

STRITZINGER v SOUTH CAROLINA, ET ALL

IN THE COURT OF APPEALS

COLUMBIA, SOUTH CAROLINA

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FEB 08 2019

SC Court of Appeals

Appellate Cause 18-2162

Trial Court Record CP4002738

**Motion For Rehearing, Motion to Continue For Ninety Days, Motion For Oral
Argument, Stay**

(1) For the issues listed below, Appellant, John S. Stritzinger is requesting the court reconsider its previous orders regarding his Interlocutory Appeal(See **State v. Andrew Looper (No. 2015-001493)** which effectively determined his ability to present cross-claims to the trial court on appeal, and continue this proceedings for ninety days which should be sufficient for Judge Kelly to determine the last motion in the cause.

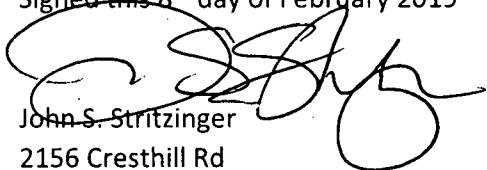
(2)Appellant believes he may need an additional ninety days depending on what other transcripts he needs to resolve the complaint following the entry of Judge Kellys Final Order on his Motion for a discovery control plan, and trial schedule.

(3) Appellant seeks oral argument.

(4)Appellant has time critical issues with a bid he authored for the US Southern Border which is not allowed to discuss with Verizon because of a no-contact order entered by Judge Valvala. Appellant cannot resolve his employment complaint without Verizon being ordered to appear, and for the same reason for Bank of America to appear since he intended to use some Bank of America technology in the design. These same claims with Verizon and Bank of America also impact the medical evaluations which did not consider any of this evidence, or even the fact that he was a senior officer of both companies.

(5) Appellant seeks a stay until the trial court completes its process on or before June 15th, 2019 or one year from the time of filing according to the clerk.

Signed this 8th day of February 2019



John S. Stritzinger
2156 Cresthill Rd
Columbia, SC 29223
843-352-3459

Issue #1 – Trial Court not likely to reverse its decision

In my experience, Trial Court Judges Seldom if ever change their original Findings. In more than ten years of practice in Texas, I had three senior Judges tell me that they expected that if my objections were clear and apparent they should be sufficient in the Court of Appeals to issue a remand or to take more evidence. Furthermore most trial court judges ask for formal bills of exception in order to attempt to get more evidence to the trial court's attention submitted in writing. In most cases in my experience judges will not offer more court time for these items.

Additional Relief

Appellant therefore requests this court allow him ninety days to reopen this cause following final judgement preserving the issues already brought forward.

(See Stritzinger v Wright – 345th District Court Texas – FM04-004690 – September 5th, 2005) after a five day trial told Appellant he “never” entertained motions for new trial except by writing, and he had never granted one in more than twenty years on the bench).

Issue #2 – Appeals taken while litigation are Pending are allowed in Many States, and the US Supreme Court and are not precluded in South Carolina by statute.

Appeals while cases are still being tried are appropriate for Interlocutory appeals which this is, because Appellant asked for multiple cases to be consolidated so he could present cross-claims to the trial court which were not permitted in the setting offered by the Probate Court, who in the context of a medical hearing did not allow third party witnesses. (Smiley). Furthermore, Appellant's position is that Greg Parker the attorney who was hired to facilitate both arguments did not care about the original issues (Verizon contract disputes) which were brought forward by my brother. Furthermore the cross-claims were already allowed in a Delaware Superior Court Medical/Criminal proceeding where Appellant offered the issues he was working with at Verizon and why they were problematic to him in context with the Obama Administration.

(See Delaware v Stritzinger – Delaware Superior Court – Valvalva – October of 2014)

Furthermore Appeals taken while the trial court are pending are allowed under US Supreme Court Rules

See 28 USC2101(b) which reads:

Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

See 28 USC2101- (e) which reads:

An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

The Interlocutory appeal came in this case because Judge Hood, the Chief Judge of the County refused to allow him amend his Petition which included the other parties outside of South Carolina by pocket veto. Judge Hood entered a continuance but did not write an order on the substance of his motion to amend, and add parties. Later after the appeal was taken, Judge Manning issued an order which confirmed this decision.

South Carolina Statute 14-3-330 states an appeal may be made when:

“(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;”

Appellant believes this was relevant because Judge Hood’s and Judge Manning’s orders would prevent Judge Kelly from trying the cause as it sits.

Other References:

Texas Rules of Appellate Procedure Rule 28 – Accelerated and Interlocutory Appeals (Exhibit B)

Issue #3 – Issues with the Form of Service have already been Corrected Post-Judgment

The Trial Court took exception with the form of service in this case, and Appellant has already fixed this issue by reserving the State of South Carolina by the Richland County Sherriff/Constable. Appellant intends to serve Bank of America, and Verizon by the 12th of February in the same cause.

(See Docket Entry in 2018CP4002738)

Issue #4 – Additional Orders entered by Judges Hood and Manning impacting Judge Kelly’s Trial in the same case

Judge Manning has entered an additional order in this case denying consolidations previously asked of Judge Hood on his own, which reinforced the decision of Judge Hood. Judge Manning both refused to transfer a case to the US District Court, but also refused to add the two cross claims which impacted two employment cases pending in the trial court.

(See Order Attached as Exhibit B)

Issue #5 – Original Documents

Movant has included several original documents on the public docket which have not been reviewed by the trial court which he believes prove his case, or the substantial likelihood that the cause as filed is legitimate and brought with good faith.

Issue #6 – The Court of Common Pleas has ignored Judge Maurer’s opinion that a county court of law could not resolve this case.

Appellant believes the SC Magistrate has already determined that this case is a Federal cause and should be transferred to US District Court.

Exhibit A – South Carolina Statute

SECTION 14-3-330. Appellate jurisdiction in law cases.

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

HISTORY: 1962 Code Section 15-123; 1952 Code Section 15-123; 1942 Code Section 26; 1932 Code Section 26; Civ. P. '22 Section 26; Civ. P. '12 Section 11; Civ. P. '02 Section 11; 1896 (22) Section 1; 1901 (23) 623; 1991 Act No. 115, Section 2, eff June 5, 1991.

Title 18 - Appeals

CHAPTER 9

Appeals to Supreme Court and Court of Appeals

SECTION 18-9-10. When appeal may be taken.

An appeal may be taken to the Supreme Court or the Court of Appeals in the cases mentioned in Sections 14-3-320 and 14-3-330. The procedure for taking an appeal is as provided by the South Carolina Appellate Court Rules.

HISTORY: 1962 Code Section 7-401; 1952 Code Section 7-401; 1942 Code Section 780; 1932 Code Section 780; Civ. P. '22 Section 645; Civ. P. '12 Section 383; Civ. P. '02 Section 344; 1870 (14) 358; 1991 Act No. 115, Section 3, eff June 5, 1991; 1999 Act No. 55, Section 26, eff June 1, 1999.

SECTION 18-9-20. Review of convictions of capital offenses.

The Supreme Court shall review each conviction of a capital offense by any court in this State.

HISTORY: 1962 Code Section 7-401.1; 1974 (58) 2361.

SECTION 18-9-30. Appeals in probate matters.

The Supreme Court and the Court of Appeals shall have jurisdiction of all questions of law arising in the course of the proceedings of the circuit court in probate matters in the same manner as provided by law in other cases.

HISTORY: 1962 Code Section 7-402; 1952 Code Section 7-402; 1942 Code Section 229; 1932 Code Section 229; Civ. P. '22 Section 186; Civ. P. '12 Section 62; Civ. P. '02 Section 56; 1870 (14) 56; 1999 Act No. 55, Section 27, eff June 1, 1999.

Exhibit B – Texas Rules of Appellate Procedure

Rule 27. Premature Filings

27.1. Prematurely Filed Notice of Appeal

- (a) *Civil Cases.* In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal.
- (b) *Criminal Cases.* In a criminal case, a prematurely filed notice of appeal is effective and deemed filed on the same day, but after, sentence is imposed or suspended in open court, or the appealable order is signed by the trial court. But a notice of appeal is not effective if filed before the trial court makes a finding of guilt or receives a jury verdict.

27.2. Other Premature Actions

The appellate court may treat actions taken before an appealable order is signed as relating to an appeal of that order and give them effect as if they had been taken after the order was signed. The appellate court may allow an appealed order that is not final to be modified so as to be made final and may allow the modified order and all proceedings relating to it to be included in a supplemental record.

27.3. If Appealed Order Modified or Vacated

After an order or judgment in a civil case has been appealed, if the trial court modifies the order or judgment, or if the trial court vacates the order or judgment and replaces it with another appealable order or judgment, the appellate court must treat the appeal as from the subsequent order or judgment and may treat actions relating to the appeal of the first order or judgment as relating to the appeal of the subsequent order or judgment. The subsequent order or judgment and actions relating to it may be included in the original or supplemental record. Any party may nonetheless appeal from the subsequent order or judgment.

Notes and Comments

Comment to 1997 change: This rule is new and combines the provisions of former Rules 41(c) and 58.

Rule 28. Accelerated, Agreed, and Permissive Appeals in Civil Cases

28.1. Accelerated Appeals

- (a) *Types of Accelerated Appeals.* Appeals from interlocutory orders (when allowed by statute), appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected within less than 30 days after the date of the order or judgment being appealed are accelerated appeals.
- (b) *Perfection of Accelerated Appeal.* Unless otherwise provided by statute, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25.1 within the time allowed by Rule 26.1(b) or as extended by Rule 26.3. Filing a motion for new trial, any other post-trial motion, or a request for findings of fact will not extend the time to perfect an accelerated appeal.
- (c) *Appeals of Interlocutory Orders.* The trial court need not file findings of fact and conclusions of law but may do so within 30 days after the order is signed.
- (d) *Quo Warranto Appeals.* The trial court may grant a motion for new trial timely filed under Texas Rule of Civil Procedure 329b(a)–(b) until 30 days after the trial court's final judgment is signed. If not determined by signed written order within that period, the motion will be deemed overruled by operation of law on expiration of that period.
- (e) *Record and Briefs.* In lieu of the clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn and uncontroverted copies of those papers. The appellate court may allow the case to be submitted without briefs. The deadlines and procedures for filing the record and briefs in an accelerated appeal are provided in Rules 35.1 and 38.6.

28.2. Agreed Interlocutory Appeals in Civil Cases

- (a) *Perfecting Appeal.* An agreed appeal of an interlocutory order permitted by statute must be perfected as provided in Rule 25.1. The notice of appeal must be filed no later than the 20th day after the date the trial court signs a written order granting permission to appeal, unless the court of appeals extends the time

Exhibit C – Additional Ruling by Judge Manning

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2018CP4002738

John Stritzinger

South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case. Plaintiff's motion for leave to amend or transfer to district court is denied.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|---|---------------------------------------|--------------------------------|
| | | \$ |
| | | \$ |
| | | \$ |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge [Signature] Judge Code 2061 Date 1-8-19

For Clerk of Court Office Use Only

This judgment was entered on the 9 day of Jan, 2019 and a copy mailed first class or placed in the appropriate attorney's box on this 9 day of Jan, 2019 to attorneys of record or to parties (when appearing pro se) as follows:

John Stritzinger
ATTORNEY(S) FOR THE PLAINTIFF(S)

[Signature]
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

[Signature]
Clerk of Court

ELECTRONICALLY FILED - 2019 Jan 08 12:17 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4002738

Exhibit D – Article on Interlocutory Appeal – Public Document

<http://adamsbischoff.com/2017/11/08/sc-supreme-court-clarifies-interlocutory-appellate-procedures/>



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SC Supreme Court Clarifies Interlocutory Appellate Procedures

NOVEMBER 8, 2017

SC SUPREME COURT DECISION

State v. Andrew Looper (No. 2015-001493)

Petitioner was charged with driving under the influence (DUI). At a pretrial hearing before a magistrate, Looper moved to suppress evidence of field sobriety tests and breath analysis, arguing they were the fruits of an unconstitutionally prolonged traffic stop. The magistrate granted Looper's motion to suppress the evidence and dismissed the DUI charge. The State appealed to the circuit court. The circuit court held the magistrate erred in granting Looper's motion and reversed and remanded for further proceedings. Looper appealed the circuit court's ruling to the court of appeals.

In South Carolina, there are different standards for when each party can appeal in a criminal case. For the State, an appeal can be taken from an order granting the suppression of evidence which "significantly impairs the prosecution of a criminal case." A defendant, on the other hand, can only appeal from a final sentence and conviction. In considering Looper's appeal, the Court of Appeals analogized the circuit court's ruling to an order denying a motion to suppress evidence. The court of appeals therefore dismissed Looper's appeal, finding that he was not "aggrieved" in a legal sense, because he had not been convicted and sentenced.

What complicates this issue in the present case is a prior case from 2000, *State v. Gregorie*, 339 S.C. 2, 3, 528 S.E.2d 77, 78 (2000), in which the court stated that "any aggrieved party may appeal the circuit court's final judgment." This language appears to grant appellate review from the circuit court's reversal in this case, and the Supreme Court granted certiorari to clarify this point of appellate procedure.

The court acknowledges that *Gregorie* language may be read to suggest that being aggrieved is the only requirement to appeal from a circuit court's order.

“

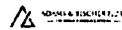
We, of course, take no exception to the notion that Petitioner was adversely impacted by the circuit court's order remanding the case for trial, but he was not aggrieved in a legal sense. Cf. *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) ("Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order.")”

The court clarifies that the proper standard for whether a defendant can appeal is that the defendant must be aggrieved by a final judgment.

TAGGED: OUR INTERLOCUTORY APPEAL MOTION TO SUPPRESS, SC SUPREME COURT

← FOURTH CIRCUIT AFFIRMS CONVICTIONS IN HE...

US SUPREME COURT REVERSES 9TH CIRCUIT AP...



ADAMS & BISCHOFF, P.C.
— CRIMINAL DEFENSE LAWYERS —

Exhibit E – Florida Bar Article on Cross Claims

PARALLEL PROCEEDINGS IN FLORIDA'S STATE AND FEDERAL COURTS – FIFTH AMENDMENT CONSIDERATIONS

 Vol. 82, No. 1 January 2008 Pg 10  Michael R. Holt  Featured Article

Crime victims rightfully demand justice. Justice, however, is not limited to Florida's criminal courts. Often, the same unlawful conduct prompting criminal prosecution also gives rise to civil liability. The civil court system not only provides an additional means of obtaining justice and closure, but it also enables victims to become financially whole. A well-known example is the case of O.J. Simpson. Although acquitted of murdering his ex-wife and another man in 1995, a jury found Simpson liable for wrongful death in 1997 and ordered him to pay \$33.5 million to the victims' families.¹ A more recent example involves nearly 300 persons who were injured or who lost family members in a massive Rhode Island night club fire in 2003. Following the criminal sentencing of certain persons responsible for the tragedy, victims filed a civil lawsuit alleging negligence and carelessness against these and other defendants.²

In many instances, criminal proceedings conclude *before* the commencement of the civil suit. This is not always the case, however, and civil litigation and criminal proceedings often overlap. Special considerations arise in these parallel proceedings, particularly when the civil case moves forward at the same rate or more quickly than the criminal case. When this occurs, defendants in the civil litigation must make an extremely difficult choice: Participate in the civil matter and permanently waive their Fifth Amendment right against self-incrimination, or remain silent, and in all likelihood, face the probability of a sizable adverse judgment.³

This dilemma is not without a solution, and courts can alleviate any prejudice by temporarily suspending discovery or briefly continuing the civil case. The standards by which Florida's state and federal courts consider these requests, however, are not uniform. Florida's appellate courts have not developed well-defined guidelines. The 11th Circuit applies a more rigid test which affords relief only if waiving the Fifth Amendment protection would result in a certain loss of the civil case. This standard contrasts the multifactor balancing test employed by other federal and state courts.

The multifactor test enables courts to take additional matters into consideration when analyzing whether to stay or limit pretrial activity in a civil case. As set forth below, civil

practitioners representing defendants in parallel proceedings must remain cognizant of the applicable standards when seeking relief. State court practitioners may urge application of the multifactor balancing test. Federal practitioners faced with the less flexible standard must focus on how asserting the Fifth Amendment privilege guarantees the loss of the civil proceeding.

Fifth Amendment Considerations in Florida State Courts

The Fifth Amendment to the U.S. Constitution provides that no person “shall be compelled in any criminal case to be a witness against himself.”⁴ It protects witnesses against making disclosures which they reasonably believe might incriminate them in future proceedings.⁵ Invoking the Fifth Amendment does not, however, preclude the fact finder in a civil matter from drawing an adverse inference.⁶ Moreover, litigants cannot make “blanket” assertions of the privilege; rather, they must invoke it on a question-by-question basis.⁷ Once a witness waives the privilege, however, it is gone forever.⁸

The potential impact of invoking the Fifth Amendment in civil proceedings depends upon the status of the party invoking the privilege. Litigants pursuing affirmative relief face an uphill battle. Courts are hesitant, and rightfully so, to permit civil plaintiffs to avoid discovery obligations or trial through invocation of the Fifth Amendment. In fact, “[w]hen a plaintiff in a civil action invokes the Fifth Amendment privilege, courts often dismiss the plaintiff’s action or strike plaintiff’s pleadings.”⁹ Conversely, “where a defendant has invoked the Fifth Amendment privilege against self-incrimination he will usually not suffer a similar detriment because a defendant is not generally seeking affirmative relief and is before the court involuntarily.”¹⁰ Defendants in the latter situation quite naturally seek stays of discovery or trial “so that the defendant’s assertion of this constitutional right does not preclude him from defending a civil suit.”¹¹

Florida’s appellate courts have not comprehensively addressed and resolved the issue of whether to grant a continuance or limit pretrial discovery when a defendant faces a parallel criminal prosecution. In *Kerben v. Intercontinental Bank*, 573 So. 2d 976 (Fla. 5th DCA 1991), the Fifth District granted certiorari to quash an order granting an indefinite stay of a civil proceeding pending the outcome of a criminal matter involving a nonparty witness.¹² The underlying civil action involved an attorney’s claim against a bank for allegedly honoring dozens of checks forged by a former legal

assistant.¹³ The legal assistant was a defendant in the civil lawsuit, but had partial final judgment entered against her in September 1998.¹⁴ The defendant bank deposed the legal assistant, who asserted her Fifth Amendment privilege throughout.¹⁵ The defendant then filed a motion to stay or abate, arguing that, because the assistant was a key witness in the civil lawsuit, the ongoing criminal proceeding would impede the bank's ability to defend against the underlying accusations.¹⁶ The trial court granted the motion, staying the case “until the impediments for proceeding. . . have been alleviated.”¹⁷

The plaintiff argued that an indefinite stay, pending resolution of charges against a nonparty witness, departed from the essential requirements of law. The appellate court agreed. The court noted that “[t]here is a dearth of authority dealing with the use of a stay based on invocation of the privilege against self-incrimination by a witness in a civil lawsuit.”¹⁸ The court rejected the defendants' claim that they would be “prejudiced” without the stay, noting that the assistant's testimony would not likely resolve the issue of whether the signatures were genuine and that the absence of the witness did not “make this lawsuit impossible for either party to try.” The court also found prejudice to the plaintiff due to the indefinite nature of the stay. The court concluded that “[t]o abate this action indefinitely based solely on the ground that a key witness is ‘unavailable’ to the defendant is an abuse of the trial court's broad discretion and departs from the essential requirements of law.”¹⁹

In *Rappaport v. Levy*, 696 So. 2d 526 (Fla. 3d DCA 1997), the Third District reversed an order staying a civil action where the defendant had yet to assert the Fifth Amendment privilege during a deposition.²⁰ The underlying civil action in that case involved a wrongful termination claim.²¹ The defendants claimed the termination was justified based upon the plaintiff's improper use of medication and theft.²² The defendants lodged a criminal complaint in connection with this conduct.²³ Following several agreed stays of discovery, the defendants noticed the civil case for trial. The plaintiff moved to strike the notice. The defendants argued that the plaintiff's parallel criminal proceeding thwarted their attempts to complete discovery and conduct the trial. In the meantime, the criminal proceedings against the plaintiff were dismissed and the state appealed the dismissal. That proceeding remained pending at the time of the court's opinion.

The trial court issued an order denying the motion to strike, lifting the previous stays of discovery and allowing both sides to take depositions. The court stayed the trial,

however, until the plaintiff was “in a position where he can testify at trial without compromising his Fifth Amendment Privilege.”²⁴ The Third District Court of Appeal reversed the ruling as premature because the plaintiff had not yet asserted his Fifth Amendment right during a deposition.²⁵ The court then noted that if the plaintiff testified at a deposition without invoking the right, the matter would be moot.²⁶ If the plaintiff did invoke the privilege, “the trial court can enter a ruling based on a properly developed record.”²⁷

The Fourth District most recently confronted, but did not resolve the issue in *McCreery v. Wilhelm's Rattan, Inc.*, 882 So. 2d 498 (Fla. 4th DCA 2004). There, the defendant in a civil action involving a car accident faced criminal charges stemming from the same alleged misconduct.²⁸ The defendant applied for, and received, a stay of the civil proceedings pending the outcome of the criminal matter.²⁹ The trial court denied the motion and the defendant petitioned for a writ of common law certiorari.³⁰ The appellate court stated that the refusal to grant a continuance of a civil matter where the defendant faced pending felony charges “may well have been a departure from the essential requirements of law.”³¹ The court, however — without elaborating — ultimately dismissed the certiorari petition because the petitioner “failed to demonstrate that he has no adequate remedy on final appeal.”³²

In *Klein v. Royale Group Ltd.*, 524 So. 2d 1061 (Fla. 3d DCA 1988), the trial court stayed a civil matter pending resolution of a parallel criminal proceeding involving a defendant.³³ The trial court denied a motion to dissolve the stay some nine months later and the plaintiff filed a petition for certiorari. Although the appellate court found that the trial court acted within its discretion to grant the stay in the first instance, “[i]t appears that there comes a time when a stay becomes unreasonable under all circumstances.”³⁴ Thus, the court granted the petition and ordered the stay dissolved.³⁵

11th Circuit Standard

Unlike Florida's state courts, the 11th Circuit follows a narrower standard which makes it very difficult to obtain a continuance or stay of discovery. The court explicitly recognized this, stating “the standard set by the [11]th Circuit as to when a stay is mandated to prevent unconstitutional infringement is more narrow and less subjective.”³⁶ Florida's district courts have noted that “the Constitution does not require a stay of civil proceedings pending the outcome of related criminal proceedings.”³⁷ Instead, courts *must* stay civil proceedings pending resolution of

parallel criminal proceedings “only when ‘special circumstances’ so require in the ‘interests of justice.’”³⁸ Such circumstances exist, and the Fifth Amendment is violated “when a person who is a defendant in both a civil and a criminal case is forced to choose between waiving his privilege against self-incrimination or losing the civil case on summary judgment.”³⁹ Unless such a result would certainly occur, “defendants may exercise their Fifth Amendment rights by not presenting evidence which would implicate them in their criminal proceedings.”⁴⁰ Stays or continuances, if warranted, may not be granted “for an indefinite period of time.”⁴¹

The 11th Circuit did not always apply this rigid, less subjective test, and in a somewhat different procedural context, permitted a stay sought by a plaintiff invoking his Fifth Amendment rights in *Wehling v. CBS*, 608 F.2d 1084 (5th Cir. 1979). There, plaintiff Wehling, the owner of proprietary trade schools in Texas, brought a libel action against CBS following a broadcast accusing him of defrauding his students and the federal government.⁴² CBS sought discovery regarding Wehling’s operation of the schools, but Wehling invoked the Fifth Amendment throughout his deposition.⁴³ Refusing to answer questions, Wehling “deprived CBS of information concerning the accuracy of its broadcast and thus thwarted discovery of issues at the heart of plaintiff’s lawsuit.”⁴⁴ The district court dismissed Wehling’s lawsuit with prejudice after he refused to answer the deposition questions.⁴⁵

On appeal, Wehling argued that the dismissal of his lawsuit based upon his assertion of the Fifth Amendment privilege impermissibly “penalized him for exercising a fundamental constitutional right.”⁴⁶ The Fifth Circuit sympathized with CBS’s position but reversed the district court, stating that “[d]ismissing a plaintiff’s action with prejudice solely because he exercised his privilege against self-incrimination is constitutionally impermissible.”⁴⁷ The court observed that Wehling was not asking to proceed to trial without providing the sought-after discovery, but rather only asked for a stay “until all threat of criminal liability has ended.”⁴⁸ The court found dismissal inappropriate because a) the Federal Rules of Civil Procedure did not warrant dismissal with prejudice for resisting discovery based upon a valid assertion of privilege; and b) a party may not be penalized for asserting the Fifth Amendment, and dismissal with prejudice based upon that assertion was indeed “costly.”⁴⁹

The court concluded that “[w]hen plaintiff’s silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant.”⁵⁰ The court specifically

observed that “[i]nstead of arbitrarily adopting a rule favoring CBS, the court should have measured the relative weights of the parties’ competing interests with a view toward accommodating those interests, if possible” and that the “balancing-of-interests approach ensures that the rights of both parties are taken into consideration before the court decides whose rights predominate.”⁵¹

Applying this test, the court approved a three-year stay of discovery, noting that “[a]lthough a three-year hiatus in the lawsuit is undesirable from the standpoint of both the court and the defendant, permitting such inconvenience seems preferable at this point to requiring plaintiff to choose between his silence and his lawsuit.”⁵² The court also noted that if CBS could, at a later time, demonstrate prejudice as a result of the delay, “the court would be free to fashion whatever remedy is required to prevent unfairness to defendant.”⁵³

The 11th Circuit reversed course in *Anglada v. Sprague*, 822 F.2d 1035 (11th Cir. 1987). There, a lawsuit was brought against the defendants for defaulting on a promissory note in which “they personally guaranteed the mortgages.”⁵⁴ Less than a year after the lawsuit commenced, criminal charges were brought against the same defendants for mortgage fraud and grand theft.⁵⁵ The district judge denied the defendants’ motion to stay the civil proceedings pending the conclusion of the criminal proceedings.⁵⁶ The jury decided in favor of the plaintiffs and the defendants appealed.⁵⁷ On appeal, the 11th Circuit held that a stay is not warranted unless an indication existed “that the invocation of the Fifth Amendment would have necessarily resulted in an adverse judgment.”⁵⁸ When asserting the Fifth Amendment privilege, it is “unacceptable” for a defendant to make a “blanket” refusal to answer all questions, rather he or she must assert the privilege on a question-by-question basis.⁵⁹ To allow otherwise would force the “court to speculate as to which questions would tend to incriminate.”⁶⁰ Additionally, the court found a stay was not necessary in this situation because other remedies were available, including requesting a closed hearing, requesting a sealed record, and “presenting evidence other than through their own testimony.”⁶¹

More recently, in *Baez v. Seminole County School Board*, 2005 U.S. Dist. LEXIS 35270, the plaintiff requested a 60-day stay in discovery of a civil matter pending the outcome of criminal proceedings.⁶² She argued that if forced to participate in discovery of the civil matter, because some allegations against her overlapped with those in the criminal matter, her right to due process would be undermined.⁶³ However, the court feared that the defendant would continue to claim the Fifth

Amendment privilege if the case was appealed.⁶⁴ Thus, the court found “[i]t would be detrimental to the progress of this litigation, and prejudicial to the plaintiff, to stay this case for the time required to resolve the underlying criminal proceeding.”⁶⁵ Moreover, the defendant merely contended that her rights “*might* be undermined,” and not that she would be subject to certain loss if the motion for stay was not granted.⁶⁶

As these cases make clear, courts have discretion to stay a parallel civil action *only* when refusing to do so would result in certain judgment against the invoking party. As set forth below, however, this standard unnecessarily omits consideration of other potentially critical factors.

Multifactor Test Applied by Other Jurisdictions

Many jurisdictions outside Florida apply a multifactor test in deciding whether to grant a temporary stay.⁶⁷ These factors have been the subject of discussion for many years.⁶⁸ The key criteria include:

1) the extent to which the issues in the criminal and civil cases overlap; 2) the status of the case, including whether the defendants have been indicted; 3) the plaintiff's interest in proceeding expeditiously weighed against the prejudice to plaintiff caused by a delay; 4) the private interests of and burden on defendants; 5) the interests of the court; and 6) the public interest.⁶⁹

Addressing the first factor, courts note that “the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.”⁷⁰ This is so, in part, “because of the danger that the government may use civil discovery to obtain evidence and information for use in its criminal prosecution, thereby circumventing the Fifth Amendment right against self-incrimination.”⁷¹ This could also be true even when government agencies are not prosecuting both the civil and criminal matters. The scope of discovery in civil matters is purposefully broad, and a civil litigant may be called upon to produce scores of documents or testimony which might adversely impact the defense of the criminal case. Thus, cases involving substantially overlapping allegations weigh heavily in favor of a stay.

The second factor, the status of the case, may also have a substantial bearing upon whether a stay is appropriate. Elaborating upon this factor, federal district courts have observed that “the potential harm to civil litigants arising from delaying them is

reduced due to the promise of a fairly quick resolution of the criminal case under the Speedy Trial Act.”⁷² Some district courts focus upon whether a criminal proceeding has actually commenced.⁷³ Others find that the threat of criminal prosecution is sufficient to trigger the need for a stay.⁷⁴

Addressing the third factor, courts have noted that “in evaluating the plaintiff’s burden resulting from the stay, courts may insist that the plaintiff establish more prejudice than simply a delay in her right to expeditiously pursue her claim.”⁷⁵ Prejudice results when the passage of time allows memories to fade, witnesses to relocate, or otherwise become unavailable and “assets to dissipate.”⁷⁶ Prejudice also results when a defendant seeks to gain a tactical advantage by seeking a stay.⁷⁷ However, the balancing test allows courts to take these factors into consideration when deciding whether a stay or continuance of discovery is appropriate in the first instance and if so, allows judges to fashion a remedy to alleviate any potential prejudice. As noted above, indefinite stays of discovery or trial are rarely appropriate.

The fourth factor, the burden on the defendant, is also of critical importance. At trial, a jury may construe the defendant’s silence as incriminating. This is not only severely prejudicial, in many instances it will result in the automatic entry of judgment against the defendant. If the defendant decides to waive his or her Fifth Amendment rights, the decision is irrevocable. While this will enable the defendant to rebut the civil charges, any statements made in a deposition or in court can and will be used by the prosecution in the criminal proceedings. Moreover, the discovery and trial process allows the prosecuting party to access information to which it might not otherwise be entitled under the applicable rules of criminal procedure. If the defendant transparently seeks a stay for tactical reasons, the court is far less likely to grant relief. But in many cases, the prejudice suffered by the defendant involved in a parallel criminal proceeding will far outweigh the inconvenience to the plaintiff, warranting at least some form of limited relief.

Additionally, the interests of justice and the interests of the court are important considerations. On one hand, stays can often be “relatively indefinite, because there is no way to predict when the criminal investigation would end.”⁷⁸ This uncertainty weighs against a stay because “[i]t is unrealistic to postpone indefinitely the pending action until criminal charges are brought or the statute of limitations has run for all crimes conceivably committed.”⁷⁹ On the other hand, “[i]f the civil action is stayed until the conclusion of the criminal proceedings, then it obviates the need to make rulings

regarding potential discovery disputes involving issues that may affect the criminal case.”⁸⁰ In fact, “the outcome of the criminal proceedings may guide the parties in settlement discussions and potentially eliminate the need to litigate some or all of the issues” in the case.⁸¹ Finally, courts can alleviate concerns about indefinite stays by “allowing the parties to petition the [c]ourt to lift or modify the stay if there is a change in circumstances warranting it.”⁸²

The public interest is likewise often enhanced by a stay of the civil litigation pending the outcome of the parallel criminal proceeding. For example, courts may deny stays in civil matters prosecuted by government agencies “intended to protect the public by halting the distribution of mislabeled drugs. . . or the dissemination of misleading information to the investing public.”⁸³ When the potential harm to the public is lacking, a stay of the civil matter is often beneficial because it allows the criminal proceedings to quickly reach their conclusion.⁸⁴ This is particularly true in cases of substantial factual overlap.⁸⁵

Conclusion

Against this background, practitioners must be mindful of their forum and the nature of the request when attempting to navigate or avoid parallel proceedings. Florida's state courts may be more willing to consider the multifactor approach adopted by other states and federal circuits. This test has distinct advantages, recognizing that all parallel litigation is not the same and that certain factors justifying relief in one situation may not compel the same result in another. The test also allows courts to consider public and private interests, and to grant a stay or continuance in the absence of any demonstrable prejudice to the plaintiffs.

A careful application of the relevant criteria will enable courts to make informed decisions. Regardless of whether the matter is in state or federal court, the more narrowly tailored the request, the greater the odds of success. Keeping this in mind, practitioners are well served to tailor their requests so as not to seek indefinite stays of discovery or trial proceedings.

¹ See *Simpson Watches Removal of Piano; \$20,000 Instrument to be Sold to Help Settle Damage Award*, **San Jose Mercury News** (California), Aug. 2, 1997, at 3B; Ruth Ryon & Carla Hall, *Simpson House Sold to Banker, Sources Say*, **L.A. Times**, Nov. 26, 1997, at B1.

², **USA Today**, July 22, 2004, available at www.usatoday.com/news/nation/2004-07-22-