

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Estate of ROBERT E. WONE, by
KATHERINE E. WONE,
as Personal Representative,

Plaintiff,

v.

JOSEPH R. PRICE, VICTOR J.
ZABORSKY,
and DYLAN M. WARD,

Defendants.

Civil Action No. 008315-08

The Honorable Brook Hedge

Next Event: Initial Conference
February 27, 2009

**PLAINTIFF'S CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS
TO STAY AND FOR A PROTECTIVE ORDER**

Robert Wone was murdered on August 2, 2006 while a guest in the home of Defendants Joseph Price, Victor Zaborsky, and Dylan Ward. Defendants are the only people other than Mr. Wone known to have been in the home at the time of the killing. For over two years, no criminal charges were brought. Then, last fall, the government revealed that the delay in solving the case was the result of Defendants' obstruction of justice, destruction of evidence, and conspiracy to stage the crime scene and provide false information to investigators. Messrs. Price, Zaborsky, and Ward now seek to put off the day of reckoning still further, claiming that they cannot answer even Mrs. Wone's most basic questions about her husband's murder without incriminating themselves.

In view of the Fifth Amendment invocations, Mrs. Wone consents to an order providing that Defendants are not required to provide testimony at this time. But the relief sought in Defendants' motion to stay goes well beyond that necessary to protect any legitimate

Fifth Amendment interests. The clear purpose of Defendants' motion to stay is to stop Mrs. Wone's case dead in its tracks -- to prevent her from investigating her claims in any fashion whatsoever during the entirety of what could prove to be lengthy criminal proceedings.

The motion to stay seeks to prevent Mrs. Wone from gaining access to evidence provided voluntarily by Defendants to the government, and provided by the government to Defendants. However, there is no Fifth Amendment protection from this type of discovery, which does not involve compelled testimony from Defendants. Mrs. Wone needs these materials urgently to develop her claims, including the expert testimony necessary to prove them.

Defendants' effort to prevent Mrs. Wone from taking discovery from third-parties is similarly unfounded. Messrs. Price, Zaborsky, and Ward have no Fifth Amendment right to prevent others from incriminating them, and Mrs. Wone has a right to pursue such discovery expeditiously before more evidence is destroyed and memories fade further.

Defendants' request for a wholesale stay of this case should be denied. The protective order sought by Defendants is likewise overbroad. Its vague duration would potentially permit Defendants to forestall Mrs. Wone's claims for years more -- in the event, for example, that Defendants are convicted and elect to pursue appeals and other post-conviction relief. Defendants' Fifth Amendment concerns can be addressed by a protective order providing that they are not required to provide testimony in this matter until further order of the Court. The issue of Defendants' testimony can be revisited by the parties and the Court in six months or earlier, if warranted by developments in the criminal case. A proposed order to this effect is attached.

BACKGROUND

Katherine Wone, as personal representative of her husband's estate, filed her Complaint in this action on November 25, 2008, asserting claims for wrongful death, negligence, spoliation of evidence, and conspiracy. The Complaint was filed just weeks after the government revealed for the first time extensive evidence of criminal conduct by Messrs. Price, Zaborsky, and Ward in connection with Mr. Wone's death.¹ See Complaint ¶¶ 19-42.

A. Mrs. Wone's Initial Discovery Requests

Shortly after filing her Complaint, Mrs. Wone began seeking the discovery necessary to prove her claims from Defendants, their friends and associates, their places of employment, and other third-parties.

1. Discovery Requests Served on Defendants

On December 15, 2008, Mrs. Wone served document requests and interrogatories on all Defendants. Her document requests sought, among other things:

All documents relating to Robert Wone, including, without limitation, any communications with or about Robert Wone or his murder.

See Affidavit of Benjamin J. Razi in Support of Plaintiff's Consolidated Opposition to Defendants' Motions to Stay and For a Protective Order (hereinafter, "Razi Aff."), Ex. 1, at 3 (emphasis added). From Mr. Ward, Mrs. Wone also requested documents relating to weapons found in his closet and a polygraph examination he apparently has taken in relation to Robert Wone's murder. See *id.*

¹ This evidence was unavailable to and unknown by Mrs. Wone prior to the fall of 2008, due to the then-ongoing confidential grand jury investigation.

Mrs. Wone's interrogatories to the Defendants highlight the basic information pertaining to her husband's murder that she is seeking and to which she is entitled:

- “Describe in detail your activities on the night of August 2, 2006, including, without limitation, when you first saw Robert Wone and what you were doing from the time that you first saw Wone on that night until the time that 9-1-1 was called at 11:49 PM.” (Emphasis added.)
- State whether and how you, on August 2, 2006, (a) “caused the introduction of drugs, medications, or foreign substances into [Robert] Wone’s body”; (b) “physically or sexually assaulted Wone”; or (c) “stabbed Wone.” (Emphasis added.)

See id., Ex. 2 at 4, 5. In addition, Mrs. Wone's interrogatories asked Defendant Ward about the whereabouts of a knife missing from his closet that police believe is more likely to be the knife with which Wone was stabbed than the prop knife that was found near Wone's body. *See id.*

Mrs. Wone also has sought deposition testimony from all three Defendants. *See id.* ¶ 4.

Instead of providing answers to Mrs. Wone's basic questions about her husband's murder, Messrs. Price, Zaborsky, and Ward simply blew off Mrs. Wone's discovery requests. Defendants did not object, produce even one document, answer even one interrogatory, or respond in any manner at all within the 30-day response period set forth in the Rules of Civil Procedure.² More than a week after their responses were due, Defendants filed the instant motion for a protective order ostensibly on Fifth Amendment grounds, even though the Defendants have no right under the Fifth Amendment or elsewhere to withhold the documents sought by Mrs. Wone.

² Defendants' motion to stay (p. 12) wildly accuses “Plaintiff's counsel [of] abuse of process.” Even though, for obvious reasons, Defendants would prefer not to have to provide Mrs. Wone with answers to her questions, document requests, third-party document subpoenas, interrogatories, and depositions are well-established and proper discovery mechanisms. *See, e.g.*, D.C. Super. Ct. R. Civ. Proc. 30, 33, 34, and 45. There is nothing “abusive” or improper about Mrs. Wone employing these mechanisms here.

2. Third-Party Discovery Efforts

Concurrently with her efforts to obtain discovery from Defendants, Mrs. Wone initiated third-party discovery by seeking relevant documents from Arent Fox LLP (Mr. Price's employer), the International Dairy Foods Association (Mr. Zaborsky's employer), A.B. Data, Ltd (Mr. Ward's employer), and other sources. Razi Aff. ¶ 5. These third-party document subpoenas already have uncovered startling new information relevant to Mrs. Wone's claims. *Id.* In the near future, Mrs. Wone intends to seek commissions from this Court authorizing her to subpoena records relating to telephone and other electronic communications Defendants made in the days surrounding Mr. Wone's death.

B. Defendants' Failure to Negotiate Regarding a Stay or Protective Order

In a telephone call on January 13, 2009 -- more than six weeks after they were served with the Complaint -- Defendants' counsel proposed a stay of the case based on Fifth Amendment concerns. *See id.* ¶ 6. When Mrs. Wone learned that Messrs. Price, Zaborsky, and Ward intended to rest on their Fifth Amendment rights rather than answer her questions, she promptly proposed terms on which she would be willing to put off -- for the time being -- testimony from the Defendants and discovery from the government. *See id.* ¶ 7 and Ex. 3. Mrs. Wone's proposal was aimed at addressing Defendants' Fifth Amendment concerns and related concerns expressed by the government, while also ensuring that:

- (1) any stay [or protective order] not prevent Mrs. Wone and her counsel from continuing to investigate those aspects of the case that do not burden or affect the parties to the criminal case, and
- (2) safeguards are in place to ensure that the Defendants do not transfer assets . . . for the purpose of shielding them from any judgment or settlement.

Id.

Defendants did not respond to Mrs. Wone's proposals until the day their responsive pleading was due, saying only that her proposals were unacceptable. *Id.* ¶ 8. Rather than negotiate with Mrs. Wone regarding the terms on which they could delay their obligations to provide discovery, Defendants filed their motion seeking a wholesale stay of Mrs. Wone's case.

ARGUMENT

I. MRS. WONE CONSENTS TO A PROTECTIVE ORDER LIMITED TO DEFENDANTS' TESTIMONY AND DISCOVERY FROM THE GOVERNMENT.

One of Mrs. Wone's principal objectives in this case is to obtain forthright and fulsome answers from Messrs. Price, Zaborsky, and Ward about the circumstances surrounding her husband's murder. The Defendants have now indicated -- through counsel -- that they will rest on their Fifth Amendment rights in response to Mrs. Wone's basic questions about their conduct on August 2, 2006 and other relevant topics, rather than engage in an open discussion of these issues. In light of Defendants' Fifth Amendment invocations, Mrs. Wone is willing to put off their testimony until circumstances change in the criminal proceeding.

Like Defendants, the U.S. Attorney's Office has informed Plaintiff's counsel of its interest in avoiding the burden of responding to civil discovery requests during the pendency of the criminal proceedings. So that this proceeding does not interfere with either Defendants' or the government's ability to litigate the parallel criminal case, Mrs. Wone consents to a protective order stating that, until further order of the Court, (1) Defendants have no obligation to provide testimony in this matter, and (2) no party shall seek discovery from any government agency or personnel involved in the investigation or prosecution of Robert Wone's murder.

Defendants seek a protective order shielding them from discovery "until the related criminal proceedings against Defendants are resolved." Defs. Proposed Protective Order.

This language is too vague and open-ended. To ensure that this case is not stalled indefinitely and moves forward as efficiently as possible under the circumstances, the Court should revisit the necessity of any protective order in six months or sooner, if circumstances warrant in the criminal case.

II. MRS. WONE SHOULD NOT BE PREVENTED FROM PURSUING DISCOVERY THAT DOES NOT IMPLICATE DEFENDANTS' FIFTH AMENDMENT RIGHTS OR BURDEN DEFENDANTS OR THE GOVERNMENT.

Mrs. Wone, like any other plaintiff, “enjoys the right to pursue h[er] case and to vindicate h[er] claim[s] expeditiously.” *Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980). Defendants seek to stymie this right by staying Mrs. Wone’s civil claims in their entirety. There is no basis under the Fifth Amendment or elsewhere for such a broad-based stay. *See generally SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980) (“The Constitution . . . does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings.”).

The Fifth Amendment protects Defendants from being compelled to provide testimony against themselves. U.S. Const. amend. V (“[N]o person . . . shall be compelled in any criminal case to be a witness against himself . . .”) (emphasis added). However, it does not provide them with license to keep from Mrs. Wone highly relevant evidence in their possession and already in the hands of the government and/or from obtaining documents and information possessed by third-parties. Because Defendants’ motion to stay seeks to prevent Mrs. Wone from pursuing these categories of discovery for no good reason, the motion to stay should be denied.³

³ By citing incomplete snippets and *dicta*, Defendants purport to rely on *United States v. Kordel*, 397 U.S. 1 (1970), *Dresser Industries*, 628 F.2d at 1368, and *United States ex rel.* (continued...)

A. Mrs. Wone is Entitled to Timely Production of All Discovery in the Criminal Case.

On December 18, 2008, the government produced to Defendants' counsel a wealth of documentation highly relevant to Mrs. Wone's claims. *See Razi Aff.*, Ex. 5 (Letter from U.S. Attorney's Office to Defendants' Counsel, dated Dec. 18, 2008). The government's initial document production included copies of:

1. Photographs of Mr. Wone's body and weapons found at the crime scene;
2. Police and autopsy reports;
3. Search warrant returns;
4. The report of a polygraph examination taken by Mr. Ward;
5. FBI reports pertaining to DNA and other biological material; and
6. Videotapes of statements provided voluntarily by Defendants to law enforcement on August 3, 2006.

Id.

Shortly after filing her Complaint, Mrs. Wone promptly requested these documents from the Defendants. *Id.*, Ex. 1. After initially ignoring Mrs. Wone's requests, Defendants now claim that they have a right under the Fifth Amendment to withhold these highly relevant documents from Mr. Wone's widow. Defendants' Fifth Amendment claim with respect to these documents does not withstand even the slightest scrutiny.

Westrick v. Second Chance, No. 04-280 (RWR), 2007 U.S. Dist. LEXIS 23917 (D.D.C. Mar. 31, 2007). But the holdings of these cases provide no support for Defendants' attempt to impose an across-the-board stay of Mrs. Wone's claims. *See Kordel*, 397 U.S. at 7-10 (Defendant's Fifth Amendment rights not violated by refusal to stay FDA civil proceeding during criminal investigation); *Dresser*, 628 F.2d at 1382-84 (D.C. Circuit affirmed district court denial of motion to quash SEC subpoena directed at company subject to parallel criminal investigation); *Second Chance*, 2007 U.S. Dist. LEXIS 23917, at *12-*15 (denying motion to stay civil lawsuit during parallel criminal investigation).

1. The Overwhelming Majority of the Documents Produced in the Criminal Case Are Not Defendants' Statements.

The overwhelming majority of the documents produced in the criminal case -- for example, crime scene photographs, police reports, autopsy-related documents, and reports relating to DNA and other forensic evidence -- do not contain statements from Defendants. These documents therefore are afforded no protection under the Fifth Amendment. *See, e.g., Fisher v. United States*, 425 U.S. 391, 408 (1976) (the right against self-incrimination “applies only when the accused is compelled to make a testimonial communication that is incriminating”) (emphasis in original); *see also, Kaemmerling v. Lappin*, No. 07-5065, 2008 WL 5396823, at *13 (D.C. Cir. Dec. 30, 2008) (“[A] DNA sample is not a testimonial communication subject to the protections of the Fifth Amendment.”) (emphasis added).

Defendants express concern in their papers that discovery by Mrs. Wone will provide the government with more discovery than it is entitled to in the criminal case. Defs. Mem. in Supp. of Mot. to Stay at 2-3. This concern is misplaced with respect to documents and information produced in the criminal case, because, by definition, the government already has these materials.

Mrs. Wone has retained a forensic expert to help her prove her claims. Without access to the core forensic evidence relating to her husband's murder, this expert will be at a disadvantage as compared with Defendants' experts who already have this evidence. Because the forensic evidence is not protected by the Fifth Amendment and either has already been or

will shortly be produced to the parties in the criminal case, Defendants should be required to produce it to Mrs. Wone.⁴

2. Defendants' Videotaped Statements Were Provided Voluntarily and Already Are in the Government's Possession.

Defendants' statements to law enforcement on August 3, 2006 were made voluntarily. *See, e.g.*, Razi Aff., Ex. 4 (Defendant's Motion for Release on Personal Recognizance, ¶ 4, dated Nov. 20, 2008, *United States v. Price*, No. 2008 CFI 027068) ("In August 2006, Mr. Price cooperated with police and gave a voluntary statement regarding the death of his friend, Robert Wone . . .") (emphasis added). Because the Fifth Amendment provides no protection for incriminating statements made voluntarily, these videotapes should be produced. *See, e.g.*, *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (stating general rule that Fifth Amendment does not apply when witness testifies voluntarily); *United States v. Monia*, 317 U.S. 424, 427 (1943) ("The [Fifth] [A]mendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him."); *In re Grand Jury Subpoena dated July 6, 2005*, 256 Fed. Appx. 379, 381 (2d Cir. 2007) ("[T]he Fifth Amendment does not protect the contents of voluntarily prepared documents There is no dispute that Appellant voluntarily made these recordings; the recordings are not entitled to Fifth Amendment protection.") (internal citations omitted).

In addition, Defendants' statements were made to the government and already are in the government's hands. Production to a civil litigant of documents already possessed by the government does not implicate the Fifth Amendment because production adds no risk of

⁴ The U.S. Attorney's Office has been informed of Mrs. Wone's request for these documents from Defendants and has not voiced an objection. Nor would there be any valid basis for such an objection. Making an additional copy of these materials for the victim's widow -- at her expense -- would impose no burden on anybody.

incrimination. *See, e.g., Golden Quality*, 87 F.R.D. at 59 (discovery of documents already turned over to grand jury “poses no Fifth Amendment threat to the individual criminal defendants”); *Koulouris v. Builders Fence Co.*, 146 F.R.D. 193, 195 (W.D. Wash. 1991) (ordering defendants to turn over all documents already produced in response to grand jury subpoenas).

B. Discovery Should Proceed as to Non-Governmental Third-Parties.

Without any legal basis, the Defendants seek to block Mrs. Wone from exploring with third-parties the circumstances of her husband’s death. Mrs. Wone has initiated discovery from third-parties regarding Defendants’ communications in the time period surrounding her husband’s murder, including email and cellular telephone communications, as well as other statements or conduct by Defendants pertinent to Mrs. Wone’s claims. Plainly, Defendants have no Fifth Amendment interest in such documents or information possessed by third-parties. *See, e.g., Hale v. Henkel*, 201 U. S. 43, 69 (1906) (The Fifth Amendment “was never intended to permit [anyone] to plead the fact that some third person might be incriminated by his testimony . . .”); *United States v. Skolek*, 474 F.2d 582, 584 (10th Cir. 1973) (“There is no constitutional right not to be incriminated by the testimony of another.”) (emphasis added); *In re Standard Fin. Mgmt. Corp.*, 77 B.R. 324, 327 (D. Mass. Bankr. 1987) (“The Fifth Amendment is a personal right not to testify and does not stretch to documents or items in the hands of others.”) (emphasis added) (internal citations omitted).

Defendants also argue that an across-the-board stay is required to prevent the government from learning information from the civil case that it would not be able to obtain on its own. Defs. Mem. in Supp. of Mot. to Stay at 2-3. It is hard to imagine what types of evidence Defendants are referring to and they cite none. In any event, a standard protective order providing that the parties are only permitted to use confidential discovery obtained in this

case for the purpose of litigating this case would eliminate the risk hypothesized by Defendants. Mrs. Wone consents to the entry of such an order and has so indicated to Defendants.

While permitting discovery from third-parties will not compromise Defendants' rights, a blanket stay of discovery will severely prejudice Mrs. Wone. Her husband's murder is now more than two years old. Once she learned in the fall of 2008 of Defendants' misconduct, Mrs. Wone promptly filed this lawsuit. Evidence pertinent to her claims undoubtedly already has been lost during the period in which Defendants have orchestrated their cover-up. If discovery as to third-parties is stayed, additional relevant evidence is likely to be destroyed, jeopardizing Mrs. Wone's case. *See, e.g., Fid. Nat'l Title Ins. Co. of New York v. Nat'l Title Res. Corp.*, 980 F. Supp. 1022, 1024 (D. Minn. 1997) (“[W]itnesses relocate, memories fade, and persons allegedly aggrieved are unable to seek vindication or redress for indefinite periods of time.”); *In re Phillips, Beckwith & Hall*, 896 F. Supp. 553, 559 (E.D. Va. 1995) (“A party is not entitled to delay resolution of a civil action, even to accommodate her Fifth Amendment interests, if her adversary's case will deteriorate as a result of the stay.”).

To prevent this severe prejudice to Mrs. Wone, the Court should permit discovery to proceed as to persons and entities other than the Defendants and government agencies or personnel involved in the investigation or prosecution of Mr. Wone's murder. *See, e.g., AIG Life Ins. Co. v. Phillips*, No. 07-cv-00500-PSF-MEH, 2007 U.S. Dist. LEXIS 52692, at *10 (D. Colo. July 20, 2007) (defendant's Fifth Amendment rights not impaired by discovery from third-parties, so stay of third-party discovery unnecessary); *Scipar Inc. v. Simses*, No. 07-CV-63A, 2007 U.S. Dist. LEXIS 45258, at *6 (W.D.N.Y. June 21, 2007) (same); *Cadence Design Sys.*

Inc. v. Avant!, Inc., No. C 95-20828 RMW(PVT), 1997 U.S. Dist. LEXIS 24147, at *8 (N.D. Cal. July 22, 1997) (same).⁵

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motions for a complete stay and for a protective order and enter the more limited protective order attached hereto.

Respectfully submitted,

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Dated: February 11, 2009

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⁵ One final point: Defendants allege that somebody working for Mrs. Wone "has falsely represented himself as actually being Ward's counsel." Defs. Mem. in Supp. of Mot. to Stay, at 12. This allegation -- based on nothing more than the unsworn assertions of "three [anonymous] persons in Florida," *id.*, Ex. E -- is false. (Curiously, this spurious claim was included in a letter filed with the Court before it was delivered to Plaintiff's counsel.)

ATTACHMENT

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Estate of ROBERT E. WONE, by
KATHERINE E. WONE,
as Personal Representative,

Plaintiff,

v.

JOSEPH R. PRICE, VICTOR J.
ZABORSKY,
and DYLAN M. WARD,

Defendants.

Civil Action No. 008315-08

The Honorable Brook Hedge

ORDER

After consideration of Defendants' Joint Motions to Stay and for a Protective Order, and Plaintiff's Opposition thereto, it is hereby ORDERED on this _____ day of _____ 2009, that Defendants' motions are DENIED, and it is hereby

FURTHER ORDERED that:

1. Defendants shall not be required to provide any testimony in this case, including by deposition, answers to interrogatories, or otherwise, until further Order of the Court;
2. No party shall seek discovery in this action from the United States Attorney's Office, the Metropolitan Police Department, or any government agency or official involved in the investigation or prosecution of the murder of Robert Wone or the criminal matters styled *United States v. Joseph Price*, Case No. 2008-CFI-27068, *United States v. Victor Zaborsky*, Case No. 2008-CFI-26997, and *United States v. Dylan Ward*, Case No. 2008-CFI-26996 until further Order of the Court;

3. Discovery as to third-parties other than those described in Paragraph 2 shall continue, consistent with the Rules of Civil Procedure; and

4. The Court shall revisit the necessity and the scope of the restrictions imposed by Paragraphs 1 and 2 of this Order at a hearing on August ____, 2009.

Dated: _____, 2009

Judge Brook Hedge
Superior Court for the District of Columbia

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2009, I caused a copy of Plaintiff's
Opposition to Defendants' Motions to Stay and for a Protective Order and the attached Proposed
Order to be served via e-filing to:

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