

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN DIVISION**

TAMARA GREEN et al.,

**Plaintiffs/Counterclaim
Defendants,**

v.

WILLIAM H. COSBY, JR.,

**Defendant/Counterclaim
Plaintiff.**

Case No.: 3:14-cv-30211-MGM

**CAMILLE COSBY'S MEMORANDUM IN SUPPORT OF HER
EMERGENCY MOTION TO STAY HER DEPOSITION, CURRENTLY SET FOR
JANUARY 6, 2016, PENDING THE RESOLUTION OF HER APPEAL OF THE
MAGISTRATE'S ORDER (DKT. 146) DENYING HER MOTION TO QUASH HER
DEPOSITION SUBPOENA**

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PRELIMINARY STATEMENT

Non-party Camille Cosby brings the present emergency motion to stay her deposition, noticed for January 6, while this Court considers her appeal of the Magistrate's ruling on her motion to quash. Mrs. Cosby's appeal concerns an issue of first impression on the application of Massachusetts' Marital Disqualification Rule ("Disqualification Rule") to testimony at deposition.

The Disqualification Rule prohibits any spouse from testifying as to their private marital conversations in "any proceeding, civil or criminal, in court or before a person who has authority to receive evidence."¹ Pursuant to that Rule, Mrs. Cosby filed a motion to quash Plaintiffs' deposition subpoena to her. On December 31, 2015, the Magistrate denied Mrs. Cosby's motion to quash, deciding that the Disqualification Rule only restricts testimony at trial, so that a spouse would have to testify at deposition about marital communications, even though that same testimony would be barred and inadmissible at trial.

Upon review of the Magistrate's order, Mrs. Cosby immediately informed Plaintiffs that she intended appeal the order to the District Court, and asked if Plaintiffs would agree to postpone the deposition during the pendency of the appeal. Plaintiffs refused and, among other things, threatened to seek the assistance of federal marshals to compel Mrs. Cosby's deposition on January 6. Accordingly, Mrs. Cosby brings this emergency motion to stay her deposition so that the District Court may have a full opportunity to review the Magistrate's order, pursuant to Fed. R. Civ. P. 72(a).

¹ See Mass. Gen. Laws Ann. ch. 233, § 20 ("Section 20") ("Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows: [...] neither husband nor wife shall testify as to private conversations with the other.")

FACTS

The Subpoena to Mrs. Cosby. On December 3, 2015, Plaintiffs' counsel announced to the press that he intended to take the deposition of Camille Cosby on January 6, 2016. Six days later, on December 9, 2015, Plaintiffs served a deposition subpoena on Mrs. Cosby, seeking her deposition testimony in connection with the claims brought by Plaintiffs herein. (*See* Dkt. 128-2.) On December 9 and 15, 2015, and pursuant to Local Rule 7.1(a)(2), counsel to Mrs. Cosby conferred with Plaintiffs' counsel regarding the viability and scope of her deposition subpoena. (*See* Dkt. 128 at 3.)

Mrs. Cosby's Motion to Quash. On December 18, 2015, Mrs. Cosby filed a motion to quash her deposition subpoena, or, in the alternative, for a protective order ("Motion"). (*See* Dkt. 127; Dkt. 128; Dkt. 141.) Mrs. Cosby's motion pointed out that, pursuant to the Disqualification Rule, she is barred from testifying about marital conversations. Plaintiffs filed their opposition to Mrs. Cosby's Motion on December 21, 2015 (*see* dkt. 130), to which Mrs. Cosby replied on December 30, 2015 (*see* dkt. 141).

The Magistrate's December 31, 2015 Denial of the Motion. On December 31, 2015, the Magistrate entered an order denying Mrs. Cosby's motion in its entirety (the "Order"). (*See* Dkt. 146.) Although the Disqualification Rule broadly prohibits any spouse from testifying as to their private marital conversations in "any proceeding, civil or criminal, in court or before a person who has authority to receive evidence,"² the Magistrate decided that the Disqualification Rule only applies to limit testimony at trial. According to the Magistrate, "the rule's underlying character—*i.e.*, competence, not privilege—concerns admissibility of evidence at trial, and not a

² *See* Mass. Gen. Laws Ann. ch. 233, § 20 ("Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows: [...] neither husband nor wife shall testify as to private conversations with the other.")

privilege against discovery.” (*See id.* at 6.) Thus, notwithstanding the prohibitions of the Disqualification Rule, “there is nothing precluding [Mrs. Cosby’s] *deposition* as a tool to discover information gleaned from conversations between Mrs. Cosby and the defendant.” (*See id.* at 10) (emphasis in original.)

Plaintiffs’ Refusal to Postpone the Deposition During Pendency of an Appeal. Upon review of the Magistrate’s Order, on December 31, 2015, counsel informed Plaintiffs’ counsel that Mrs. Cosby intended file an appeal with the District Court, and asked if Plaintiffs would agree to stay the deposition during the pendency of the appeal. To that end, counsel suggested that Mrs. Cosby’s deposition could proceed during the third week of January in the event the appeal was denied. (*See* Exhibit A.)

Plaintiffs responded that they would oppose any appeal or stay of the Order. (*See id.*) Plaintiffs also threatened, absent an order from this Court, to “enforce [Mrs. Cosby’s] appearance, on the date of the deposition, by whatever legally appropriate means are available” including by “obtaining the assistance of the U.S. Marshalls to secure her attendance.” (*See id.*) Plaintiffs further threatened to seek attorneys’ fees and costs if Mrs. Cosby did not comply with the notice of deposition and subpoena. (*See id.*)

Accordingly, Mrs. Cosby has brought the instant emergency motion.

ARGUMENT

I. THIS COURT HAS DISCRETION TO STAY MRS. COSBY’S DEPOSITION DURING THE PENDENCY OF AN APPEAL.

This Court should stay Mrs. Cosby’s deposition while she fully briefs her appeal of the Magistrate’s Order. Mrs. Cosby’s deposition has been noticed for January 6, 2016, but Plaintiffs’ counsel has refused to postpone the deposition during the pendency of Mrs. Cosby’s appeal of the Magistrate’s ruling on her motion to quash.

Emergency relief may be sought when issues raised on a motion to quash will not be decided before the date of the deposition. *See Goodwin v. City of Boston*, 118 F.R.D. 297, 298 (D. Mass. 1988); *see also* Local Rule 40.4. Upon such motion, this Court has discretion to fashion the terms of a protective order to accommodate the needs of the interested party. *See Ares-Serono, Inc. v. Organon Int'l B.V.*, 153 F.R.D. 4, 6 (D. Mass. 1993). Indeed, this Court may impose a stay on discovery for a finite period of time, or limit discovery for finite amount of time, so long as the postponement is in the interest of justice. *See Digital Equip. Corp. v. Currie Enterprises*, 142 F.R.D. 8, 12 (D. Mass. 1991) (citing *Securities & Exchange Commission v. Dresser Industries*, 628 F.2d 1368, 1375 (D.C.Cir.) (court may impose protective orders or postpone civil discovery in the interests of justice)).

II. AN EMERGENCY STAY IS NECESSARY SO THAT THIS COURT MAY CONSIDER A MATTER OF FIRST IMPRESSION ON THE MASSACHUSETTS MARITAL DISQUALIFICATION RULE.

Here, this Court should grant Mrs. Cosby emergency relief, staying her deposition pending her appeal of the Magistrate's Order pursuant to Fed. R. Civ. P. 72(a). The Order raises an issue of first impression concerning the scope of the Marital Disqualification Rule. In the Order, the Magistrate concluded that the Marital Disqualification Rule does not apply to limit deposition testimony on spousal communications. (*See* Dkt. 146 at 10.) No Massachusetts state case, nor any federal case, has ever so interpreted the Rule. Accordingly, this Court should stay the deposition so that it may consider full briefing and argument over the scope of the Rule.

A. The Marital Disqualification Rule Has Been Established To Protect Marital Communications.

The Disqualification Rule broadly prohibits any spouse from testifying as to the private conversations with the other in "any proceeding, civil or criminal, in court or before a person

who has authority to receive evidence.” *See* Mass. Gen. Laws Ann. ch. 233, § 20.³ Unlike Massachusetts’ spousal privilege—which only restricts testimony “in the trial of an indictment, complaint, or other criminal proceeding”—the Disqualification Rule does not contain any such limitation. *See* Section 20, First (“[N]either husband nor wife shall testify as to private conversations with the other.”); *c.f.* Section 20, Second ([N]either husband nor wife shall be compelled to testify *in the trial of an indictment, complaint or other criminal proceeding* against the other”); *see also* MA R. Evid. § 504.⁴

Instead, the Rule serves to protect several important policy considerations that the Massachusetts Legislature has protected for over a century—*e.g.*, preserving the confidentiality of marital communications as well as preventing any marital disharmony caused by an examination which might call for unfavorable, yet protected testimony (*see Gallagher v. Goldstein*, 402 Mass. 457, 460-61 (1988))—by prohibiting any spouse from providing testimony that discloses their confidential marital communications. Availing herself to the Disqualification Rule’s broad protections, Mrs. Cosby filed her motion to quash.

B. Notwithstanding The Broad Nature Of The Marital Disqualification Rule, The Magistrate Decided That The Rule Does Not Apply At Deposition.

Despite the broad and plain language of the statute, the Magistrate denied Mrs. Cosby’s motion to quash. In so doing, the Magistrate decided that the Disqualification Rule only applies to prohibit testimony at trial and does not limit testimony at deposition. (*See* Dkt. 146 at 6.) According to the Magistrate, the Disqualification Rule does not apply to testimony at deposition, so “there is nothing precluding [Mrs. Cosby’s] *deposition* as a tool to discover information

³ There are several statutorily-enumerated exceptions to the marital disqualification rule (*see* Gen. Laws Ann. ch. 233, § 20, First).

⁴ Although the Magistrate acknowledges that Mrs. Cosby’s brief cites to Mass. Gen. Laws Ann. ch. 233, § 20 (*see* dkt. 146 at n.7), the Order nevertheless cites to MA. R. Evid. § 504 in its discussion of the Disqualification Rule which (*see id.* at 5), while “derived” from the statute, does not contain the complete language of the Rule. *See* Mass. Gen. Laws Ann. ch. 233, § 20, First.

gleaned from conversations between Mrs. Cosby and the defendant.” (*See id.* at 10.) Seemingly, according to the Magistrate’s interpretation, Mrs. Cosby is required to disclose her private and confidential marital communications to Plaintiffs during her deposition because her testimony may be used as a discovery tool to discover other information based on her private communications with her husband.

Neither Plaintiffs nor the Magistrate cited any Massachusetts or federal case holding that the Disqualification Rule is limited only to trial testimony, nor has research located any such case. To the contrary, the broad and plain language of the Disqualification Rule, prohibiting a spouse from testifying in “*any proceeding, civil or criminal, in court or before a person who has authority to receive evidence*” suggests that the Rule’s prohibitions apply to all testimony. *See* Mass. Gen. Laws Ann. ch. 233, § 20 (emphasis added); *see also Gallagher*, 402 Mass. at 460-61 (“The language of [Section 20] is not to be enlarged or limited by construction unless its object and plain meaning require it.”).

Additionally, the Magistrate’s Order requires a result that seems contrary to Massachusetts law. The Order suggests that Mrs. Cosby is required to testify to the substance of her marital communications at deposition. (*See* Dkt. 146 at 10) (finding that the Disqualification Rule does not apply to deposition testimony). However, under Massachusetts law, a spouse who provides an answer about such communications is considered to have waived the privilege. *Miller v. Miller*, 448 Mass. 320, 326 (2007) (if no objection is made when the prohibited testimony is introduced, “then the testimony may be admitted for its full probative value”). As such, the Magistrate’s Order creating an exception for deposition testimony would potentially swallow up the entire Disqualification Rule.

Because the Disqualification Rule promotes policy implications protected and enumerated by Massachusetts statute, this Court should grant Mrs. Cosby an emergency stay to allow this Court to fully brief these issues upon appeal pursuant to Fed. R. Civ. P. 72(a).

C. A Stay Is Also Necessary Because Plaintiffs Intend To Provide Intimate Details Of Mrs. Cosby's Marriage To The Press.

Deciding the application of the Marital Disqualification Rule here is all the more important because Plaintiffs have indicated that they intend to disclose Mrs. Cosby's deposition testimony, including her private marital conversations, to the press. In his Order, the Magistrate has suggested that the Plaintiffs may ask Mrs. Cosby about the most intimate details of her marital life, including her husband's sexual "proclivities." (*See* Dkt. 146 at 10; Dkt. 130 at 5.) Plaintiffs have made clear that they will publicize all such testimony. (Dkt. 148 at 8-10.) A trial objection will do Mrs. Cosby little good if the private and intimate details of her marital life are discussed during deposition and released to the media thereafter. *See Gallagher*, 402 Mass. at 460-61.

Indeed, without a stay of her deposition, both Mrs. Cosby's privacy and freedom will be put at issue in a case to which she is not a party, and for which she is not alleged to have any personal, first-hand knowledge. Plaintiffs have threatened using the U.S. Marshals to secure Mrs. Cosby's attendance at the January 6, 2016 deposition, rather than working with Mrs. Cosby to afford this Court a proper opportunity to review the underlying issues of first impression that that may be presented on appeal. An emergency stay of Mrs. Cosby's deposition is warranted in this case to preserve her substantive rights to privacy while this Court reviews the Magistrate's Order on appeal.⁵

⁵ Additionally, since the time that Mrs. Cosby's motion to quash was filed, on December 30, 2015, Defendant Cosby was charged in a separate criminal proceeding, *see Commonwealth of Pennsylvania v. William*

CONCLUSION

For the reasons set forth herein, this Court should grant Mrs. Cosby's emergency motion to stay her deposition, currently set for January 6, 2016, while this Court considers her appeal of the Magistrate's ruling on her motion to quash.

Dated: January 4, 2016

Respectfully submitted,

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Henry Cosby (Dkt. No.: MJ-38102-CR-0000131-2015). Neither the magistrate nor the parties briefed or discussed the propriety potential implications of that criminal proceeding upon Mrs. Cosby's deposition in this matter.

CERTIFICATE OF SERVICE

I hereby certify that, on January 4, 2016, I caused the foregoing document and corresponding exhibit to be electronically filed using the CM/ECF, which will automatically transmit Notice of Electronic Filing to all attorneys of record, as follows:

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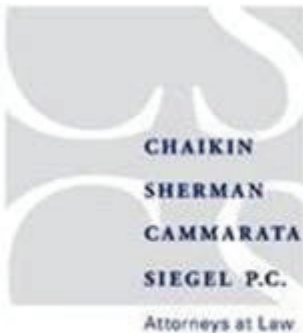
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Subject: RE: Camille Cosby deposition/additional scheduling.

Marshall,

We oppose any appeal or stay of the Court's ruling. It is our opinion that an appeal does not lie, and a stay is not warranted. The deposition will go forward pursuant to the notice of deposition, and subpoena issued to Mrs. Cosby. A failure to appear, without a Court order excusing her attendance, will be a violation of her obligation under the subpoena and she will be subject to the consequences of any such decision. Any such failure to appear will leave us no choice but to enforce her appearance, on the date of the deposition, by whatever legally appropriate means are available to us, including obtaining the assistance of the Court, and with permission of the Court obtaining the assistance of the U. S. Marshall to secure her attendance. Furthermore, we intend to seek attorneys' fees and costs for the willful failure to comply with the notice of deposition and subpoena.

I wrote you before Christmas asking for your cell phone number so we could speak over the weekend to discuss the scheduling of plaintiffs' depositions. Despite the fact that you wrote that I could call you on Saturday and Sunday, and my call to you on Sunday, I never received a return call. I anticipate we will be able to agree upon a location for the Sept 13 deposition, as well as dates for the remaining depositions, when we are together in Springfield on January 6.
Joe



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Subject: Camille Cosby deposition/additional scheduling.

Joe and Matthew,

We intend to file an appeal of today's decision with the District Court on Monday. In the event that our appeal is unsuccessful, we can make Mrs. Cosby available for deposition during the third week of January. Let me know if this is agreeable to you, or if we also need to seek a stay of the January 6 deposition date from the Court.

In addition, we still need to figure out where we're going to have Ms. Moritz deposition on January 13, as well as some additional dates for plaintiffs depositions.

Let me know when you're available, and I will give you a call.

Have a great New Year.

Marshall