

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA—CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : No. CP-46-CR-3932-2016

v. :

WILLIAM H. COSBY, JR. :

**DEFENDANT'S MOTION TO EXCLUDE ANY EVIDENCE REGARDING THE
SETTLEMENT OF THE CIVIL SUIT BETWEEN ANDREA CONSTAND AND
DEFENDANT**

TO THE HONORABLE STEVEN T. O'NEILL, COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY:

Defendant William H. Cosby, Jr., by and through his attorneys, submits the following motion to exclude any evidence of and concerning the October 2006 confidential settlement agreement (the "Settlement Agreement") entered into between Andrea Constand and Mr. Cosby, among others, resolving Ms. Constand's civil suits against Mr. Cosby (and others) and the negotiations regarding that Settlement Agreement for the reasons discussed below:

1. The Settlement Agreement and negotiations regarding the Settlement Agreement are inadmissible pursuant to Pennsylvania Rule of Evidence, Rule 408 ("Rule 408"), which requires the exclusion of settlement agreements and settlement negotiations when offered to prove the validity of the disputed claim, i.e., guilt.
2. The Settlement Agreement is inadmissible pursuant to 42 Pa.C.S.A. § 6141 (c), which strictly prohibits the introduction of evidence of settlement of personal injury or property damage claims. Ms. Constand's civil suit, which was resolved pursuant to the Settlement Agreement, alleged, among other things, claims for battery, sexual assault and intentional emotional distress.

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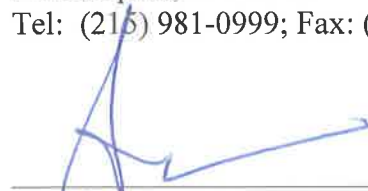
3. The Settlement Agreement and the negotiations of the Settlement Agreement are inadmissible pursuant to Pennsylvania Rule of Evidence 403 because any marginal probative value is outweighed by the danger of unfair prejudice that will result from the risk that a jury will view the Settlement Agreement as a confession of liability or guilt.

WHEREFORE, Mr. Cosby requests that the Court exclude any evidence of and concerning the October 2006 Settlement Agreement entered into between Ms. Constand and Mr. Cosby to resolve the Civil Action filed by Ms. Constand, and any negotiations of that Settlement Agreement.

Respectfully submitted,



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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA—CRIMINAL DIVISION

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MONTGOMERY COUNTY
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COMMONWEALTH OF PENNSYLVANIA : No. CP-46-CR-3932-2016
v. :
WILLIAM H. COSBY, JR. :

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S MOTION TO EXCLUDE ANY EVIDENCE REGARDING THE SETTLEMENT OF THE CIVIL SUIT BETWEEN ANDREA CONSTAND AND DEFENDANT

Any evidence of and concerning the October 2006 confidential settlement agreement (the “Settlement Agreement”) entered into between the Commonwealth’s claimant witness Andrea Constand and Defendant William H. Cosby, Jr. resolving Ms. Constand’s 2005 civil suit against Mr. Cosby and any statements of and concerning negotiations regarding that Settlement Agreement are inadmissible pursuant to Pennsylvania Rules of Evidence, Rule 408 (“Rule 408”), 42 Pa.C.S.A.

§ 6141 (“Section 6141”), and Pennsylvania Rule of Evidence, Rule 403 (“Rule 403).

On March 8, 2005, Ms. Constand filed a civil suit against Mr. Cosby in the United States District Court for the Eastern District of Pennsylvania (Case No. 2:05-cv-01099), alleging, among other things, claims for battery, sexual assault, and intentional infliction of emotional distress based upon the same alleged sexual encounter with Mr. Cosby that is the subject of the Commonwealth's Complaint (the “Civil Action”).¹ In October 2006, the Civil Action was resolved

¹ Three weeks before the Civil Action was filed, on February 17, 2005, the District Attorney for Montgomery County, Bruce Castor, issued a press release confirming that his office had declined to prosecute Mr. Cosby for any crimes involving Ms. Constand because “insufficient[] credible, and inadmissible evidence exists upon which any charge against Mr. Cosby could be sustained...”.

pursuant to the Settlement Agreement. The Settlement Agreement also resolved a separate action brought by Ms. Constand against Martin D. Singer, Esq. and *The National Inquirer* that had also been filed in February 2006 in the United States District Court for the Eastern District of Pennsylvania (Case No. 2:06-cv-00483). The Parties to the Settlement Agreement were Ms. Constand, Mr. Cosby, Mr. Singer, American Media, Inc. (the publisher of *The National Inquirer*) and Ms. Constand's parents, Gianna and Andrew Constand. In November 2006, as part of that Settlement, Ms. Constand dismissed both actions with prejudice.

Pennsylvania Rule of Evidence, Rule 408 ("Rule 408") requires exclusion of settlement agreements and settlement negotiations when used to prove the validity of the disputed claim, i.e., guilt. Rule 408 provides:

(a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction;

(1) furnishing, promising or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

(b) Exceptions. The court may admit this evidence for another purpose, such as a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 408 precludes the admission of evidence related to settlements because (1) the evidence is often irrelevant, since parties may elect to settle for reasons that are not indicative of weakness in that party's position; and (2) there is a strong public policy rationale for promoting settlements.

See Rochester v. Machine Corp. v. Mulach Steel Corp., 449 A.2d 1366, 1368-1370 (Pa. 1982); 1 West's Pa. Prac., Evidence § 408-1 (4th ed.) (Dec. 2016); *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985) (in discussing Rule 408's Federal analog, the court noted that "such evidence is of questionable relevance on the issue of liability or the value of a claim, since settlement may well reflect a desire for peaceful dispute resolution, rather than the litigant's perceptions of the strengths or weaknesses of their relative positions").

Rule 408 includes the exclusion of civil settlement agreements and negotiations when offered in criminal cases, as reflected in the Comments to Rule 408 and the Advisory Committee Notes to Rule 408's Federal analog – Federal Rules of Evidence, Rule 408. Rule 408 is based on Federal Rule of Evidence 408. Comment to Pa.R.E. 408. The 2006 amendment to Federal Rule of Evidence 408 was amended, in part to address the division of the circuits on the applicability of Rule 408 to criminal cases. The 2006 Advisory Committee Note to Federal Rule of Evidence 408 commented that, "statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation when offered to prove liability for, invalidity of, or amount of those claims." 2006 Advisory Committee Note. Indeed, following the 2006 amendment, federal courts have applied Federal Rule of Evidence, Rule 408 to criminal proceedings. *United States v. Davis*, 2009 WL 3646459, at *4 (E.D.Pa. 2009); *United States v. Roti*, 484 F.3d 934, 935-37 (7th Cir. 2007).

Furthermore the Comment to Pennsylvania Rule of Evidence, Rule 408, in noting the difference between Pennsylvania Rule of Evidence 408(a) and Federal Rule of Evidence 408(a), states: "[T]he federal rule in paragraph (a)(2) contains language that seems to permit the use in criminal cases of statements made to government investigators, regulators, or enforcement authority in negotiation in civil cases. That language has not been adopted because the use of such

statements might conflict with the policies underling Pa.R.Crim.P. 586 (relating to dismissal of criminal charges not committed by force or violence upon payment of restitution) or Pa.R.Crim.P. 546 (relating to dismissal upon satisfaction or agreement).” This Comment demonstrates an intent that Rule 408 operates in the criminal context to exclude evidence of settlement negotiations. Further, the plain language of Pennsylvania Rules of Evidence, Rule 101 renders each of the rules of evidence applicable to criminal proceedings.²

Rule 408(a)(1), insofar as it deals with completed compromises, is consistent with 42 Pa.C.S.A. § 6141, which is set out in the Comment to Rule 408. Section 6141(c) strictly prohibits the introduction of evidence of settlement of personal injury or property damage claims at trial. It provides as follows: “(c) ADMISSIBILITY IN EVIDENCE.-Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement payment [made with respect to a personal injury or property claim] shall not be admissible in evidence on the trial of any matter.” *See also Wilkerson v. Allied Van Lines. Inc.*, 521 A.2d 25, 30-31 (Pa. 1987) (Section 6141(c) requires exclusion of evidence of settlement).

Furthermore, the Court should exclude this evidence pursuant to Rule 403, which provides: “The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Pa. R. Evid. 403. “Unfair prejudice” means a “tendency to suggest decision on an improper basis or to divert the jury’s attention away

² There has been no suggestion that introduction of the Settlement Agreement would serve some purpose other than to establish guilt. For example, there is no allegation or evidence that the Settlement Agreement, negotiated after the District Attorney announced that he was not prosecuting Mr. Cosby, was made in an effort to obstruct a criminal investigation or prosecution. *Cf., Commonwealth v. Pettinato*, 520 A.2d 437, 428 (Pa. 1987) (court allowed burglary victim to testify that defendant approached her a few weeks before the criminal trial and offered her \$50 not to testify).

from its duty of weighing the evidence impartially.” Comment to Pa. R. Evid. 403. Any marginal probative value of the Settlement Agreement might have it clearly outweighed by the danger of unfair prejudice that will result from the risk that a jury will view the Settlement Agreement as a confession of liability and guilt. *Davis*, 2009 WL 3646459, at *5. “It does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendant [] had done nothing wrong, [he] would not have paid the money ...”. *Ibid.* (quotation marks and citation omitted). In addition, the fact that the Settlement Agreement also resolved Ms. Constand’s action against Mr. Singer and *The National Inquirer* and that these defendants (as well as others) were parties to the Settlement Agreement demonstrates its very limited probative value and the risk that its admission would only confuse the jury and be unfairly prejudicial.

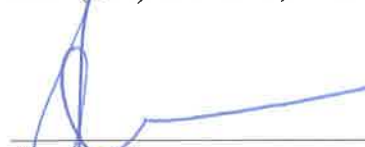
CONCLUSION

Mr. Cosby respectfully requests that the Court exclude all testimony, documentary evidence, comment, reference or inference regarding the Settlement Agreement or the negotiation of the Settlement Agreement.

Respectfully submitted,



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