

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO. 2018-00596-CA-44

THE CANTOR LAW GROUP, P.A.,
et al.,

Plaintiff

vs.

HALL J. WEBB, *et al.*,

Defendants

**ORDER OVERRULING COUNTER-DEFENDANTS' OBJECTION TO MASKED
WITNESS TESTIMONY**

THIS MATTER came before the Court on Counter-Defendant's objection to administrative procedures regarding witnesses wearing mask while testifying during an in-person trial proceeding. The Court having reviewed the motion, having heard argument of counsel, and being otherwise fully advised in the premises, makes the following findings:

The instant case is scheduled for the three-week trial docket commencing on March 29, 2021. This is a defamation per se and punitive damages cause of action.

On March 16, 2021, the Court conducted a jury trial informational session to discuss policies, procedures and the logistics of conducting jury trials during the pandemic. The session was attended by approximately 75 attorneys whose cases are currently scheduled for the three-week trial docket referenced above. At the session, the Administrative Judge for the Circuit Civil

Division presented and explained the manner in which jury trials in civil cases will be conducted in the Eleventh Judicial Circuit of Florida. A procedure established and implemented by Administrative Memorandum No. 21-A AF 24 CA 01, dated January 25, 2021. The jury trial procedure within the Eleventh Judicial Circuit requires that trials be conducted in compliance with *all* CDC guidelines, including all participants wearing a mask all the time and socially distancing at all times. Counter-Defendants has only raised an objection in regard to witnesses wearing mask while providing their testimony. Counter-Defendant argues witnesses wearing mask while testifying will limit the jury's ability to assess the witness' demeanor and credibility. Counter-Defendants argue that masking of witnesses poses serious due process concerns that cannot be overridden if there are reasonable alternatives to the masking of the witnesses.

There are two compelling interest before this Court: the due process rights of the Counter-Defendants to have the jury observe and assess the demeanor and credibility of the witness and the safety and well-being of all the participants in an in-person jury trial in the midst of the Covid-19 pandemic. Throughout the state of Florida, courts are grappling with the changing face of trials in light of the Center for Disease Control and Prevention guidelines. The public health crisis, for which there is no definitive end point, has prompted this Circuit to develop a way forward that strikes a balance between its role in protecting public health and the administration of justice.

There is no question that the constitutional rights to which we are all entitled to are one of the most precious privileges we enjoy. Among those rights is the right that nobody shall be deprived of its life, property or liberty without due process of the law. *See Pena v. Rodriguez*, 273 So. 3d 237, 240 (Fla. 3d DCA 2019). Due process also encompasses the right to a fair trial including the ability to cross-examine the witnesses. *See id.* ("One of the basic elements of due process is the right of each party to be apprised of all the evidence upon which an issue is to be

decided, with the right to examine, explain or rebut such evidence.”). “It is axiomatic that a party defending against a claim is entitled to due process.” *Sanchez v. Marin*, 138 So. 3d 1165, 1167 (Fla. 3d DCA 2014). “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). “One aspect of due process is the privilege of a party to view and cross-examine a witness.” *Grabau v. Dep't Of Health, Bd. of Psychology*, 816 So. 2d 701, 709 (Fla. 1st DCA 2002). By the same token, there is no question that among the most valuable liberties that a person has is the ability to live without fear that he or she is at risk of contracting a virus that could be lethal.

It is not the first time that a court is presented with this issue. The challenges presented by masked witness testimony have become more common in this Covid-19 era and have been addressed by various courts, particularly in criminal matters. The analysis conducted has been in the context of mask requirements and the Confrontation Clause. Some courts have concluded that allowing a witness to testify while wearing a mask affects the ability of the jurors and defendant to assess demeanor and credibility and infringes upon defendant’s right to confront witnesses. *See United States v. Young*, 19-CR-00496-CMA, 2020 WL 3963715 (D. Colo. July 13, 2020); *United States v. Sheikh*, 2:18-CR-00119 WBS, 2020 WL 5995226 (E.D. Cal. Oct. 9, 2020). Other courts have concluded that the mask requirement does not significantly obstruct the ability to observe demeanor as the mask only covers two witness traits: movement of the nose and mouth. *See United States v. James*, CR-19-08019-001-PCT-DLR, 2020 WL 6081501 (D. Ariz. Oct. 14, 2020). In addition, the Confrontation Clause does not require that the jury be able to see the entire face or body of the witness and being able to see the witness’s nose and mouth is not essential to testing the reliability of the testimony. *See id.* This is because there are four elements of confrontation in

the trial context: (1) physical presence of the witness; (2) testimony under oath; (3) cross-examination; and (4) observation of demeanor by the trier of fact. *See United States v. Crittenden*, 4:20-CR-7, 2020 WL 4917733 (M.D.Ga. Aug. 21, 2020). The combination of all the elements is what ensures that the evidence admitted, the testimony of witnesses, is reliable. *See id.* The mask requirement only eliminates two aspects of the observation of demeanor by the jury: the nose and mouth of the witness. *See id.* But the face is not the only aspect of the demeanor of a witness. The trier of fact is still able to see the reaction to the questions pose by the expression of the eyes, body language, and tone.

Despite the fact that the above case law discusses the right of confrontation in criminal cases, the ability of a litigant to examine and observe the demeanor of a witness is of paramount importance in civil cases as well. The Court finds persuasive the case law finding that the mask wearing requirement does not infringe upon the defendant's right of confrontation in criminal litigation. If in the criminal context the mask requirement was found not to infringe upon the right of confrontation, this Court does not see how the conclusion should be different in a civil case under due process requirements.

The Court understands and it is sensitive to the genuine concerns of Counter-Defendants. The Court is also sensitive to the fact that we are in the midst of a worldwide pandemic that has cost the lives of millions of people, that it still poses a risk to the health and safety of people, and that it has altered the life of everyone, including the way we interact with each other, conduct business and court proceedings, etc. Taking into consideration the seriousness of the Covid-19 pandemic and the implications of this lethal virus, this Circuit, following the mandates of our Florida Supreme Court, the guidelines established by the Centers for Disease Control and Prevention ("CDC"), scientific data and the input of stakeholders involved in the decision making

regarding the safe means and methods to be implemented and followed to protect the public, jurors, the attorneys, their staff, judges, court reporters, clerks, and court employees, established a reasonable procedure that this Court must and will follow to ensure the safety and well-being of all the participants appearing before it. The mask requirement is necessary to further an important and compelling public policy, which is to ensure the safety of everyone in the courtroom during this pandemic while at the same time complying with the Court's duty to administer and deliver justice.

The Court considered Counter-Defendant's suggestion of allowing the witness to testify from a separate courtroom where the witness will be alone and unmasked and his or her testimony live-streamed to the main courtroom where the judge, jurors and attorneys will be located. The Court asked Counter-Defendants how that suggestion is different from having the witness appear through the Zoom platform. Counter-Defendants argued that being present in a courtroom provides an environment of decorum and seriousness that may be diminished when appearing by Zoom. The Court does not contradict Counter-Defendants' assessment; however, this Court has been successfully conducting court proceedings, including non-jury trials through the Zoom platform for approximately a year. When utilized in a court proceeding, the Zoom platform is the courtroom, and as such, all the rules and requirements applicable to in-person proceedings have applied, and will continue to apply in full force and effect in any court proceeding conducted remotely before this Court. Additionally, this Court does not believe that having a witness in a separate courtroom testifying through a camera will make a significant difference for purposes of assessing demeanor and credibility. At the end of the day, the procedure is the same whether the witness is in another courtroom or appearing through the Zoom Platform. Either way there is a camera in the middle separating the witness from the rest of the participants including the jury.

What is more, having a courtroom assigned solely to a witness poses a burden on the courts as the undersigned is not the only judge conducting jury trials during the three-week trial period and the infrastructure is limited. In addition, the Court must take on the titanic task of coordinating all the logistics involved in ensuring that everybody does not arrive at the same time, that the elevators are available to move two people at a time to their respective floors, the coordination of breaks to avoid unnecessary traffic in the hallways, among others aspects that are to be taken into consideration during this pandemic. All of this is done with one goal in mind: providing the parties with an opportunity to achieve finality in their pending cases in an attempt to provide prompt administration of justice during these Covid-19 times.

The other suggestion provided was having the witness in the witness stand surrounded by plexiglass but unmasked. That is an option that puts everybody within the courtroom at risk and is an option that this Court does not find reasonable. The right of Counter-Defendants cannot outweigh the risks that Covid-19 poses indoors for an extended period of time to the health and safety of others within the courtroom. The CDC does not recommend the use of face shields as a substitute for a mask as they are not as effective. *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> (Feb. 18, 2021). If face shields are not as effective as masks neither is plexiglass, where there is not covering at all on the face area. *See Crittenden*, 2020 WL 4917733, at *6.


This Court finds that the due process of Counter-Defendants is not diminished nor infringed upon by the mask requirement, particularly in light of the fact that the witnesses will be physically present in the courtroom, they will be testifying under oath, Counter-Defendants will be able to cross-examine them face to face in the open courtroom and the testimony will be elicited in front of Counter-Defendants, the attorneys, the jury, and the judge. *See Crittenden*, 2020 WL 4917733,

at *6. Although the jurors will not be able to see the witness's nose and mouth, they will be able to still see the witness's demeanor through his or her body language, tone, the expression of the eyes, the reactions to the questions asked, and movement of the hands.

Contrary to Counter-Defendants position, the mask requirement does not undermine the truth-telling function of the trial. A person is credible or not credible with or without a mask. A person tells the truth or lies with or without a mask. This Court is not imposing upon Counter-Defendants the requirement of having in person masked witnesses as they have the option, with the agreement of all the parties involved, to conduct the trial through the Zoom platform, or conduct the trial in person with witnesses appearing by Zoom. This Court, however, is bound by the Administrative procedures established in the Circuit and as part of that procedure, masks are a requirement while appearing in person during court proceedings; a requirement that must be followed by all. It is

ORDERED AND ADJUDGED that Counter-Defendants' objection is overruled. All witnesses who testify at an in-person trial conducted by this Court must comply with CDC guidelines and wear a mask.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 04/01/21.



WILLIAM THOMAS
CIRCUIT COURT JUDGE

**No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT**

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall

IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.