

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
2483CV00692

PAUL O'KEEFE, AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF JOHN JOSEPH O'KEEFE III & others¹

vs.

C&C HOSPITALITY, LLC d/b/a C.F. McCARTHY'S & others²

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT KAREN
READ'S MOTION TO STAY CIVIL PROCEEDINGS PENDING RESOLUTION
OF CRIMINAL TRIAL; DEFENDANT WATERFALL BAR & GRILL, LTD
d/b/a WATERFALL BAR & GRILL'S MOTION TO STAY PENDING
RESOLUTION OF RELATED CRIMINAL TRIAL; AND DEFENDANTS
C&C HOSPITALITY, LLC d/b/a C.F. McCARTHY'S AND G&S HOSPITALITY,
LLC d/b/a C.F. McCARTHY'S MOTION TO STAY**

The Estate and some of the surviving relatives of John J. O'Keefe III ("O'Keefe") filed this action against C.F. McCarthy's, Waterfall Bar & Grill, and Karen Read alleging wrongful death and negligent and reckless infliction of emotional distress. For the reasons discussed below, the defendants' motions to stay the proceedings pending the resolution of the criminal trial against defendant Karen Read are **ALLOWED** in part and **DENIED** in part.

BACKGROUND

The plaintiffs filed this action on August 26, 2024. Their complaint alleges the following facts. C&C Hospitality, LLC and G&S Hospitality, LLC own and operate C.F. McCarthy's

¹Paul O'Keefe, individually; John O'Keefe II; Margaret O'Keefe; and Margaret O'Keefe as guardian of Kayley Furbush

²G&S Hospitality, LLC d/b/a C.F. McCarthy's; Waterfall Bar & Grill, Ltd. d/b/a Waterfall Bar & Grill; and Karen Read

restaurant in Canton, Massachusetts. Waterfall Bar & Grill, Ltd. owns and operates the Waterfall Bar & Grill in Canton. Karen Read ("Read") was in a dating relationship with O'Keefe. On January 28, 2022, Read arrived at C.F. McCarthy's around 8:51 p.m. Between 8:58 p.m. and 10:29 p.m., the restaurant served her seven alcoholic beverages, which she drank. Read, who showed signs of intoxication while at C.F. McCarthy's, left around 10:40 p.m., carrying an alcoholic beverage out of the restaurant.

Read and O'Keefe entered the Waterfall Bar & Grill around 10:54 p.m. Read was carrying an alcoholic beverage from C.F. McCarthy's and showed signs of intoxication. Between 10:54 p.m. and 11:54 p.m., Waterfall Bar & Grill served Read one shot and one mixed alcoholic beverage, which she drank. Read and O'Keefe left Waterfall Bar & Grill around 12:10 a.m. on January 29, 2022.

The plaintiffs' complaint alleges the following additional facts: Read was under the influence of alcohol and unable to safely operate a motor vehicle. It was snowing and there was an impending blizzard. Read drove O'Keefe to a residence at 34 Fairview Road in Canton. After O'Keefe exited the vehicle, Read drove her SUV into O'Keefe, knocking him to the ground and causing him serious injuries. Read then fled the scene and returned to O'Keefe's residence at 1 Meadows Avenue in Canton, leaving O'Keefe on the ground in the blizzard. O'Keefe died from his traumatic injuries and hypothermia at 7:50 a.m. on January 29, 2022. Read's blood was drawn that day and read 93 mg/dl, which extrapolates to a blood alcohol level of between .13 and .29 at the time she hit O'Keefe.

Counts I through III of the complaint allege wrongful death against C.F. McCarthy's, Waterfall Bar & Grill, and Read, respectively, and Counts IV through XIII allege negligent, reckless, and intentional infliction of emotional distress.

In connection with O'Keefe's death, Read has been charged in Norfolk Superior Court, Docket Number 2282CR00117, with second degree murder, manslaughter while operating under the influence, and leaving the scene of an accident. Following a criminal trial that ended in a hung jury on July 1, 2024, Read is scheduled to be retried in Norfolk Superior Court on January 27, 2025.

In this civil case, Read has not answered the complaint. Instead, she moved to stay the proceedings. According to the tracking order, discovery will not close until August 17, 2026, and no trial date or pre-trial conference date has been scheduled. The plaintiffs have noticed Read's deposition for December 4, 2024.

DISCUSSION

Read moves to stay this action on the ground that her Fifth Amendment privilege against self-incrimination would be impacted if the wrongful death case proceeds while the criminal prosecution is ongoing. C.F. McCarthy's and Waterfall Bar & Grill also move to stay this litigation to preserve the resources of the parties and witnesses and promote judicial economy.

A stay of proceedings in a civil case pending the resolution of a parallel proceeding is addressed to the court's sound discretion. *Soe, Sex Offender Reg. Bd. No. 252997 v. Sex Offender Registry Bd.*, 466 Mass. 381, 391 (2013); *Travenol Lab, Inc. v. Zotal, Ltd.*, 394 Mass. 95, 97 (1985). However, the Court must give serious consideration to the reality that parallel civil and criminal proceedings significantly burden the Fifth Amendment privilege against self-incrimination. *Soe, Sex Offender Reg. Bd. No. 252997 v. Sex Offender Registry Bd.*, 466 Mass. at 388. Participation in the civil case poses the danger to the defendant of an increased likelihood of conviction at the criminal trial by self-incrimination through exposure to cross-examination.

Id. at 387. Despite the strategic dilemma posed by parallel proceedings; the refusal to stay a civil case pending the outcome of a criminal prosecution does not violate due process, even where the defendant's refusal to testify in the civil case creates an adverse inference against her. *Id.* at 389-391 & n.8. See also *Care and Protection of Quinn*, 54 Mass. App. Ct. 117, 122-123 (2002) (party in civil proceeding who faces criminal charges is not entitled to have judge accommodate both her desire to testify and her desire to remain silent); *United States Trust Co. of New York v. Herriott*, 10 Mass. App. Ct. 313, 316 (1980) (there is no constitutional requirement that civil proceeding must yield to criminal one).

In deciding whether to enter a stay, the court must balance the competing interests at stake based on the particular facts of the case, the interest of the public and the parties in the timely and fair adjudication of a civil wrong, any prejudice to the civil litigants from a stay, and the potential harm to the defendant from being compelled to choose between defending herself in the civil action and protecting herself from criminal prosecution. *Soe, Sex Offender Reg. Bd. No. 252997 v. Sex Offender Registry Bd.*, 466 Mass. at 391; *Adoption of Ursa*, 103 Mass. App. Ct. 558, 568 (2023), rev. den., 493 Mass. 1106 (2024); *United States Trust Co. of New York v. Herriott*, 10 Mass. App. Ct. at 317. The party seeking a stay bears the burden of establishing its necessity. *Singh v. Capuano*, 468 Mass. 328, 332 (2014); *Soe, Sex Offender Reg. Bd. No. 252997 v. Sex Offender Registry Bd.*, 466 Mass. at 391.

The Estate undoubtedly has an interest in the expeditious resolution of this wrongful death case. Nonetheless, Read's criminal retrial is scheduled to commence on January 27, 2025, and based on the first trial, will likely take no more than three months. A stay of six months is reasonable and would neither violate the public interest nor, as discussed below, unduly prejudice the plaintiffs. See *J&G Foods, Inc. v. Eaton*, 2012 WL 4049225 at *2 (Mass. Super. Ct.) (Ferrara,

J.) (staying civil case pending resolution of criminal case against defendant where civil case was only nineteen months old, criminal case was scheduled to be resolved in six months, and delay of additional six months would not significantly harm plaintiff). Cf. *Soe, Sex Offender Reg. Bd. No. 252997 v. Sex Offender Registry Bd.*, 466 Mass. at 392 (board properly denied request to continue classification proceeding where it was uncertain whether criminal case, although scheduled to begin shortly, would conclude within reasonable period of time and there was strong public safety interest in prompt classification); *Adoption of Ursa*, 103 Mass. App. Ct. at 569 (judge properly denied stay of care and protection case where criminal trial was not scheduled for another six months and delay would disrupt lives of minor children and harm them). See also *United States Trust Co. of New York v. Herriott*, 10 Mass. App. Ct. at 319 (judge properly denied open-ended request for continuance that could have delayed civil case indefinitely).

The plaintiffs claim prejudice from a stay due to the degradation of evidence. Specifically, they argue that restaurant employees and third-party witnesses may experience fading memories or become uncooperative over time. See *Del Valle v. Bechtel Corp.*, 2008 WL 4107325 at *1 (Mass. Super. Ct.) (Neel, J.) (noting that delay of depositions and discovery poses risk of irremediable loss of witness memory and lesser risk of witness unavailability for deposition or trial). Given the extensive investigation into O'Keefe's death and the completed first prosecution, the risk that evidence will be unpreserved and witness memories will fade does not appear to be substantial.

The plaintiffs further contend that delay will be prejudicial because Read's media campaign is poisoning the jury pool, citing her October 18, 2024 television interview with NBC's Dateline. Any influence on the jury pool from delay can be remedied by the usual

procedures employed during empanelment to ensure that jurors remain impartial despite any prior knowledge of the case. See *Commonwealth v. Entwistle*, 463 Mass. 205, 221-222 (2012), cert. den., 568 U.S. 1129 (2013) (there is no entitlement to jury that knows nothing about the case and even with pervasive pretrial publicity, impartial jury can be empaneled as long as judge determines that jurors can fairly weigh evidence presented, set aside any information learned outside courtroom, and follow judge's instructions); *Commonwealth v. Toolan*, 460 Mass. 452, 463-465 (2011) (noting that jury pool will be found to be pervasively biased by media coverage only in extraordinary circumstances); *Commonwealth v. Mack*, 482 Mass. 311, 316 (2019) (individual voir dire of prospective jurors is proper way to ensure that each selected juror can render fair and impartial verdict in case where risk of juror bias from pretrial publicity is particularly acute or especially significant); *Commonwealth v. Seabrooks*, 433 Mass. 439, 442 (2011) (same).

Moreover, because this case is in its earliest stages and the criminal case is scheduled to go to retrial in three months, the court will not be inconvenienced by a brief stay, and any scheduling conflict with witnesses that might arise would presumably be resolved in favor of the criminal prosecution. Even with a brief stay, the plaintiffs' wrongful death claim can be litigated within the established tracking order.

C.F. McCarthy's and Waterfall Bar & Grill emphasize that their employees and the third-party witnesses who testified at the first criminal trial may be subject to discovery in this trial while also having to testify in the criminal retrial. They therefore urge a stay to preserve the resources of the parties and witnesses. However, the defendants have not demonstrated an undue burden on the witnesses from parallel proceedings, and the Court gives only minimal weight to preservation of the parties' resources.

The most important factor to be weighed is the potential impairment of Read's Fifth Amendment privilege against self-incrimination. See *United States Trust Co. of New York v. Herriott*, 10 Mass. App. Ct. at 317 (court must not turn deaf ear to serious claim of privilege). The critical issues in both this civil action and the criminal prosecution are whether Read was intoxicated and caused O'Keefe's death by hitting him with her motor vehicle. Although the restaurants' civil liability turns on whether they acted reasonably when serving alcoholic beverages to Read prior to O'Keefe's death, their liability nonetheless depends on whether Read hit O'Keefe with her vehicle, a critical issue in the criminal prosecution. There is thus substantial overlap between the two cases, implicating Read's Fifth Amendment privilege.

The plaintiffs argue that "[b]y actively participating in public discourse and potentially profiting from media engagements, Read effectively foregoes any claim of [F]ifth [A]mendment protection" and her "choice to speak out starkly contradicts any suggestion that she is concerned with self-incrimination." As distasteful as Read's media campaign may be to the plaintiffs, her statements to the media about the criminal case do not constitute a waiver of her right against self-incrimination. See *Commonwealth v. Dormandy*, 423 Mass. 190, 195-196 n.3 (1996) (defendant's unsworn statements to police about crime do not waive Fifth Amendment testimonial privilege); *United States Sec. & Exch. Comm'n v. Kanodia*, 153 F.Supp.3d 478, 483 n.2 (D. Mass. 2015) (defendant's submission to interviews with U.S. Attorney's Office and guilty plea to information did not waive Fifth Amendment privilege with respect to indictment). Cf. *Care and Protection of M.C.*, 479 Mass. 246, 261 (2018) (witness who testifies under oath waives self-incrimination privilege in same proceeding with respect to subject of testimony); *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 78 (1st Cir. 2004) (defendant waived Fifth Amendment privilege by giving deposition testimony and filing affidavit under oath

concerning subject matter of criminal charges). The Court therefore must give due consideration to that weighty privilege. Cf. *Del Valle v. Bechtel Corp.*, 2008 WL 4107325 at *1 (denying stay of discovery in wrongful death case pending resolution of criminal charges where corporate defendant seeking stay lacked any Fifth Amendment privilege and could not invoke privilege of affiliated individuals to prevent discovery).

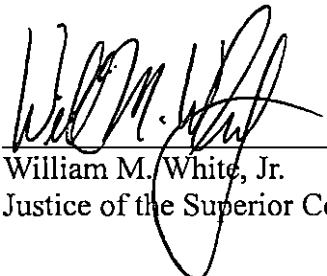
As noted, *supra*, this civil suit is only in the initial stages whereas the criminal retrial is scheduled for January 27, 2025, and likely will last no more than three months. The prejudice to Read from having to choose between defending this wrongful death action and protecting herself from providing evidence that might be used against her in the criminal retrial outweighs the Estate's interest in the expeditious resolution of the wrongful death case. Thus, a brief stay of this action is warranted. See *M.K. v. D.B.*, 102 Mass. App. Ct. 183, 190 (2023) (noting that because pending criminal proceeding presents Fifth Amendment conundrum for defendant in civil case, civil action often is at least partially stayed until conclusion of criminal case).

Nonetheless, a general stay of litigation generally is not the best option available to the court and litigants, and a stay should be tailored to avoid undue prejudice. *Cook v. Lynn & William, Inc.*, 675 F.Supp.3d 155, 158 (D. Mass. 2023); *Green v. Cosby*, 177 F.Supp.3d 673, 678-679 (D. Mass. 2016). See also *M.K. v. D.B.*, 102 Mass. App. Ct. at 190 (acknowledging possibility of partial stay of civil case). By limiting a stay to the deferral of particular discovery, the court can allow a civil proceeding to progress as much as possible without prejudicing the litigants' interests. *Green v. Cosby*, 177 F.Supp.3d at 682-683. It is unnecessary to completely stay this wrongful death suit to avoid impairing Read's Fifth Amendment privilege. Rather, the interests of the parties, the court, and the public will best be served by staying only that discovery directed to Read, pending resolution of the second criminal prosecution in Norfolk

Superior Court. See *id.* See also *United States Sec. & Exch. Comm'n v. Kanodia*, 153 F.Supp.3d 478, 483 (D. Mass. 2015) (staying defendant's deposition to protect Fifth Amendment privilege pending resolution of criminal charges but allowing other discovery to proceed).

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendant Karen Read's Motion to Stay Civil Proceedings Pending Resolution of Criminal Trial; Defendant Waterfall Bar & Grill, Ltd d/b/a Waterfall Bar & Grill's Motion to Stay Pending Resolution of Related Criminal Trial; and Defendants C&C Hospitality, LLC d/b/a C.F. McCarthy's and G&S Hospitality, LLC d/b/a C.F. McCarthy's Motion to Stay be **ALLOWED** to the extent that the scheduled deposition of defendant Karen Read and other discovery from defendant Karen Read are **STAYED** pending the retrial in *Commonwealth v. Karen Read*, Docket Number 2282CR00117. In all other respects, the defendants' motions to stay are **DENIED**.



William M. White, Jr.
Justice of the Superior Court

DATED: October 31, 2024