

IN THE STATE COURT OF FULTON COUNTY  
STATE OF GEORGIA

**JONAH DELDRAGE, as Surviving  
Spouse of MERLIN HUMBERTO  
ACOSTA BONILLA, Deceased,**

**Plaintiff,**

**v.**

**ROYAL FOOD SERVICE CO., INC.,  
ZURICH AMERICAN INSURANCE  
COMPANY, and MARCUS JONES,**

**Defendants.**

**CIVIL ACTION NUMBER:**

**21EV000532**

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**DEFENDANTS' MOTION TO STAY AND BRIEF IN SUPPORT**

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COME NOW, **ROYAL FOOD SERVICE CO, INC., ZURICH AMERICAN INSURANCE COMPANY, and MARCUS JONES** (hereinafter collectively referred to as "Defendants"), by and through their attorneys of record, and hereby file this Motion to Stay the above-styled matter pending adjudication of a related criminal action and brief in support, showing the Court as follows:

**PRELIMINARY STATEMENT**

This action arises from an accident involving multiple vehicles that occurred in Suwanee, Gwinnett County, Georgia on October 30, 2020. Plaintiff's decedent was a passenger in the first vehicle impacted by Defendant Marcus Jones's (hereinafter "Defendant Jones") vehicle. The driver of that vehicle and Plaintiff's decedent died at the scene. As a result of the accident, Defendant Jones received a citation for following too closely and was subsequently charged with two (2) counts of second degree vehicle manslaughter. Defendant Jones has not yet been arraigned and an indictment has not been filed.

The criminal action for this accident involves the same allegations as the civil matter filed by Plaintiff – there is complete overlap. To avoid self-incrimination, Defendant Jones will necessarily invoke his Fifth Amendment privilege in response to any discovery into the substantive facts of the accident. As such, Plaintiff will not be allowed thorough and complete discovery until the resolution of the criminal matter. Moreover, Defendant Jones will be prejudiced in his criminal matter by asserting his Fifth Amendment privilege in the civil matter. For these reasons and the reasons discussed herein, Defendants' Motion to Stay should be granted.

### **STATEMENT OF FACTS**

#### **A. The Subject Accident.**

On October 30, 2020, Defendant Jones was driving a vehicle on behalf of Defendant Royal Food Service Co, Inc. (hereinafter "Defendant Royal Food") northbound on Interstate 85. Defendant Jones was delivering food to a nearby location. As he approached Exit 111, he collided with four (4) vehicles in the right lane on Interstate 85. Plaintiff's decedent was a passenger in the first impacted vehicle and died at the scene.

#### **B. The Criminal Investigation and Subsequent Proceedings.**

On the day of the accident, Defendant Jones received a citation for following too closely. He was also charged with two (2) counts of second degree vehicular manslaughter. On November 6, 2020, a warrant was issued for Mr. Jones's arrest and bond was set. Thereafter, Mr. Jones turned himself into the Gwinnett County Jail and bonded out. As of the date of this Motion, Defendant Jones has not been arraigned or entered a plea.

#### **C. The Instant Action**

Plaintiff filed this action on January 26, 2021, naming Defendants Jones, Royal Food, and Zurich American Insurance Company. (*See generally* Pl.'s Compl.). Plaintiff alleges Defendant

Jones was negligent in causing the accident and negligent *per se* for violating rules of the road during the accident. (Id. at ¶¶ 25-27). Plaintiff further alleges Defendant Royal Food was negligent under the doctrine of *respondeat superior* and in the hiring, entrustment, and training of Defendant Jones. (Id. at ¶¶ 28-35). Finally, Plaintiff has brought a claim against Defendant Zurich American Insurance Company as the insurer of Defendant Royal Food pursuant to Georgia's direct action statute, O.C.G.A. § 40-2-140(d)(4). (Id. at ¶¶ 36-37).

### **ARGUMENT AND CITATION OF AUTHORITY**

As the United States Supreme Court has noted, “courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action.” *United States v. Kordel*, 397 U.S. 1, 12 n. 27, 90 S. Ct. 763 (1970). The Fifth Amendment protects individuals from involuntary self-incrimination in a criminal matter, “but also privileges him not to answer official questions put to him **in any other proceeding, civil or criminal**, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316 (1973) (emphasis added).

The Court may exercise its inherent authority to “control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *Bloomfield v. Liggett & Myers*, 230 Ga. 484, 485, 198 S.E.2d 144 (1973); *see also Austin v. Nagareddy*, 344 Ga.App. 636, 638, 811 S.E.2d 68. Where there is a parallel criminal action, the Court maintains discretion to stay a pending civil action. *Id.* at 639. “[A] person who waives his privilege of silence in a civil case risks that testimony in the civil case will be admissible in the criminal case.” *Id.* at 640 (citing *Brown v. State*, 256 Ga.App. 603, 610, 568 S.E.2d 727 (2002)). “A court may be justified in ordering a stay where the delay of the non-criminal proceeding would not seriously injure the public interest.” *S.E.C. v. Zimmerman*, 854 F. Supp. 896, 899 (N.D.Ga. March 24, 1993).

The similarity of the issues in the civil and criminal actions is "the most important threshold issue" a court must decide in determining whether to stay the civil action. *S.W. v. Clayton County Public Schools*, 185 F. Supp.3d 1366, 1372, 94 Fed.R.Serv.3d 1303 (N.D.Ga. May 12, 2016) (citing *Doe I v. City of Demopolis*, 2009 WL 2059311, at \*3 (S.D.Ala July 10, 2009)).

Although Georgia has yet to formally adopt a clear set of factors for determining whether to grant a stay, the court in *Nagareddy* recognized that the following factors set forth in authorities from other State and Federal jurisdictions may be considered:

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

*Nagareddy*, 344 Ga.App. at 639 (citing *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers*, 87 F.R.D. 53, 56 (E.D. Pa. April 30, 1980)). While these factors do not create a bright line rule, Georgia courts may consider a stay of the civil action "based on the particular facts before it and the extent to which such a stay would work a hardship, inequity, or injustice to a party, the public or the court." *Nagareddy*, 344 Ga.App. at 640; see *U-Haul Co. of Arizona v. Rutland*, 348 Ga.App. 738, 752 (2019). The interests here weigh heavily in favor of a stay and, therefore, Defendants' Motion should be granted.

**A. A Stay of the Civil Action Will Protect Defendant Jones's Fifth Amendment Rights.**

Without a stay of the instant action in place, Defendant Jones's privilege against self-incrimination under the Fifth Amendment will be jeopardized. Accordingly, the degree of the implication of Defendant Jones's Fifth Amendment rights should first be considered in determining

whether to grant a stay. *See Continental Ins. Co. v. Cota*, 2008 WL 4298372, \*2 (N.D.Cal. Sept. 19, 2008). If the instant action is not stayed, there will be an expansion of the rights of criminal discovery beyond that allowed under the rules of criminal procedure, and "expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case." *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376 (D. D.C. July 16, 1980). Additionally, the overlapping issues between the civil and criminal matter will impair Defendants' ability to meaningfully respond to discovery. The privilege of Defendant Jones against self-incrimination will necessarily hinder discovery efforts in the civil matter. If Defendant Jones responds to discovery, he will have to assert his Fifth Amendment privilege in response to every substantive inquiry. Likewise, if he were to be deposed, he would have to assert the same privilege in response to almost every question. If a stay is granted, Plaintiff will be afforded more complete discovery after the resolution of the criminal matter.

The issues presented in the civil action mirror those alleged by Plaintiff. Defendant Jones is alleged to have negligently collided with the vehicle Plaintiff's decedent was riding in, causing his death. Similarly, Defendant Jones has been charged in Gwinnett County with two (2) counts second degree vehicular manslaughter stemming from the same accident. The alleged conduct is the same. The concurrent civil and criminal proceedings impair Defendant Jones's ability to meaningfully defend himself in the civil action without waiving his Fifth Amendment rights. Defendant Jones should not be forced to decide between providing a viable defense in the civil action while simultaneously risking his defense in the criminal matter. A stay of this action until the resolution of the criminal proceeding will preserve Defendant Jones's constitutional rights and his ability to defend himself in this action.

**B. The Factors in Nagareddy Weigh in Favor of a Stay.**

**1. Overlap Between Criminal and Civil Proceedings.**

As discussed above, overlap between the allegations of the civil and criminal proceedings is "the most important threshold issue" when determining whether to stay the civil action. *S.W. v. Clayton County Public Schools*, 185 F. Supp.3d at 1372. A high degree of overlap creates a greater risk of self-incrimination. *See Aspen Financial Services v. Dist. Ct.*, 128 Nev. 635, 643, 289 P.3d 201 (2012).

The subject matter and allegations between this action and the pending criminal case against Defendant Jones are the exact same. The charges against Defendant Jones – second degree vehicular manslaughter and following too closely – are the same as those alleged by Plaintiff in his Complaint. (*See* Pl.'s Compl. ¶¶ 24, 27) ("The wreck caused Merlin's death" ... "Defendant Jones failed to obey Georgia law and the Uniform Rules of the Road, and is therefore liable *per se*, in several ways including but not limited to ... following too closely"). Therefore, there is a high degree of overlap between the civil and criminal proceedings such that Defendant Jones will not be able to adequately defend himself in the civil matter without waiving his Fifth Amendment rights in criminal matter.

**2. Defendant Jones Has Not Yet Been Indicted, Warranting a Greater Need for a Stay.**

Defendant Jones has not yet been indicted and, therefore, the need for a stay is greater. Defendant Jones has not been arraigned and has not entered a plea. If he is forced to respond to discovery and be deposed, he will be waiving his Fifth Amendment privilege and anything produced and divulged during discovery can be used against him. Defendant Jones may be subject to additional charges if responds to discovery. The criminal prosecutor will have more information than what he would be entitled to under the rules of criminal procedure.

If Defendant Jones chooses to negotiate a plea to avoid jail time, that opportunity may be hindered by him waiving his Fifth Amendment rights and testifying. Such testimony will certainly subject Defendant Jones to self-incrimination since he will be required to testify truthfully during a thorough and sifting cross-examination by Plaintiff. This may also negatively affect the criminal judge's acceptance of Defendant Jones's plea. Because the information and documents disclosed during discovery can be used against Defendant Jones, this factor weighs in favor of a stay.

3. **Defendants' Private Interests Weigh in Favor of a Stay, and Plaintiff's Private Interests Do Not Outweigh the Risks Associated with a Parallel Proceeding.**

Defendant Jones's private interests weigh in favor of a stay because his Fifth Amendment rights hang in the balance. An assertion of the Fifth Amendment privilege during discovery in a civil action may negatively impact a defendant's criminal case. *See Hardiman v. Cozmanoff*, 4 N.E.3d 1148, 1153 (Ind. 2014). Specifically, if Defendant Jones were to invoke his Fifth Amendment privilege in response to a deposition question, the criminal prosecutor may be able to obtain his defense strategy. *See Afro-Lecon, Inc. v. U.S.*, 820 F.2d 1198, 1203 (Fed.Cir.1987) (explaining that parallel civil proceeding could expose criminal defense to prosecutor). Defendant Jones may be burdened by the "likelihood that the materials unearthed during civil discovery may eventually inure to the benefit of the government prosecution." *King v. Olympic Pipeline Co.*, 104 Wash.App. 338, 16 P.3d 45 (2000).

Here, a stay of the civil action is critical due to the burden placed on Defendant Jones. Defendant necessarily risks his Fifth Amendment privilege if he is compelled to respond to discovery and testify at his deposition. If no stay is granted, and the parties move forward with discovery, Defendant Jones will have to decide whether to invoke his Fifth Amendment privilege

and weigh the associated risks. Any information obtained during discovery can be used in his criminal matter against him.

Plaintiff's private interests will not be prejudiced by a stay. Due to the pandemic, courts have halted civil and criminal jury trials. When the courts reopen, criminal trials will take precedence. As such, Defendant Jones's criminal case will resolve well before this case. Moreover, Plaintiff will be able to conduct complete discovery on Defendant Jones after the resolution of his criminal case, thereby avoiding duplicative efforts in obtaining discovery. Therefore, this factor weighs in favor of granting a stay.

**4. The Interests of Persons Not Parties to this Action.**

The interests of those which are not parties to this action will not be prejudiced if a stay is granted. This accident involved eight (8) individuals in five (5) different vehicles. Plaintiff is the only party who has filed suit, and Defendants are continuing their investigation of the accident. The other parties in the accident will not be prejudiced by the stay and, in fact, will benefit from the stay as it will provide them with the opportunity to resolve their claims against Defendants without the fear of insurance policy limits being diminished during this action. The stay will allow those parties time to continue their investigation into the accident and continue their medical treatment if need be prior to resolving their claims. For these reasons, this factor weighs in favor of a stay.

**5. A Stay of the Civil Action Pending Resolution of the Criminal Action Will Serve the Interests of the Court and the Public.**

By staying the civil matter, the Court will be able to efficiently use its time and resources in this case. Following the resolution of the criminal matter, discovery will be able to move forward without being obstructed due to Defendant Jones's right against self-incrimination. Furthermore, the public maintains "an interest in the integrity of the criminal case." *Javier H. v. Garcia-Botello*,

218 F.R.D. 72, 74 (W.D.N.Y. Sept. 12, 2003). Specifically, the "trial judge should give substantial weight to [the public interest in law enforcement] in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities." *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir.1962). Therefore, a stay of the civil action will encourage judicial efficiency and promote the interests of the public.

A stay of this action will ensure the uninterrupted progress of discovery following the completion of the criminal matter. Defendant Jones's Fifth Amendment right against self-incrimination will remain at risk if this matter is not stayed. Plaintiff will then have to engage in duplicative discovery prior to and after the resolution of the criminal matter. This will delay the civil matter and waste the resources of Plaintiff, Defendants, and the Court. For these reasons, a stay should be granted here.

### **CONCLUSION**

For the aforementioned reasons, Defendants respectfully requests that this Court enter an Order staying the above-referenced civil action pending adjudication of the related criminal proceedings.

Respectfully submitted this 26th day of February, 2021.

**HALL BOOTH SMITH, P.C.**

*/s/ Daniell R. Fink*

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**CERTIFICATE OF SERVICE**

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I hereby certify that I have this date served a copy of the within and foregoing **DEFENDANTS' MOTION TO STAY AND BRIEF IN SUPPORT** upon the following through the Odyssey eFileGa electronic filing system, an electronic notification will be sent automatically, addressed as follows:

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This 26th day of February, 2021.

[SIGNATURE PAGE FOLLOWS]

**HALL BOOTH SMITH, P.C.**

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