

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO  
GENERAL DIVISION

WINFREY PENIX, as Administrator  
of the Estate of MELISSA ANN  
PENIX,

Plaintiff,

vs.

MOUNT CARMEL HEALTH SYSTEM  
D/B/A MOUNT CARMEL WEST, ET AL.

Defendants.

Case No: 19-CV-1138

Judge Jenifer A. French

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PLAINTIFF'S COMBINED MEMORANDUM CONTRA  
MOTIONS TO STAY FILED BY DEFENDANTS WILLIAM S.  
HUSEL, D.O. AND MOUNT CARMEL HEALTH SYSTEM

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Plaintiff objects to Defendants' attempts to unnecessarily delay these civil proceedings for the sole benefit of the Defendants themselves. The relief sought by Defendants is not appropriate, pursuant to well-established Ohio law. To grant a stay of these proceedings, purportedly based on assertions that a stay is required due to Fifth Amendment issues or potential nursing board investigations, would be inconsistent with Ohio law. The Motion should be denied.

In cases addressing the issue of whether a stay is appropriate in the setting of a parallel criminal investigation, the court is typically presented with a binary choice: Can a criminal *defendant* be compelled to provide discovery in a civil case? Even on that question, courts typically answer in favor of the plaintiff in the civil case, finding that

the assertion of the Fifth Amendment cannot operate to halt plaintiff's prosecution of her case. In contrast, the ultimate issue raised by *Defendants'* request for a stay is whether a possible criminal defendant can prohibit a civil plaintiff from conducting *any* discovery of *any* person, party, or thing in a civil case, simply because the possible criminal defendant might assert the Fifth Amendment. Defendants provide absolutely no law in support of such a blanket prohibition on discovery, and such is not warranted in this case.

Defendants seek an *indefinite* stay of this case until after Defendant Husel is charged with crimes, defends against those criminal charges to final resolution, and implicitly, until exhausts any and all appeals of such criminal matters. Defendants also claim a stay is necessary due to investigations of Mount Carmel nurses by the nursing board, where no Fifth Amendment rights are implicated. Ohio law does not support pressing pause on these cases and prohibiting discovery of *any and all* parties to this case, simply because Defendant Husel wishes to assert his Fifth Amendment privilege, or because some Mount Carmel nurses are being investigated by the nursing board (on referral from Mount Carmel itself).

Defendant Husel's assertion of the privilege does not act to prevent Plaintiff from conducting discovery of Mount Carmel and its numerous employees in order to prosecute the claims asserted. Plaintiff does not even seek to take the deposition testimony of Defendant Husel, nor has any written discovery been issued to him. The assertion that he is unable to defend himself, ignores the reality of cases like this, where medical records speak for the actions of the medical providers involved, and expert

witnesses provide the defense for the actions of those medical providers. Simply put, Defendant Husel's testimony is not sought in this matter, nor is it a prerequisite to this litigation moving forward.

Likewise, Mount Carmel is simply using the potential criminal proceedings, as well as licensure investigations into its own nurses, as mere pretext to seek to further delay these cases indefinitely. This is little more than a contrived argument for stay, without a legitimate purpose. Indeed, Mount Carmel provides no legal authority for a nursing board investigation to warrant a stay of civil proceedings.

Accordingly, Defendants are not entitled to a stay of these proceedings, and the Motion should be denied.

#### I. RELEVANT FACTUAL BACKGROUND

In January and February of 2019, about 28 civil cases, including this case, were filed against Defendant Mount Carmel Health System, including its employee medical providers such as nurses, pharmacists, and Defendant Husel. The lawsuits allege, *inter alia*, Mount Carmel was systemically negligent in providing care and treatment to the patients, resulting in the wrongful death of each plaintiff's decedent. Collectively, these cases shall be referred to herein as the "Husel cases."

Defendants have filed Answers to the Complaints filed in the Husel cases, categorically denying any liability for the treatment, injuries, or wrongful deaths. Defendant Husel has even claimed personal immunity from suit (though a far-fetched assertion). While some of the Husel cases have been settled by the parties therein, most of the Husel cases remain pending before various members of the bench of this Court.

In order to proceed with gathering information in support of their claims, the plaintiffs in the Husel cases issued discovery requests to Defendant Mount Carmel, and *not Defendant Husel*. This discovery includes Interrogatories and Requests for Production issued to Mount Carmel, as well as Notices to Take Deposition of numerous nurses and pharmacists employed by Mount Carmel. Specifically, Notices of Deposition have been filed for 37 different witnesses (employees of Mount Carmel), none of whom are Defendant Husel. Following these depositions, it will undoubtedly be necessary to conduct additional depositions, exploring the facts surrounding the pattern of deaths at Mount Carmel's ICU on Defendant Husel's watch.

Given the specific representations made by counsel for Defendant Husel relating to his likely assertion of the Fifth Amendment, Plaintiff has not served any discovery upon Defendant Husel, nor does Plaintiff seek to take his deposition. However, there is no Fifth Amendment privilege over the information sought in the discovery directed to Mount Carmel and its employees. Defendants do not even assert that the nurses and other employees have refused to cooperate in their investigation or interviews, but rather make the generic and unsupported claim that they have "limited ability" to speak with their own employees about issues in this case.

Now, Defendants seek to prevent the victims in the Husel cases – the families of those patients whose lives were terminated in the Mount Carmel ICU – from exercising their legal right to conduct discovery into how Mount Carmel's actions, or inaction, led to 35 deaths over the course of four years in their ICUs. A stay of these proceedings is

not warranted, and would be extremely harmful to the plaintiffs in the Husel cases, to the Court, and to the public.

## II. LAW AND ARGUMENT

“A stay of civil proceedings due to a pending criminal investigation is “an *extraordinary remedy.*” *United States v. Ogbazion*, No. 3:12-cv-95, 2012 U.S. Dist. LEXIS 136016, \*2 (S.D. Ohio) (emphasis added), citing *Louis Vuitton v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012). The United States Supreme Court has made clear, “[t]he constitution [ ] does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings.” *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, citing *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

In this case, there is no appropriate basis upon which this Court should grant a stay of proceedings. In fact, Defendants fail to even provide this Court with any authority for the proposition that a civil case should be stayed, simply because one of the parties may face criminal charges and will be unable or *unwilling* to testify in his own defense in the civil action. This is because Ohio courts have consistently held that the Fifth Amendment’s protection *does not require* a stay of proceedings as requested by Defendants. Further, Defendants provide absolutely no legal support for the argument that nursing board investigations of their own employees necessitate a stay of these civil proceedings.

- A. **“A Defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.”<sup>1</sup>**

Contrary to Defendants’ assertion, there is *no requirement* that a civil proceeding be stayed pending the outcome of criminal proceedings. *Prudential Ins. Co. of America v. Blanton*, 118 F.Supp.3d 980, 984 (N.D.Ohio 2015). A party to a civil proceeding has no right to continue to assert his defense against an adverse party, and at the same time, refuse to give pertinent testimony material to the claims or defenses in the case. *See Shrader v. Equitable Life Assur. Soc.*, 10 Ohio App.3d 277 (10th Dist.1983), *rev’d on other grounds*. Further, “Ohio law is clear that the protection against compulsory self-incrimination does not extend to prohibit civil litigation while the possibility of prosecution exists, nor does it require staying a related civil case until a criminal appeal is resolved.” *Ohio Bar Liability Ins. Co. v. Silverman*, 10th Dist. No. 05AP-923, 2006-Ohio-3016, citing *State ex rel. Verhovec v. Mascio*, 81 Ohio St.3d 334, 336 (1998); *see also Viafora v. Suhail*, 11th Dist. No. 2010-G-2987, 2010-Ohio-5796, *Urban v. State Med. Bd.*, 10th Dist. No. 03AP-429, 2004-Ohio-104, *Eichenberger v. Sharp*, 10th Dist. No. 94AP-271, 1994 Ohio App. LEXIS 5011, *Commonwealth Land Title Ins. Co. v. Davis*, 10th Dist. Nos. 91AP-1239 & 1240, 1992 Ohio App. LEXIS 4893, *Tedeschi v. Grover*, 39 Ohio App.3d 109 (10th Dist.1988), *Barr v. Intermark Internatl., Inc.*, 2d Dist. Nos. 91-CA-16 & 91-CA-20, 1992 Ohio App. LEXIS 4370. In fact, the Supreme Court of Ohio, in a case cited by

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<sup>1</sup> *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324-26 (9th Cir.), *cert. denied*, 516 U.S. 827 (1995).

Defendants herein, found the trial court abused its discretion in staying a civil case pending resolution of criminal appeal. *See Verhovec*, 81 Ohio St.3d at 336.

These Ohio decisions contemplate the real, and not uncommon situation, where a civil defendant may be forced to risk disadvantage in a civil case, by virtue of *his or her decision* to refuse to testify. This is consistent with pronouncements of the Supreme Court of the United States, which found *no unconstitutional infringement of the Fifth Amendment privilege* by forcing an individual to risk disadvantage in a civil case by refusing to provide material facts for fear of self-incrimination in a pending criminal case. *See Baxter*, 425 U.S. 308, *accord Silverman* at ¶ 11. Put succinctly by one Ohio court, “merely because a civil defendant may lose a suit which involves a substantial monetary stake does not, *ipso facto*, raise a claim of compulsion by the state’ and *does not violate any Fifth Amendment guarantee.*” *Verhovic*, 81 Ohio St.3d at 337, quoting *Tedeschi*, 39 Ohio App.3d at 111 (emphasis added). Further, if a party refuses to provide testimony by asserting his Fifth Amendment privilege, the U.S. Constitution *does not prohibit adverse inferences* being drawn against the party invoking the privilege in the civil action. *See Baxter*, 425 U.S. at 318; *see also Viafora*, 2010-Ohio-5796 (11th Dist.) and *Cuyahoga Hts. Local Sch. Dist. v. Palazzo*, 8th Dist. No. 103592, 2016-Ohio-5137.

While consideration of Fifth Amendment interests are important, the court “also must ensure that the *opposing party is not unduly disadvantaged.*” *Rothstein*, 2008 U.S. Dist. LEXIS 107989, at \*8 (emphasis added), quoting *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir.1996). The law is clear: Defendant Husel does not have “an absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth

Amendment privilege.” *Ogbazion* at \*5, quoting *Rothstein* at \*4; see also *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir.1983)(a stay is not appropriate “even though the pendency of the criminal action ‘force[s] him to choose between preserving his privilege against self-incrimination and losing the civil suit.’”) Similarly, the Supreme Court of Ohio has clearly held “[t]he protection against self-incrimination was not necessarily designed to protect witnesses from *every* prejudicial effect resulting from their own testimony.” *Verhovec*, 81 Ohio St.3d at 337, quoting 4 Rotunda and Nowak, *Treatise on Constitutional Law* (2 Ed.1992) 666, Section 23.23 (emphasis added).

There is no disagreement on whether Defendant Husel can be compelled to testify; he can’t. However, Defendants still complain that Defendant Husel may be subjected to adverse inferences in the civil case, by his refusal to testify or provide discovery. While Defendant Husel may suffer this burden if this civil case proceeds, that is a burden the courts have recognized as a known and accepted consequence of asserting one’s Fifth Amendment privilege. See *Baxter*, 425 U.S. at 318; see also *Viafora*, 2010-Ohio-5796, and *Palazzo*, 2016-Ohio-5137 (recognizing that adverse inferences may be drawn against the party invoking the privilege in the civil action, without violating the Constitution).

Ohio law is clear: simply because Defendant Husel has a privilege against being compelled to testify, does not mean that all actions or litigation which relates to him must cease. Defendant Husel’s decision to exercise his Fifth Amendment rights has consequences, well-recognized by both Federal and Ohio courts. Defendants are merely

using the Fifth Amendment privilege as pretext to improperly seek to *indefinitely* delay these proceedings, involving numerous parties other than Defendant Husel.

**B. The factors used by Ohio courts weigh against granting a stay of this civil case.**

In deciding whether to grant the “extraordinary remedy” of a stay, Ohio courts look to the following factors:

the length of the delay requested; whether other continuances have been requested and received, the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstances which gives rise to the request for a continuance; and other relevant factors.

*O'Brien v. O'Brien*, 8th Dist. No. 89615, 2008-Ohio-1098. While this is the first formal request for a delay of proceedings, these factors when weighed together, strongly weigh against a stay of these proceedings.

1. *The length of the delay requested by Defendants is indefinite.*

In this case, the length of the stay requested by Defendants is almost dispositive of this issue, as Defendants seek an *indefinite* stay of these proceedings. Defendants cite to the need for a stay “pending the final adjudication of the ongoing criminal investigation of potential criminal charges against Dr. Husel.” (Husel’s Mot. at 1.) They provide this Court with no evidence of when such “final adjudication” will likely occur, let alone the amount of time necessary for the criminal matter to conclude, if criminal charges are indeed filed. Should charges be filed, the length of the requested stay will undoubtedly amount to years, as Defendant Husel’s criminal attorney has denied all

allegations, stated Defendant Husel did not intend to cause these deaths, and thus, trials of the criminal matters will be necessary. In essence, Defendants wish to hold this civil case (and many others) hostage to Defendant Husel's criminal liability for an indefinite period of time. An *indefinite* delay of proceedings, as is sought in this case, "weighs against a stay." *Arts Rental Equip., Inc. v. Bear Creek Constr., LLC*, Hamilton CP No. A0902875, 2013 Ohio Misc. LEXIS 33, \*3 (*denying indefinite stay* due to it being "unclear when the criminal matters will be resolved").

2. *Plaintiff will suffer inconvenience and prejudice from an indefinite stay.*

An indefinite stay of these proceedings would be extremely inconvenient and highly prejudicial to Plaintiff. It would be a perversion of justice to allow a civil defendant who is also criminally liable to add further insult to injury by indefinitely denying the victims of the defendant recourse and compensation in the civil justice system. Similarly, justice is not served by allowing nursing license investigations to act as a restriction on Plaintiff's ability to prosecute this case. With each passing month, Plaintiff's beneficiaries are delayed in seeking and obtaining the compensation they are owed, for the harms caused by Defendants.

Importantly, an indefinite delay of these proceedings also poses a risk, due to the loss of evidence to support Plaintiffs' claims from the passage of time; indeed, that is the legislative justification for the extremely short statute of limitations in medical claims, like this case. Memories will fade, witnesses will disappear, and documentary evidence will be at risk of being lost. On top of these risks, the very real risk exists that the surviving spouses of the deceased patients (many of whom are elderly) will not live to

see this litigation through, should an indefinite stay be granted to Defendants. There cannot be a more significant harm to the numerous plaintiffs in these cases, than to be unable to have their day in court.

Defendants also try to prevent any discovery from occurring, by claiming a stay will permit the parties to negotiate a settlement of these cases. While such negotiations can hardly be characterized as active, Defendants are blatantly asking this Court to force Plaintiff to negotiate a settlement at the tip of a spear, without the ability to conduct discovery into the information Defendants are hiding from public view. Defendants want this Court to support their desire to resolve these cases, solely on their own terms, forcing Plaintiff to “negotiate” in the dark about what really happened. To claim a stay is appropriate so that settlement can be discussed, is mere pretext.

With each passing month, each family grieves and remains in limbo getting no answers as to whether they will be permitted to hold the Defendants (not just Defendant Husel) accountable for their actions. For Defendants to flippantly and baselessly claim “Plaintiff will suffer no resulting harm” from a stay is absurd, insensitive, and reflects no appreciation for the Plaintiff’s desire and *right* to proceed with this case to resolution. The *inconvenience and prejudice to Plaintiff is paramount* and weighs *heavily* against a stay.

3. *The Court’s interests are not served by delaying these proceedings indefinitely to serve the benefit of a single Defendant.*

As the Rules of Practice in this Court note, “[d]elay in criminal and civil cases in the Courts of Common Pleas throughout the state of Ohio is a serious problem in the

administration of justice.” Loc.R., Stmt. of Purpose. Given this Court’s extremely busy docket and the general interest in moving civil cases forward on a timely basis, the interests of the Court clearly weigh against a stay of the Husel cases.

Allowing the numerous Husel cases to languish on the civil docket of this Court for (likely) years while Defendant Husel works through potential criminal proceedings would result in *significant* delay and damage to the Court’s ability to perform its role of ensuring the timely administration of justice. As this court is aware, “unnecessary delay erodes the public’s confidence in the judicial system.” Loc.R., Stmt. of Purpose. With the passage of time, the potential discovery disputes will only get more complex, as witnesses will fail to retain pertinent testimony and the parties will have to take additional efforts to preserve evidence for *eventual discovery* (or production to this Court for *in camera* review should privilege be asserted).

This Court is not at all served by allowing the Husel cases to sit quietly for years, while Plaintiffs and Mount Carmel wait idly by for Defendant Husel’s criminal proceedings (and appeals thereof) to resolve. The interest of the Court clearly weigh against a stay of these proceedings.

5. *Defendants’ request for a stay is contrived and not for legitimate reasons.*

Defendants seek to prohibit any and all discovery, not simply discovery of Defendant Husel, because of Defendant Husel’s intention to assert the Fifth Amendment privilege. Assuming, *arguendo*, he will in fact assert the privilege, what is the net result? Is Defendant Husel realistically going to make himself available for questioning if/after he is convicted and all criminal appeals are exhausted (3-5 years

from now)? Of course not. Therefore, Defendants are advocating the entire litigation discovery process on behalf of over 20 families be prohibited indefinitely for no legitimate reason or purpose. Defendant Husel's testimony and Fifth Amendment rights are irrelevant to the information and testimony relating to claims against Mount Carmel, and its employees, for *inter alia*, hospital, nurse, or pharmacist negligence, negligent supervision and credentialing, etc.

In addition to this spurious assertion, Defendants also claim that a stay will permit the parties the opportunity to resolve the cases. Nothing is stopping Defendants from coming to the table to try and resolve these cases. Certainly, engaging in the discovery process does not prevent Defendants from resolving these cases. Further, Defendants make the incredulous claim that a stay will *benefit* additional families who may have claims against Defendants, but who have yet to file those claims. This assertion is made without any support, because such an assertion has no basis in reality or fact. Defendants' faux concern about potential additional lawsuits against them rings hollow, and the interests of "non-parties" to this case are not served by a stay.

The purported reasons for a stay are not legitimate, and the contrived nature of Defendants' requested delay weighs against a stay of proceedings.

6. *The public interest supports the timely administration of civil justice.*

One purpose of this Court's Rules of Practice is "to serve the public interest which mandates the prompt disposition of all cases before this Court." Defendants, apparently seeing little or no public interest in the civil justice system, make the incredulous assertion that the public interest favors a stay of these proceedings. Quite to

the contrary, the public has an immense interest in the efficient administration of justice, be it civil or criminal, and further has an immense interest in the outcome of this litigation involving the third largest hospital system in the County, and the deaths of 35 patients over a four year period. To claim the public has no compelling interest is absurd.

It has already been more than four years, in some of the Husel cases, since the negligent, reckless, and/or intentional actions of Defendants caused the death of Mount Carmel patients. The public interest is not served *in any way, shape, or form* by delaying these proceedings, nor can Defendants provide this Court with *any support* for such an assertion. The public's confidence in the judicial system depends on the timely administration of justice to litigants, including those seeking civil redress. Their rights do not cede to the whims of Defendant Husel seeking to indefinitely protract these proceedings years into the future. The public's interest weighs heavily against a stay.

**III. CONCLUSION**

Defendants fail to provide this Court with any basis for granting the "extraordinary relief" of stay of these civil proceedings. A possible criminal defendant cannot prohibit civil plaintiffs from conducting *any* discovery of *any* person, party, or thing in a civil case, simply because the criminal defendant may assert the Fifth Amendment. In applying the factors used by Ohio's courts to evaluating requests for a stay, and in accordance with good public policy and the purpose of this Court, the Defendants' extraordinary request for a stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2019, a copy of the foregoing document was filed with the Clerk of Courts through the Court's e-filing system, which will provide notice to the following:

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