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COURT OF APPEALS
STATE OF WASHINGTON
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NO: 63156-0-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

WESTERN CARTAGE, INC.; SEATTLE BULK RAIL STATION, INC.,;
WASHINGTON TRANSPORTATION, INC.,; SEATTLE TRANSLOAD, INC.,
all Washington Corporations,

Plaintiffs/Appellee,

vs.

NATHAN S. YIN and BUNTHOEUN D. YIN, husband and wife,

Defendants/Appellant

BRIEF OF DEFENDANT/APPELLANT

NATHAN YIN
DEFENDANT/APPELLANT
1121 V St. NW
Auburn, WA 98001
253-315-9639

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Order of January 9, 2009, denying Defendant's Motion to Completely Stay Proceedings.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant, Nathan Yin, was arrested and administratively booked on February 19, 2008, for investigation of theft.¹ Subsequent to the arrest, but prior to the filing of charges, the instant case was commenced by Plaintiffs. Defendant, Nathan S. Yin, moved the Court to stay proceedings pending the outcome of the criminal charges. Did the trial court abuse its discretion by denying Mr. Yin's Motion to Stay Proceeding and thereby

¹ On June 1, 2009, subsequent to the entry of the final Judgment in the instant proceeding, Nathan Yin was charged in King County Superior Court, Cause No: 09-1-04281-7 SEA, with 81 counts of theft in the first degree arising from the identical conduct alleged by the Plaintiffs in Plaintiffs' Complaint. (Attached as Appendix A)

improperly deny Mr. Yin the right to fully defend himself in the civil case?

III. STATEMENT OF THE CASE

Nathan Yin was arrested and administratively booked on February 19, 2008, for investigation of theft from his employers occurring from approximately 2004-2007. Plaintiffs filed the underlying lawsuit on May 9, 2008, for damages for conversion by theft. Nathan Yin moved the trial court to stay proceedings on December 31, 2008. The trial court denied Nathan Yin's motion to stay proceedings on January 9, 2009. The trial court entered an Order granting Plaintiffs' Motion for Partial Summary Judgment on January 23, 2009, and entered final judgment on February 12, 2009. This appeal ensues.

IV. ARGUMENT

"A party cannot be **compelled** to testify or **compelled** to provide discovery in a civil proceeding while there is a

parallel criminal action pending against the party.”² Delaying civil proceedings to avoid the danger of self-incrimination “strikes a reasonable balance favoring an individual’s liberty interests over his or his property interests.”³ This court has discretion to stay its proceedings “where the interest of justice so requires.”⁴ Courts are afforded that discretion because:

[T]he denial of a stay could impair a party’s Fifth Amendment privilege against self-incrimination, extend criminal discovery beyond the limits set forth in Federal Rule of Criminal Procedure 16(b), expose the defense’s theory to the prosecution in advance of trial, or otherwise prejudice the criminal case.⁵

Nathan Yin is facing criminal charges arising from the identical allegations as those at issue in this proceeding. Mr. Yin cannot fully defend against the civil charges absent resolution of the criminal charges or waiving his Fifth Amendment privileges. Accordingly, in consideration of Mr.

² *Ex parte Ebbers*, 871 So.2d 776(2003)9(citations omitted)(emphasis in original).

³ *Escamilla v. Tri-City Metro Task Force*, 100Wn.App.742, 750, 999 P2d 625 (2000).

⁴ *King v. Olympic Pipeline*, 104 Wn.App. 338, 350, 16 P.3d 45 (2000).

⁵ *Trustees of Plumbers and Pipefitters Nat. Pension Fund v. Transworld Mechanical, Inc.*, 886 F.Supp. 1134, 1138 (S.D.N.Y., 1995).

Yin's Fifth Amendment Constitutional right against self-incrimination and his right to present a comprehensive defense against the civil and criminal charges, his Motion to Stay Proceedings should have been granted.

A. A Stay of Discovery is Required Under *King v. Olympic Pipeline*.

The court in *King v. Olympic Pipeline*⁶ set forth the factors a court should consider in exercising its discretion to issue a stay. In *King* the plaintiffs pursued wrongful death claims against Olympic Pipeline and three of its corporate officers.⁷ During that same time, the corporate officers were under investigation by the federal law enforcement agencies.⁸ The corporate officers requested a stay to "preserve both the right to invoke the Fifth Amendment privilege, and the right to defend fully in the civil case".⁹ In considering the appeal of the trial court's

⁶ 104 Wn.app.338, 16 p.3d45 (2001).

⁷ *Id.* At 345.

⁸ *Id.* At 346.

⁹ *Id.*

denial of the stay, the Court of Appeals adopted the following factors for the trial court's consideration:

- (1) Implication of the Fifth Amendment privilege;
- (2) Similarities between the civil and criminal cases;
- (3) State of the criminal case;
- (4) The burdens on the party asserting the privilege;
- (5) Interest of non-parties to civil litigation; and
- (6) Public interest in civil and criminal litigation.¹⁰

When Mr. Yin's circumstances are considered in light of these factors, it is evident that the trial court should have exercised its sound discretion and stayed the proceedings pending the resolution of the criminal proceedings. "The right of a citizen to defend ... in a court is corollary to the plaintiff's right to sue there."¹¹

1. Mr. Yin's Fifth Amendment Rights are implicated, weighing in favor of a stay.

"The implication of the right against self-incrimination must be given serious consideration in the balancing of interests".¹² In *King*, the plaintiff argued that the

¹⁰ See generally, *King v. Olympic Pipeline*, 104 Wn.App. 338, 16 P.3d 45 (2001).

¹¹ *Degen v. United States*, 517 U.S. 820, 828 (1996).

¹² *White v. Mapco Gas Products, Inc.*, 116 F.R.D. 498, 502, (E.D.Ark., 1987)(granting stay).

corporate defendants' Fifth Amendment rights were only "negligibly" implicated because no indictment had yet issued.¹³ The *King* court rejected this reasoning finding that "potential criminal jeopardy" might be sufficient to implicate the privilege.¹⁴ In the present circumstances, Mr. Yin had already been arrested based upon conduct factually the same to that alleged in the Complaint, and criminal charges against Mr. Yin were filed on June 9, 2009. Mr. Yin's position is far more compelling than that addressed in *King*, wherein no arrest had yet occurred.

2. The criminal and civil cases contain similar allegations weighing in favor of a continued stay.

"A stay is most appropriate where the subject matter of the parallel civil and criminal proceeding or investigation is the same."¹⁵ In *Trustees of Plumbers*,¹⁶ relied upon by the *King* court, the court read the criminal indictment and civil

¹³ *King v. Olympic Pipeline*, 104 Wn. App. 338, 353, 16 p.3d 45 (2001).

¹⁴ *Id.* At 354.

¹⁵ *Id.* at 357.

¹⁶ 886 F. Supp. 1134, 1139 (S.D.N.Y., 1995)(granting stay).

complaint together to consider the degree to which the issues overlapped. Here, Mr. Yin stands criminally charged with conduct identical to that alleged in the civil complaint.¹⁷

In both instances it is alleged that Mr. Yin embezzled money from plaintiffs. The cases and pivotal facts are identical.

3. Mr. Yin's criminal proceedings are
underway, weighing in favor of a continued
stay of the civil matter.

As reasoned by the *King* court:

"The argument for deferring civil proceedings until after completion of criminal proceedings is stronger where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter because the noncriminal proceeding might undermine the party's Fifth Amendment privilege against self-incrimination."¹⁸

The court reasoned that where the resolution of the criminal proceedings is close at hand, "the detriments of a stay are counterbalanced by the prospect of a speedy criminal trial,

¹⁷ See Appendix A. (Criminal Complaint)

¹⁸ *King*, 104 Wn. App. At 358.

and by the potential *res judicata* or collateral estoppel of resolution of common issues.¹⁹

A stay of the civil proceedings until resolution of the criminal matter thus only minimally inconveniences the plaintiffs.

4. The interests of plaintiffs in proceeding are outweighed by Mr. Yin's Fifth Amendment rights and his interest in a full defense against the allegations in the civil case.

The interest in "expeditious resolution" of the civil matter is "trumped by defendants' interest in avoiding the quandary of choosing between waiving their Fifth Amendment rights or effectively forfeiting the civil case".²⁰ Further, "to the extent necessary to ensure protection of the privilege against self-incrimination, concerns about delays must yield".²¹

Resolution of the criminal case may "actually benefit the civil proceeding by producing a result that completely

¹⁹ *Id.*

²⁰ *Trustees*, 886 F.Supp. at 1140.

²¹ *Ex Parte Ebbers*, 871, So.2d 776, 788 (2003).

resolves the civil liability issues".²² In *King*, the court reasoned that, even where a criminal indictment has not yet issued, a stay might be appropriate given the court's inherent authority to control its calendar.²³ The Court considered that:

If a brief, limited stay produces no stay in criminal status and other issues have not emerged to alter the balance, the court remains free to lift the stay and proceed, or explore other means of protecting legitimate Fifth Amendment concerns.²⁴

The defendant faced with simultaneous prosecution on criminal and civil fronts is faced with immense burdens, including "diversion of resources in simultaneous defense of civil and criminal actions", and, "the likelihood that the materials unearthed during civil discovery may eventually inure to the benefit of the government prosecution". The concerns regarding discovery are grounded in the fact that civil discovery is far more broad than that permitted in

²² *King v. Olympic Pipeline*, 104 Wn. App. 338, 360, 16 P.3d 45 (2001).

²³ *Id.* at 361.

²⁴ *Id.* at 362-363.

criminal cases.²⁵ In addition, some courts 'have commented that postponement of civil proceedings is desirable to protect the integrity of the separate civil and criminal processes, lest the civil proceedings interfere with the criminal case by churning over the same evidentiary material".²⁶

Permitting civil discovery to proceed prior to resolution of the criminal case has the potential to allow prosecutors to use the defendant's invocation of the privilege in civil discovery as a "road map" and form the "link in the chain of evidence" thus providing an unfair advantage to the criminal prosecution.²⁷ Moreover, where a defendant appears for deposition, responds to any discovery, or testifies at trial by invoking the privilege, the trier of fact is permitted to draw potentially negative inferences from such invocation.²⁸ Alternatively, if the defendant fails

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 364.

²⁸ *Id.*

to "invoke the privilege in the civil case, it is waived, and all evidence may be used in a criminal prosecution".²⁹ Accordingly, defendant is placed in the untenable position of waiving his Fifth Amendment right or forgoing his right to a complete defense against civil allegations.

Each of the factors considered by the *King* court as to the burden on the defendant weighs strongly in favor of a stay of discovery. Here, far more compelling than *King*, Mr. Yin in fact faces criminal charges based upon conduct factually identical to that alleged herein. Mr. Yin is burdened with a diversion of resources due to the concurrent defense of civil and criminal actions. Further, as *King* foresaw, Mr. Yin's invocation of his Fifth Amendment privilege effectively forced him to concede the civil case. As such, Mr. Yin's Fifth Amendment right against self-incrimination, and his right to fully defend against the civil and criminal charges outweigh the minor inconvenience to the plaintiffs of a delay.

²⁹ *Id.* at 350-351.

V. STANDARD OF REVIEW

A court's determination on a motion to stay proceedings or grant a protective order is discretionary, and is reviewed for only for abuse of discretion.³⁰ A trial court abuses its discretion only if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons.³¹

In the instant case, the trial court abused its discretion by denying Nathan Yin's Motion to Stay Proceedings by forcing Mr. Yin to make a Hopson's choice to effectively defend himself in the criminal action or participate in the civil action. Mr. Yin's decision to exercise his Fifth Amendment privilege against self-incrimination resulted in the entry of an Order of Summary Judgment which is manifestly unreasonable given that Mr. Yin was unable to defend himself.

VI. CONCLUSION

The trial court abused its discretion by denying Nathan Yin's Motion to Stay Proceedings and, thereby, effectively

³⁰ *Id.* at 348.

³¹ *Id.* at 348.

forcing him to choose between exercising his constitutional Fifth Amendment against self-incrimination or conceding the civil litigation.

Dated: 7-09-09



NATHAN YIN
Defendant/Appellant
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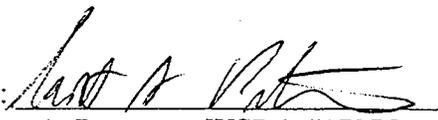
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10	02/20/2007	151136	Alexander Griguletskly	\$3,500.00
11	02/26/2007	151193	Alexander Griguletskly	\$2,375.00
12	02/27/2007	151196	Alexander Griguletskly	\$2,300.00
13	02/28/2007	151215	Alexander Griguletskly	\$3,500.00
14	03/02/2007	151208	Alexander Griguletskly	\$2,600.00
15	03/08/2007	151230	Alexander Griguletskly	\$4,700.00
16	03/09/2007	151260	Alexander Griguletskly	\$5,000.00
17	03/13/2007	151275	Alexander Griguletskly	\$4,600.00
18	03/19/2007	151285	Alexander Griguletskly	\$4,800.00
19	03/29/2007	151363	Alexander Griguletskly	\$4,000.00
20	04/10/2007	151430	Alexander Griguletskly	\$4,500.00
21	04/13/2007	151461	Alexander Griguletskly	\$2,000.00
22	04/16/2007	151473	Alexander Griguletskly	\$2,000.00
23	04/19/2007	151478	Alexander Griguletskly	\$4,500.00
24	04/24/2007	151528	Alexander Griguletskly	\$2,500.00
25	05/02/2007	151559	Alexander Griguletskly	\$4,040.00
26	05/03/2007	151560	Alexander Griguletskly	\$3,000.00
27	05/07/2007	151611	Alexander Griguletskly	\$4,500.00
28	05/10/2007	151628	Alexander Griguletskly	\$3,500.00
29	05/18/2007	151709	Alexander Griguletskly	\$4,000.00
30	05/22/2007	151727	Alexander Griguletskly	\$4,600.00
31	05/31/2007	151768	Alexander Griguletskly	\$2,800.00
32	06/07/2007	151825	Alexander Griguletskly	\$3,700.00
33	06/13/2007	151864	Alexander Griguletskly	\$4,200.00
34	06/20/2007	151942	Alexander Griguletskly	\$4,800.00
35	06/21/2007	151962	Alexander Griguletskly	\$6,500.00
36	06/28/2007	151121	Alexander N Griguletskly	\$4,500.00
37	06/28/2007	152121	Alexander N Griguletskly	\$4,500.00
38	07/02/2007	152180	Alexander N Griguletskly	\$5,500.00
39	07/06/2007	152210	Alexander N Griguletskly	\$6,700.00
40	07/11/2007	152241	Alexander N Griguletskly	\$5,500.00
41	07/25/2007	152378	Alexander N Griguletskly	\$7,500.00
42	07/27/2007	152446	Alexander N Griguletskly	\$3,500.00
43	08/02/2007	152504	Alexander N Griguletskly	\$6,000.00
44	08/06/2007	152565	Alexander N Griguletskly	\$7,200.00
45	08/13/2007	152666	Alexander N Griguletskly	\$7,500.00
46	08/14/2007	152871	Alexander N Griguletskly	\$4,800.00
47	08/16/2007	152680	Alexander N Griguletskly	\$5,000.00
48	08/22/2007	152727	Alexander N Griguletskly	\$5,000.00
49	08/30/2007	152781	Alexander N Griguletskly	\$7,500.00
50	08/31/2007	152790	Ghirmai Debessu	\$2,856.00

1	51	09/05/2007	152820	Ghirmai Debessu	\$2,500.00
2	52	09/05/2007	152822	Alexander N Griguletskly	\$4,500.00
3	53	09/10/2007	152867	Ghirmai Debessu	\$4,500.00
4	54	09/14/2007	152893	Ghirmai Debessu	\$2,000.00
5	55	09/17/2007	152901	Ghirmai Debessu	\$3,920.00
6	56	9/17/2007	152900	Alexander N Griguletskly	\$4,320.00
7	57	09/19/2007	152925	Ghirmai Debessu	\$4,240.00
8	58	9/19/2007	152928	Alexander N Griguletskly	\$2,500.00
9	59	09/24/2007	152991	Ghirmai Debessu	\$2,480.00
10	60	10/01/2007	153063	Ghirmai Debessu	\$2,120.00
11	61	10/08/2007	153089	Ghirmai Debessu	\$1,880.00
12	62	10/12/2007	153125	Ghirmai Debessu	\$1,840.00
13	63	10/12/2007	153126	Oleg Lipchan	\$1,260.00
14	64	10/15/2007	153148	Ghirmai Debessu	\$2,840.00
15	65	10/19/2007	153204	Oleg Lipchan	\$2,310.00
16	66	10/22/2007	153197	Ghirmai Debessu	\$3,240.00
17	67	10/25/2007	153220	Ghirmai Debessu	\$3,840.00
18	68	10/29/2007	153247	Ghirmai Debessu	\$3,760.00
19	69	10/31/2007	153260	Ghirmai Debessu	\$3,560.00
20	70	10/31/2007	153258	Oleg Lipchan	\$2,625.00
21	71	11/05/2007	153270	Ghirmai Debessu	\$3,560.00
22	72	11/12/2007	81029	Ghirmai Debessu	\$3,840.00
23	73	11/16/2007	81050	Ghirmai Debessu	\$3,720.00
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	75	11/27/2007	81055	Oleg Lipchan	\$1,575.00
	76	11/29/2007	81059	Ghirmai Debessu	\$4,240.00
	77	12/03/2007	81064	Oleg Lipchan	\$2,555.00
	78	12/10/2007	81066	Ghirmai Debessu	\$3,480.00
	79	12/14/2007	81069	Ghirmai A Debessu	\$3,240.00
	80	12/21/2007	81072	Ghirmai A Debessu	\$2,160.00
	81	12/24/2007	81074	Ghirmai Debessu	\$2,520.00

Contrary to RCW 9A.56.030(1)(a) and 9A.56.020(1)(a), and against the peace and dignity of the State of Washington.

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document on:

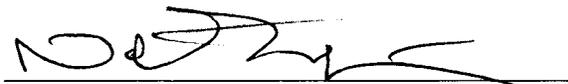
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- Via U.S. Mail
- Via Facsimile
- Via Hand Delivery

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2009 JUL 10 PM 5:16

Signed this 10 day of July, 2009, at Kent,
Washington.



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