

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,

Plaintiffs,

v.

KISLING, NESTICO & REDICK, LLC,
et al.,

Defendants.

Case No. CV-2016-09-3928

Judge James Brogan

**Dr. Sam Ghoubrial's Motion for
Reconsideration**

Now comes Defendant Dr. Sam Ghoubrial (“Dr. Ghoubrial”), by and through counsel, and respectfully moves this Honorable Court to reconsider its decision regarding the application of a crime-fraud exception to permit testimony from Julie Ghoubrial over the assertion of the spousal privilege.¹ In reaching this decision, the Court erroneously relied on *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989), which did not apply the crime-fraud exception to the spousal privilege, and ultimately has been questioned and limited in part. Critically, no Ohio court has applied the crime-fraud exception to the spousal privilege stated in R.C. 2317.02(D).

Further, R.C. 2317.02(D) contains no mention of such an exception to the privilege. Rather, the crime-fraud exception is expressly codified within R.C. 2317.02(A)(2), which applies specifically to the attorney-client privilege. Therefore, the legislature’s failure to codify the crime-fraud exception with respect to the spousal privilege bars this Court from creating a crime-fraud exception to apply to Mrs. Ghoubrial’s deposition testimony over the assertion of the spousal privilege. As such, the Court must reconsider its ruling on this issue and hold that the spousal

¹ The Court Ordered Julie Ghoubrial to appear and testify over objection during a phone conference held on April 18, 2019. While the Court indicated a written Order would be issued, no such Order has been circulated to date.

privilege protects Mrs. Ghoubrial from testifying to communications between her and Dr. Ghoubrial made during coverture. R.C. 2317.02(D).²

Alternatively, even if the Court concludes that an uncodified and previously unrecognized crime-fraud exception applies to the spousal privilege, the exception cannot apply to Mrs. Ghoubrial because her testimony will not concern any joint ongoing or future crime or fraud. *See* R.C. 2317.02(A)(2); *United States v. Sims*, 755 F.2d 1239, 1243 (6th Cir.1985) (recognizing a “joint participants exception” to the confidential marital communications privilege). Instead, any potential testimony concerning alleged criminal or fraudulent activity would be in regards to past acts unilaterally taken. Accordingly, even if such an exception could apply to the spousal privilege, it would not operate to remove the privilege as applied to the testimony sought from Mrs. Ghoubrial.

As such, Dr. Ghoubrial respectfully moves this Court to reconsider its decision regarding the applicability of a crime-fraud exception to allow testimony from Mrs. Ghoubrial over the assertion of the spousal privilege. The Court must re-examine its position because (1) no such exception exists, and (2) even if the exception could apply to the spousal privilege, Mrs. Ghoubrial’s testimony would not fall under the scope of such exception.

A Memorandum in Support is attached and incorporated by reference.

² Dr. Ghoubrial also has a right to assert the spousal privilege to prevent Mrs. Ghoubrial from disclosing private information discussed in private and with the expectation those communications would remain confidential.

Respectfully Submitted,

/s/Bradley J. Barmen

Bradley J. Barmen (0076515)

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MEMORANDUM IN SUPPORT

A. INTRODUCTION

During a phone conference On April 18 2019, this Honorable Court denied Dr. Ghoubrial's Motion to Quash and Motion for Protective Order regarding the deposition of Julie Ghoubrial. When denying the Motion, the Court relied on *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) to hold that the spousal privilege does not protect the expected testimony of Mrs. Ghoubrial from disclosure under a crime-fraud exception despite the fact that the crime-fraud exception exclusively applies to the attorney-client privilege.

Dr. Ghoubrial respectfully requests that this Court reconsider its decision regarding the applicability of a crime-fraud exception to the spousal immunity, as no such exception exists. The crime-fraud exception applies to the attorney-client privilege in the criminal context, not to spousal privilege in civil matters. Thus, Mrs. Ghoubrial should be protected from testifying as to any communication or acts between her and Dr. Ghoubrial during coverture under R.C. 2317.02(D).

B. LAW AND ARGUMENT

Two Ohio statutes address the spousal communication privilege. R.C. 2945.42 governs issues of privilege in criminal cases, while R.C. 2317.02 controls in civil cases. *Reo v. Univ. Hosps. Health Sys.*, 11th Dist. Lake No. 2018-L-110, 2019-Ohio-1411, ¶ 41, citing *State v. Vanhoy*, 3d Dist. Henry No. 7-2000-01, 2000-Ohio-1893, 2000 WL 799096, *2 (June 22, 2000). Evid. R. 501 provides for application of statutorily defined privileges, one of which is the privilege to exclude communications or acts made by a husband or wife in the other's presence. R.C. 2317.02(D). The privilege is held by the non-testifying spouse and may be applied to bar testimony of such communications or acts so long as they were not made "in the known presence" of another. *State v. Savage*, 30 Ohio St. 3d 1, 2,

506 N.E.2d 196, 197, 1987 Ohio LEXIS 250, *3, 30 Ohio B. Rep. 11. Specifically, R.C. 2317.02(D) states, in full:

The following persons shall not testify in certain respects:

(D) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist

Notably, R.C. 2317.02(D) contains no reference to any crime-fraud exception. Moreover, no Ohio court has recognized that such an exception applies to the spousal privilege in light of the lack of statutory support. Conversely, the attorney-client privilege, codified in R.C. 2317.02(A), explicitly refers to such an exception³ and is widely recognized by courts in Ohio. *See, e.g., Cobb v. Shipman*, 11th Dist. Trumbull No. 2011-T-0049, 2012-Ohio-1676, ¶ 61. Despite the obvious lack of support under R.C. 2317.02(D) and in case law, the Court erroneously concluded that the spousal privilege does not apply to protect Mrs. Ghoubril from testifying at a deposition under a crime-fraud exception.

Ohio courts recognize the statutorily created spousal privilege makes no reasonable allowance for judicial construction. In *Lawson v. Grange Mut. Cas. Co.*, 2nd Dist. Montgomery App. No. CA 18002, 200 Ohio App. LEXIS 2438 (June 9, 2000), the Court ruled the trial court erred in forcing the wife (Mrs. Brandt) to testify, over husband's (Mr. Lawson) objections, regarding allegations husband had discussed engaging in insurance fraud with her. The Court held:

³ R.C. 2317.02(A)(2) states: "An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima-facie showing of bad faith, fraud, or criminal misconduct by the client."

In the present case, the communications between Lawson and Brandt appear to fall squarely within the framework of the statute, and the statute, by its own terms, makes no reasonable allowance for any judicial construction. Hence, the admission of the privileged comments by the Common Pleas Court, over the objection of Lawson, was in violation of R.C. 2317.02(D).

Here, as in *Lawson*, Dr. Ghoubrial has a statutorily protected right to object to the forced disclosure of confidential communications made in private with his wife during their marriage. There are no exceptions to that statutorily protected right that could apply in this circumstance mandating that Dr. Ghoubrial waive those rights. Any such order is plain error.

The Court's reliance on *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) cannot justify applying a crime-fraud exception to the spousal privilege. Initially, *Zolin* did not apply the crime-fraud exception to the spousal privilege. Instead, *Zolin* concerned the proper manner of reviewing whether the crime-fraud exception could apply to prevent protection under the attorney-client privilege. *See Zolin*, 491 U.S. at 556. Thus, the Court's reliance on *Zolin* to apply the crime-fraud exception to the spousal privilege was mistaken from the outset, as *Zolin* provides no support for applying the crime-fraud exception to the spousal privilege.⁴ Moreover, even if *Zolin* could be applied here, which it cannot, it would still permit either Mr. or Mrs. Ghoubrial to assert the

⁴ Additionally, since decided in 1989, *Zolin* has been called into doubt, overruled in part, and vacated by various courts. *See, e.g., Church of Scientology of California v. United States*, 506 U.S. 9, 11-12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992); *United States v. Jose*, 131 F.3d 1325, 1329 (9th Cir. 1997); *DeFazio v. Hollister, Inc.*, E.D.Cal. No. CIV S-04-1358 WBS GH, 2008 U.S. Dist. LEXIS 96522, at *6 (Nov. 18, 2008), fn. 1; *United States v. Ankeny*, 30 M.J. 10, 17 (C.M.A.1990), fn. 6.

spousal privilege to private communications regarding alleged acts that occurred in the past and the crime-fraud exception only applies to on-going or wrongful acts contemplated in the future.⁵

Indeed, it appears that Ohio courts have followed the statutory language of R.C. 2317.02, as courts routinely apply the crime-fraud exception to the attorney-client privilege under R.C. 2317.02(A)(2), but have not extended the exception to apply to the spousal privilege under R.C. 2317.02(D). Accordingly, the Court plainly erred when extending the crime-fraud exception in this case, and the Court's mistaken reliance on *United States v. Zolin* cannot remedy the clear error. Rather, the spousal privilege applies to preclude Mrs. Ghoumbrial from testifying to any communications between her and Dr. Ghoumbrial made under coverture pursuant to R.C. 2317.02(D).

Alternatively, even if the crime-fraud exception under R.C. 2317.02(A)(2) applied to the spousal privilege, the exception could not apply to the testimony sought by Plaintiffs from Mrs. Ghoumbrial. In Ohio,

A party invoking the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a crime or fraud has been committed and that the communications were in furtherance of the crime or fraud. The mere fact that communications may be related to a crime is insufficient to overcome the attorney-client privilege.

Sutton v. Stevens Painton Corp., 193 Ohio App.3d 68, 2011-Ohio-841, 951 N.E.2d 91, ¶ 20 (8th Dist.), citing *State ex rel. Nix*, 83 Ohio St.3d at 383-384. Plaintiffs cannot demonstrate probable cause showing that any communications between Dr. and Mrs. Ghoumbrial were in furtherance of any crime or fraud that was ultimately committed. Additionally, Mrs. Ghoumbrial's testimony could only concern *past* events, not any *ongoing or future* crime or fraud. See R.C. 2317.02(A)(2) (providing

⁵ As it is undisputed the Ghoumbrials are now divorced and living apart, Mrs. Ghoumbrial could not have any information regarding alleged on-going or future contemplated wrongful acts that would fall under the crime-fraud exception.

that the exception applies to communications relating to “furthering an ongoing or future commission of bad faith by the client.”). Thus, the even if the exception in R.C. 2317.02(A)(2) could apply, it would not apply to remove the protections under the spousal privilege under these circumstances.

Finally, although no Ohio court has applied the crime-fraud exception to the spousal privilege, a Sixth Circuit decision holding that a “joint participants exception” applies to the confidential marital communications privilege demonstrates that even if such an exception could apply to the spousal privilege under Ohio law, it would not apply to the expected testimony of Mrs. Ghoubrial. *See United States v. Sims*, 755 F.2d 1239, 1243 (6th Cir. 1985). In *Sims*, the Sixth Circuit stated:

[W]e limit the exception to permit admission of only those conversations that pertain to patently illegal activity. By narrowly construing the exception, we are attempting to protect the privacy of marriage and encourage open and frank marital communications. **Only where spouses engage in conversations regarding joint ongoing or future patently illegal activity does the public's interest in discovering the truth about criminal activity outweigh the public's interest in protecting the privacy of marriage.**

(Emphasis added.) *United States v. Sims*, 755 F.2d 1239, 1243 (6th Cir. 1985). Therefore, under *Sims*, the unique intimacy regarding marital communications required any exception to be narrowly construed and applies only if the conversation involves (1) joint, (2) ongoing or future, (3) patently illegal activity. *Id.* Since the expected testimony of Mrs. Ghoubrial does not involve any of the three requirements under *Sims*, even if such an exception could apply in Ohio, it would not apply under the circumstances of this case. Consequently, the Court erred when it decided that a crime-fraud exception prevents Mrs. Ghoubrial from protection under the spousal privilege.

At a minimum, the deposition of Julie Ghoubrial should not be permitted to go forward unless and until the Court has had an opportunity to review and rule on this Motion. If the

deposition is conducted before the Court rules on this Motion there will be no recourse for the potential prejudice. Dr. Ghoubrial, a named defendant herein, and Mrs. Ghoubrial, a non-party witness, have rights and protections by virtue of their marriage which are codified by statute. Respectfully, no court has the discretion to strip individuals of their statutorily protected rights via oral directive based on inapplicable law.

C. CONCLUSION

For the reasons stated, Dr. Ghoubrial respectfully moves this Court to reconsider its decision regarding the applicability of the spousal privilege to Mrs. Ghoubrial's expected deposition testimony. Ohio law does not recognize a crime-fraud exception to the spousal privilege. Therefore, Mr. and Mrs. Ghoubrial must be permitted to assert the spousal privilege and avoid testifying as to any communication between them during coverture during deposition.

Respectfully Submitted,

/s/Bradley J. Barmen

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was filed electronically with the Court and sent via email to the below parties on this 23rd day of April, 2019. The parties, through counsel, may also access this document through the Court's electronic docket system:

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