4. At the time of the collision, Mr. Solimine was employed as a tow truck operator for Mike's Towing and Recovery, 227 Pine St., Attleboro, Massachusetts. He was earning approximately \$700 per week and has been unable to work since the date of the collision. It is not known at this time when or if he will be able to return to work.

5. Plaintiff is aware of the existence of only \$100,000 in automobile liability coverage that would satisfy any judgment entered by this Court. Under the circumstances of this case, that insurance coverage is woefully inadequate. Accordingly, this court (Connon, J.) approved an attachment on the real estate of Mr. Resendes in the amount of \$500,000 on September 16, 2008.

6. Plaintiff has attempted to learn of the existence of other potential defendants in the nature of dram shop claims. He has done so by propounding interrogatories which were served upon the defendant on July 21, 2008, document requests which were served upon the defendant on July 21, 2008, and a notice of taking deposition which was scheduled for October 7, 2008. To date, defendant has refused, failed and neglected to respond to the interrogatories, produce the documents, attend his deposition, or otherwise provide any information about where he obtained the alcohol he ingested on the evening of May 9, 2008. In addition, he has filed a motion for a protective order permitting him to continue to withhold this and other information pertinent to the resolution of the civil action.

7. The rights of the parties to the civil action are to be considered as equal. *United States Trust Company of New York v. Herriott*, 10 Mass. App. Ct. 313, 316 (1980). In filing for a protective order, defendant seeks greater rights and seeks to impose an undue burden on the

plaintiff. While plaintiff recognizes that the Fifth Amendment privilege against self-incrimination does extend to civil proceedings, it is clear that criminal defendants have no generalized due process rights to stay proceedings in a related civil action, and there is no constitutional requirement that the civil proceeding must yield to the criminal one. *DeVita v. Sills*, 422 F.2d 1172, 1181 (3d Cir. 1970). Indeed, it "is not inherently unconstitutional . . . to proceed with parallel civil and criminal proceedings." *Mainelli v. United States*, 611 F. Supp. 606, 615 (D.C.R.I. 1985) (citing *United States v. Kordel*, 397 U.S. 1, 25 L. Ed. 2d 1, 90 S. Ct. 763 (1970)); accord *Arthurs v. Stern*, 560 F.2d 477, 479-80 (1st Cir. 1977), cert. denied, 434 U.S. 1034, 54 L. Ed. 2d 782, 98 S. Ct. 768 (1978).

8. The Fifth Amendment privilege "applies only when the accused is compelled to make a testimonial communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408 (1976). This right to invoke the privilege in no way extends to a blanket invocation of the privilege. *S.E.C. v. First Financial Group of Texas, Inc.*, 659 F. 2d 660, 668 (5th Cir. 1981). The question of the validity of the invocation of the privilege is for the court to decide after conducting a particularized inquiry, deciding, in connection with each specific area that the questioning party seeks to explore, whether or not the privilege is well-founded. *Id.* In that regard, the trial court must make a highly fact bound inquiry into the particular circumstances and competing interests involved in the case. *Sterling National Bank v. A-1 Hotel International, Inc.*, 175 F. Supp 2d 573, 576 (S.D.N.Y. 2001). And whether the privilege is applicable must be determined by the court on a question by question basis. *Id.* "The judge's actions should be supported by a statement of reasons or by a record which demonstrates the basis for his conclusion with sufficient clarity to provide meaningful appellate review." *United States Trust Company of New York v. Herriott*, 10 Mass. App. Ct. at 317.

9. The court's decision of whether to preclude discovery because of a pending criminal action involves a balancing of interests. *Arthurs v. Stern*, 560 F.2d 477, 479 (1st Cir. 1977). The pertinent interests include: (1) the private interests of the plaintiff in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendant; (3) the convenience to the courts; (4) the interest of persons not parties to the civil litigation; and (5) the public interest. *Arden Way Assoc. v. Boesky*, 660 F. Supp. 1494, 1496-7 (S.D.N.Y. 1987). See also, *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980).

10. As to the first factor, the plaintiff Charles Solimine has a great interest in proceeding expeditiously and further delay will risk faded recollections of relevant witnesses. Plaintiff needs to make immediate inquiry of persons who were with the defendant on the night in question to determine the viability of a dram shop action. The only one who can provide information as to where he was and who he was with that evening is the defendant. And plaintiff must get that information as soon as possible as memories become stale with the passage of time.

11. Furthermore, the plaintiff's physical and financial health needs favor speedy resolution of this matter. Mr. Solimine has suffered catastrophic injuries at the hands of the defendant, and allowing him to avoid providing discovery effectively allows him to evade responsibility for what he did. It also provides protection to others who may have contributed to Resendes's intoxication on the night in question, and those persons too must be held accountable.

12. In contrast, the burden on the defendant and the benefit of staying the case is speculative. Defendant has made generalized statements regarding his rights in the context of the criminal case, but has made no factual or legal demonstration of actual harm from producing discovery in the civil case. There will be no harm by requiring the defendant to tell who he was

with and where he was on May 9, 2008. Also, most of the interrogatories and anticipated deposition questions do not involve testimonial communication.¹ In this regard, defendant has failed to satisfy the burden of demonstrating why a protective order is necessary in this case, and improperly seeks unwarranted blanket protection.

13. Moreover, the defendant's interest may be relevant, but there are less drastic methods to protect the defendants' rights. For example, this court can seal answers to interrogatories and limit disclosure to counsel in the civil case. *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 12 (D.C. Mass. 1991). Further, this court may seal depositions under Rule 30(d) which allows a court to "limit the scope and manner of the taking of the deposition as provided in Rule 26(c)". Moreover, this court may prohibit the use of depositions, interrogatories and affidavits in the criminal case. See *United States v. Parcels of Land*, 903 F.2d 36, 44 (1st Cir. 1990); see *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291 (2d Cir. 1979) (depositions taken under court approved stipulation available only to parties and counsel and used only in the civil litigation); cf. *United States v. Parcels of Land*, 903 F.2d 36, 44 (1st Cir. 1990) (protective order prohibiting use of forfeiture claimant's deposition transcripts and interrogatories except for perjury and impeachment); *D'Ippolito v. American Oil Co.*, 272 F. Supp. 310 (S.D.N.Y. 1967) (defendants adequately protected if held with no one else present except parties to action, persons to be deposed, and counsel, and if depositions immediately sealed until the conclusion of the criminal trial).²

14. Although the plaintiff's interests in this case may parallel those of the government in the criminal proceedings, there is no evidence, to date, of "bad faith or malicious government

¹ To the extent that any particular questions may involve testimonial communication which is incriminating, defendant can assert the Fifth Amendment privilege in response to that particular inquiry.

² California allows a civil litigant to seek an immunity order for a witness who has invoked the Fifth Amendment privilege. *Daly v. Superior Court*, 19 Cal. 3d 132 (1977).

tactics." *Mainelli v. United States*, 611 F. Supp. at 615 (quoting *S.E.C. v. Dresser*, 628 F.2d 1368 (D.C.Cir. 1980)). Indeed, there has been no contact or coordination of efforts between the Bristol County District Attorney and plaintiff's counsel, and defendant has not made any allegations to the contrary.

15. The convenience of the courts dictates that this civil action proceed immediately. The tracking order imposes a discovery deadline of April 26, 2009. The deadline for amending the complaint to add parties was October 28, 2008. There does not seem to be any rush to conclude the criminal proceedings, and that is attributable in most part to defendant's efforts to delay.³ Delaying the civil case, in this context, would be most inconvenient.

16. The interests of persons not parties to this litigation is a further concern. Indeed, the other potential defendants need to be named in this case, so that they can participate in discovery and defend themselves. Also, the workers compensation carrier has a lien in excess of \$200,000, and its rights are also affected by any delay in these proceedings.

17. The public interest in deterring drunk driving, providing civil remedies to persons injured by drunk drivers, and in holding liquor servers accountable weighs in favor of denying a protective order.

18. The defendant has not shown good faith relative to the discovery propounded in this case and in seeking a timely resolution of the criminal proceedings. That is, despite the fact that defendant has been in custody of the interrogatories and document requests for several months, he has not taken any action to respond. Moreover, he has continued to stall and delay the conclusion of the criminal proceedings, and he should not be rewarded in this forum with a protective order.

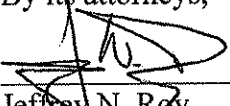
³ In the criminal proceeding, defendant failed to timely file a motion to suppress for a February 25, 2009 hearing in the Taunton District Court, resulting in a further continuance to May 1, 2009. There is no trial date scheduled for the criminal action.

19. Finally, defendant also has refused, failed, and neglected to produce documents, despite the fact that there is no legal basis for refusing to do so. Indeed, it should be noted that defendant is not seeking a protective order relative to the production of documents. That is consistent with the rule that although documents may be incriminatory, the defendant cannot resist production because he cannot claim that he was compelled to prepare them. *United States v. Doe*, 465 U.S. 605 (1984). It is reasonable to have expected at the very least, the defendant would have shown some good faith by producing documents. His failure to do so is evidence of bad faith, and again, reason for this court to not reward him by granting a protective order.

WHEREFORE, the Plaintiff respectfully requests that this Court deny defendant's motion for a protective order, and instead compel the defendant to answer interrogatories, produce the requested documents, and attend a deposition forthwith.

Respectfully submitted,

Plaintiff,
By its attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by (hand) (mail) on 2/9/09

