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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 Vianca Lizarraga,)

9 Plaintiff,)

10 v.)

11 City of Nogales Arizona, and Ramon F. Borbon)
and Esmeralda Borbon, husband and wife,)

12 Defendants.)
13 _____)

CV 06-474 TUC DCB

ORDER

14 This case has been stayed since November 1, 2007, to allow a parallel criminal case
15 to proceed to trial. The trial commenced on April 29, 2008, but ended in a mistrial. The trial
16 has been reset for October 23, 2008.

17 On May 16, 2008, Defendant asked the Court to lift the stay and issue a scheduling
18 order for this case to proceed. The Court lifted the stay on July 15, 2008, and asked the
19 parties to file a joint proposed case management schedule for the case. The Joint Case
20 Management Plan was filed on August 8, 2008. The parties estimate that discovery will take
21 until July 31, 2009, with dispositive motions filed by August 14, 2008 and a Pretrial Order
22 filed on August 30, 2009.

23 On July 30, 2008, the Plaintiff filed a Motion for Protective Order to restrict the use
24 of discovery in this case from being used in the criminal case. Plaintiff submits that the
25 grounds for the protective order are virtually identical to the reasons the case was previously
26 stayed. Plaintiff noted that there has already been extensive briefing on the propriety of
27 using civil discovery proceedings to advance interests in a simultaneous criminal matter.
28 Plaintiff submits that the protective order is necessary to minimize the risk that “the rules and

1 policies applicable to one suit from doing violence to those pertaining to the other.” (Motion
2 at 3 (citing *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962)).

3 Plaintiff is correct that prior briefs have covered this question, but it was not the
4 determinative reason this Court granted the stay in this case. Instead, this Court was
5 persuaded by Plaintiff’s assertion, supported by her treating psychiatrist, that her mental
6 fragility prevented her from simultaneously participating here and in the criminal trial. Her
7 psychiatrist believed that her ability to participate in the criminal case would be jeopardized
8 if she was forced to proceed here in so close proximity to the criminal trial. This would of
9 course jeopardize the criminal trial. The Court’s last order extending the stay until the trial
10 date in April made it quite clear that there would be no further extension of the stay if the
11 criminal matter was again continued, because if the “Plaintiff’s mental health [was]
12 sufficiently stable to proceed in the criminal matter, it must be sufficiently stable to proceed
13 here.” The Court explained that if the criminal matter was not proceeding, this case would
14 go forward. (Order, document 83, at 2.)

15 The Court applied a balancing test, weighing the advantages to the movant for the
16 stay against the harm to others which would result from granting the motion. *See Federal*
17 *Sav. and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 903 (9th Cir. 1989) (setting out the five
18 factors for consideration: (1) plaintiff’s interests in resolving the civil case quickly; (2) the
19 burdens a stay will impose upon the defendants; (3) the effect a stay will have on the courts;
20 (4) third parties’ interests; and (5) the public’s interests). This same balancing is required in
21 respect to the State’s Motion to Stay, if the Court grants the State leave to intervene pursuant
22 to Fed. R. Civ. P.24(b). The Court concluded that the mental and emotional harm to the
23 Plaintiff, which would negatively impact the criminal trial, outweighed the disadvantage to
24 the Defendant of not proceeding with the civil case.¹

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26 ¹When this case was initiated, Defendant answered and sought a stay due to 5th
27 Amendment concerns, which the Court denied and instead issued a protective order. At that
28 time, the Court balanced the Defendant’s need for the stay against the Plaintiff’s interest in

1 On August 18, 2008, the State filed a Motion to Intervene and Motion to Stay. The
2 Defendant objects to the Motion to Intervene as untimely because the prosecutor has sat on
3 the sidelines for almost two years regarding the need for a stay in this case. (Opposition to
4 State at 3.) Rule 24 requires a timely motion and delay alone may merit a rejection. *Id.* at
5 4 (citing *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir.
6 1997); *Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc.*, 62 F.3d
7 1217, 1219 (9th Cir. 1995). These cases reflect situations where intervention was denied
8 because it would delay a proceeding or cause re-litigation of issues already resolved by the
9 parties, resulting in prejudice to the parties. In determining whether a motion for intervention
10 is timely, we consider three factors: "(1) the stage of the proceeding at which an applicant
11 seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the
12 delay." *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir.1986). *Wilson*, 131
13 F.3d at 1302.

14 The Defendant submits, "the Court has already considered the prejudice to the
15 Defendants and recognized this case has been pending for one and a half years with no active
16 advancement by the Plaintiff." (Order filed March 12, 2008, at 2.) Defendant submits that
17 he is defended under a reservation of rights insurance provision, which might be jeopardized
18 depending on the outcome in the criminal case so he is prejudiced by not being allowed to
19 depose key witnesses that are relevant to the civil case. (Opposition at 4.) As noted above,
20 the interests balanced by the Court when it last stayed the case differ from those urged now.

21 While the State's silence unquestionably limited this Court's previous decision to
22 stay to Plaintiff's assertion that she would not be able to hold-up under the strain of her
23 responsibilities in the two proceedings, if forced to perform simultaneously, and this could
24 certainly impact the criminal trial. This was enough to offset the prejudice to the Defendant
25 when combined with the fact of a timely trial date in the criminal case. Additionally, the

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27 proceeding and found that a protective order served both parties.

1 State's delay in seeking to intervene is understandable given the Court granted the Plaintiff's
2 request and stayed the case.

3 The Court finds that intervention will not unduly delay or prejudice the adjudication
4 of the original parties rights. First, there has been little discovery in the case as is reflected
5 by the parties' request in the Joint Case Management Report for almost one year of
6 discovery. The record reflects that the Defendant has been deposed, Plaintiff has submitted
7 to an Independent Medical Examination (IME), and her medical records have been disclosed.
8 None of this will have to be redone because of the State's intervention nor will the State's
9 intervention delay future discovery in the case because it intervenes for the sole purpose of
10 securing the stay and will not be participating in the civil case. It is the stay that will delay
11 the case, not the intervention.

12 Having found the request to intervene timely and that intervention will not delay the
13 case, the Court also finds that the State meets the procedural requirements of permissive
14 intervention under Fed. R. Civ. P. 24(b) because there are many common questions of law
15 and fact in the civil and criminal cases. In both cases, the question is whether or not the
16 Defendant raped the Plaintiff, and the defense is that the two had consensual sex.

17 Because the Court grants the State's intervention, the Court considers the merits of
18 the State's request for a stay. Here, the commonality between the two cases is the most
19 important factor in deciding whether or not to stay this case. A conviction in the criminal
20 case may work an estoppel in favor of the Plaintiff in a subsequent civil case, but if she
21 proceeds to judgment here first, there is the threat of inconsistent judgments. *See SEC v.*
22 *Nicholas*, 2008 WL 2977480, * 4-5 (9th Cir. August 4, 2008) (discussing parallel civil and
23 criminal proceedings and collateral estoppel); *see also* (Plaintiff's Reply at 1-2 (discussing
24 Full Faith and Credit Act, 28 U.S.C. § 1783, which requires federal courts to give the same
25 preclusive effect to state court judgments as given in the state courts and A.R.S. § 13-807
26 providing for issue preclusion) (citations omitted).

1 A criminal Defendant does not need the wide-ranging civil discovery rules to launch
2 a full and fair defense. *Id.* at *5. ““The criminal rules of discovery were not designed with
3 the intention of stymieing a defendant’s ability to mount a complete defense.”” *Id.* (quoting
4 *SEC v. Downe*, 1993 WL 22126, at *12-13 (N.Y. January 26, 1993)). “Rather, they are
5 purposefully limited so as to prevent perjury and manufactured evidence, to protect potential
6 witnesses from harassment and intimidation, and to level the playing field between the
7 government and the defendant, who would be shielded from certain discovery by the Fifth
8 Amendment.” *Id.* (citing *Campbell v. Eastland*, 307 F.2d 478, 487 (n.12 (5th Cir. 1962)).

9 This case is a good example of how that balance can be upset when civil discovery
10 finds its way into a criminal case. Here, the Plaintiff’s medical records discovered in the
11 civil case are now being used in the criminal case by the State to establish that Plaintiff did
12 not consent to sex with the Defendant and being used by the Defendant to prove the Plaintiff
13 is lying and to charge the prosecuting attorney with soliciting perjured testimony from the
14 Plaintiff.

15 The discovery in the civil case is voluminous and complex, involving both medical
16 records and medical and mental health expert opinions. Already, the criminal court is being
17 forced to consider the relevancy and admissibility of medical records and the IME in the
18 criminal case. The State alleges that normally the Victim’s Bill of Rights protects a crime
19 victim from being forced to disclose records of medical treatment to a Defendant. (Motion
20 for Stay at 7 (citing Ariz. Const. Art. 2, § 2.1(A)(5)). In an Arizona criminal case, a
21 Defendant is entitled to disclosure of the type he secured here through the civil proceeding,
22 only after a Rule 15.1(g) hearing, where he would have to show a substantial need for the
23 records that at least potentially reaches a constitutional dimension and that it would be an
24 undue hardship for him to get evidence that is the substantial equivalent by another means.
25 He would have to present a sufficiently specific basis to believe that there is a reasonable
26 possibility that he is entitled to records as a matter of due process, and then the trial court

1 would conduct an *in camera* review of the documents before deciding which if any
2 documents to disclose. *Id.* at 7-8 (citations omitted).

3 The district court has discretion to stay a civil action in favor of parallel criminal
4 proceedings if a stay is in the interest of justice. *Keating v. Office of Thrift Supervision*, 45
5 F.3d 322, 324 (9th Cir. 1995). Given the criminal trial is set for October, 2008, the Court
6 finds that staying the civil proceedings is the most prudent course under the circumstances
7 as outlined by the State. The criminal proceeding is of paramount importance to the victim,
8 the Defendant, the public, and the courts. The simultaneous prosecution of the two cases will
9 undermine the public's interest in a fair and efficient prosecution of its criminal laws, distract
10 the parties and the court involved in the criminal proceeding from preparing the criminal case
11 and divert the trial courts' attention with burdensome discovery litigation and unnecessary
12 law and motions.

13 **Accordingly,**


14 **IT IS ORDERED** that the State's Motion to Intervene and Motion for a Stay
15 (document 96) is GRANTED.

16 **IT IS FURTHER ORDERED** that the Plaintiff's Motion for a Protective Order
17 (document 89) is DENIED AS MOOT.

18 **IT IS FURTHER ORDERED** that the State shall keep the Court informed
19 regarding the status of the criminal proceeding regarding any continuances, when it
20 commences, and its conclusion.

21 DATED this 27th day of August, 2008.

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David C. Bury
United States District Judge