

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 Supplemental Brief
Regarding Spousal Privilege or Immunity**

Now comes Defendant, Dr. Sam Ghoubrial ("Dr. Ghoubrial"), by and through counsel, and hereby respectfully submits his Supplemental Brief Regarding Spousal Immunity or Privilege.¹

Ohio's statutory spousal privilege is designed to protect different interests than those protected by the attorney-client privilege or other statutory privileges. Accordingly, the privilege is governed by different rules, including differences in the scope of the privilege, applicable exceptions to the privilege, and even who is legally permitted to assert the privilege. For example:

1. The crime-fraud exception² to the attorney-client privilege **does not apply to spousal privilege**³; and
2. The spousal privilege belongs to the non-testifying spouse. Dr. Ghoubrial, the non-testifying spouse, has not waived and does not waive his statutory spousal privilege.⁴

¹Dr. Ghoubrial adopts and incorporates the arguments put forth in his Motion for Reconsideration of the Court's April 18, 2019 Oral Orders as if fully rewritten herein.

²Notably, the Fifth Amended Complaint is a civil action, not a criminal action. No allegations of criminal conduct exist against Dr. Ghoubrial or any of the other Defendants. To the extent fraud is alleged, Dr. Ghoubrial, M.D. maintains such claims are 100% false.

³Moreover, the crime-fraud exception to attorney-client privilege only applies to future ongoing wrongful conduct, not past conduct. If it applied to past behaviors, it would eviscerate the attorney-client privilege for all clients charged with crimes or being sued for fraud. Thus, even if this same crime-fraud exception was applicable to spousal privilege, the exception could not be invoked in this case.

⁴Even if a husband or wife wanted to testify, the spouse against whom the testimony is being elicited can prevent the testimony by asserting the privilege. Dr. Ghoubrial has an absolute right to invoke spousal privilege to prevent his former spouse, Julie Ghoubrial, from disclosing confidential communications made in private during their marriage. (footnote continued)

A. The Crime-Fraud Exception DOES NOT APPLY to Spousal Privilege

Simply put, federal law applying the crime-fraud exception to future ongoing criminal or fraudulent conduct does not apply to the spousal privilege in civil matters. In *United States v. Sims*, 775 F.2d 1239, (6th Cir. 1985), the Sixth Circuit Court of Appeals held the only exception to the protections given to confidential marital communications is the joint participants exception. This exception applies only to confidential marital communications that pertain to joint *criminal* activity of the spouses. In adopting the joint participant exception to the protections afforded confidential marital communications, the Sixth Circuit recognized the unique intimacy of marital communications. That is why the Sixth Circuit limited the application of the joint participant exception to only those communications regarding conduct that was patently unlawful. The Sixth Circuit stated:

Any exception to the marital communications privilege results in intrusion upon an individual's privacy greater than that occurring in any of the other protected relationships. Out of concern for this unique intimacy... the future crime or tort exception should not be applied to the marital privilege so as to withdraw protection from communications concerning activity which *is not on its face* unlawful. It follows that a mere statement of a spouse's criminal plans should not be outside the privilege. On the other hand, conduct sought by one spouse that is unambiguously illegal would seem outside the area of desired husband-wife intimacy, so that the admission of related communications would be unlikely to hinder favored discussions.

Sims, supra, at 1243 (emphasis in original).

Here, there are no allegations of criminal conduct that could possibly warrant breaching the statutorily protected sanctity of marital communications between Dr. Ghoubril and his former wife that occurred in private during the marriage. Moreover, R.C. § 2317.02(D) makes no mention of any

Here, Julie Ghoubril herself does not want to testify and if forced to testify she will assert her statutory spousal privilege. See Julie Ghoubril's Motion to Reconsider the Court's April 18, 2019 Oral Orders, filed 4/25/19.

exception to the marital privilege, other than communications made in the knowing presence of a third party. Clearly the legislature never intended for the crime-fraud exception to the attorney-client privilege, codified in R.C. § 2317(A)(2), to also apply to the spousal privilege. Tellingly, there is no case law in Ohio extending the crime fraud exception to the attorney-client privilege to the spousal privilege created by R.C. § 2317.02(D).

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, 2000 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 his wife. The Court held:

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 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. Ghoubril 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. Ghoubril waive those rights. Any such order would be plain error and immediately appealable. *See, Burnham v. Cleveland Clinic et al.*, 151 Ohio St.3d 356, 2016-Ohio-8000 (holding an order requiring the production of information protected by the attorney-client privilege causes harm and prejudice that inherently cannot be meaningfully or effectively remedied in a later appeal. Thus a discovery order that is alleged to breach the confidentiality guaranteed by the attorney-client privilege satisfies R.C. 2505.02(B)(4)(b) and is a final, appealable order that is potentially subject to immediate review).

Alternatively, even if the crime-fraud exception under R.C. 2317.02(A)(2) did apply to the spousal privilege, the exception could not apply to the testimony sought by Plaintiffs from Mrs. Ghoubrial. 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 a communication 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 any communications between Dr. Ghoubrial and Mrs. Ghoubrial were in furtherance of any crime or fraud that was ultimately committed. Additionally, Mrs. Ghoubrial's testimony could only concern *past* events, not *ongoing or future* crimes or frauds. See R.C. 2317.02(A)(2) (providing that the crime-fraud exception applies to communications relating to "furthering an ongoing or future commission of bad faith by the client."). Thus, even if the crime-fraud exception to the attorney-client privilege created in R.C. 2317.02(A)(2) could apply, it would not apply to remove the protections under the spousal privilege under these circumstances.

B. Dr. Ghoubrial's Spousal Privilege HAS NOT BEEN WAIVED

Plaintiffs' counsel argues his alleged discussions with Mrs. Ghoubrial waived Dr. Ghoubrial's spousal privilege. This argument is a complete misstatement of the law and without any good faith argument to support such a misrepresentation of law.⁵ In fact, whether these alleged discussions occurred or not is not even relevant to a waiver analysis because none of Mrs.

⁵This is not the first time Attorney Pattakos has attempted to induce a non-party witness to breach confidentiality. As the Court may recall from Dr. Fonner's Affidavit, even after being advised Dr. Fonner did not want to discuss a prior settlement due to a confidentiality agreement, Attorney Pattakos attempted to induce Dr. Fonner to break such confidentiality by improperly telling him the agreement did not apply, even though Attorney Pattakos had not even read the agreement (and even though the confidentiality does apply to testimony in this case as well).

Ghoubrial's conduct is relevant to the issue. *See* Julie Ghoubrial's Motion to Reconsider the Court's April 18, 2019 Oral Orders, filed 4/25/19. As the Ohio Supreme Court ruled in *State v. Savage*, 30 Ohio St. 3d 1, 2, 506 N.E.2d 196 (1987), spousal privilege belongs to the non-testifying spouse, which in this case is Dr. Ghoubrial. In *Savage*, the Ohio Supreme Court stated:

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(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.

Notably, the Ohio Supreme Court chose the phrase "so long as" when describing the *only* statutorily recognized exception to the privilege. That is, "so long as" the statement was not knowingly made in the presence of others, the privilege applies. Importantly, the Ohio Supreme Court did not recognize the attorney-client crime-fraud exception or any other crime-fraud exception to the spousal privilege enumerated in R.C. § 2317(D).

Thus, even if Julie Ghoubrial made certain statements to attorney Pattakos, Dr. Ghoubrial did not. Nor did he authorize Julie Ghoubrial to make any such alleged statements to attorney Pattakos, or to anyone else. As the privilege belongs to Dr. Ghoubrial as the non-testifying spouse, no alleged waiver on the part of Julie Ghoubrial would or could prevent Dr. Ghoubrial from asserting his statutory spousal privilege to prevent Julie Ghoubrial from disclosing confidential marital communications made in private during the marriage.

After the Ohio Supreme Court decided *State v. Savage*, the 11th District Court of Appeals followed suit in *State v. Simpson*, 11th Dist. Lake No. 93-L-014, 1994 Ohio App. LEXIS 4472, at *49-50 (Sept. 30, 1994), holding:

R.C. 2317(D) addresses the husband-wife privilege and provides, in pertinent part:

“The following persons shall not testify in certain respects:

(D) Husband or wife, concerning any communications 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;***.”

The privilege is held by the non-testifying spouse, and may be applied to bar testimony of such communications or acts. *State v. Savage* (1987), 30 Ohio St.3d 1, 2, 506 N.E 2d 196.

The law is clear: Dr. Ghoumbrial has an absolute right to assert his spousal privilege to prevent Julie Ghoumbrial from being compelled to testify regarding private marital communications over his objection. Mrs. Ghoumbrial does not wish to give any testimony in this matter and she has expressed she has no direct or relevant evidence regarding the issues in this case. *See* Julie Ghoumbrial’s Motion to Reconsider the Court’s April 18, 2019 Oral Orders, filed 4/25/19.

While there is an argument the spousal privilege applies to both the testifying and non-testifying spouse, neither spouse has the legal authority to unilaterally waive the privilege without the consent of the other. *See* 1 Weissenberger’s Ohio Evidence Treatise § 501.17 (2018). The spousal privilege extends to both husband and wife, protecting both partners and prohibiting each of them from testifying as to certain matters. *Id.* By the express reciprocity articulated in the language of the statute, neither spouse can unilaterally waive the privilege without the consent of the other.

Moreover, it is well-settled that “once a privilege applies, ... the one who holds the privilege is the only one who can determine to release it or to disclose the communication.” *State v. Ventura*, 101 Ohio Misc.2d 15, 19, 720 N.E.2d 1024 (C.P. 1999). *See also, Maust v. Palmer*, 94 Ohio App.3d 764, 641 N.E.2d 818 (1994) (while attorney-client privilege can be waived, it can only be waived by the client, not by the attorney).

Dr. Ghoubrial has not and does not waive his statutory spousal privilege. Accordingly, Julie Ghoubrial cannot be compelled to testify, over Dr. Ghoubrial's objection, to private matters communicated to her during the marriage. *See, Merrill v. William E. Ward Ins.*, 87 Ohio App.3d 583, 622 N.E.2d 743 (10th Dist. 1993) (holding under the husband-wife privilege, the party seeking to introduce a privileged statement must secure a waiver from both spouses, or in the case of a holder's death, from the successor in interest of the deceased).

Plaintiffs' counsel also argues Dr. Ghoubrial's spousal privilege was waived because Julie Ghoubrial testified in the unrelated divorce action, which argument is unavailing and again misstates the law.⁶ Plaintiffs argue Julie Ghoubrial's testimony and Dr. Ghoubrial's alleged failure to object and/or assert the spousal privilege to her testimony somehow constitutes a waiver of the privilege in this matter. This argument is nonsensical. The spousal privilege does not apply in divorce cases. In *City of Fairfield v. Profitt*, 12th Dist. Butler Case No. CA96-11-240, 1997 Ohio App. LEXIS 3649, (Aug. 11, 1997) at *14, the Twelfth District stated:

The clear import of the foregoing statute [R.C. 2317(D)] is to abrogate the marital privilege in divorce and alimony actions. It was under the authority of this statute that the supreme court permitted the husband to testify. No such statute governs the situation in the case at bar. Moreover, the legislature has not chosen to exempt estranged spouses from the rule or marital privilege as set forth in R.C. 2317(D).

Simply by necessity, the spousal privilege cannot operate in divorce proceedings where testimony concerning communications made and acts done during coverture may be necessary to prove grounds for divorce or to provide for an equitable division of marital property. *See* 1

⁶As previously stated, the divorce action was sealed and Julie Ghoubrial's testimony in that matter was expressly designated as confidential by Judge Quinn. Any knowledge Plaintiffs and/or their counsel claim to have regarding the subject matter of Julie Ghoubrial's testimony in the divorce case is either purely speculative and unsupported or was obtained in direct violation of Judge Quinn's Orders. Moreover, absent waiver by Dr. Ghoubrial, such information remains inadmissible.

Weissenberger's Ohio Evidence Treatise § 501.17 (2018). Waiver is a "voluntary relinquishment of a known right." *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.2d 470, 2006-Ohio-6553, ¶¶ 49, 861 N.E.2d 109.

Dr. Ghoubrial could not voluntarily waive a right he did not have in the divorce action. Likewise, any testimony by Julie Ghoubrial in the divorce action cannot be considered a waiver of the spousal privilege in this matter for the same reason. Neither Mrs. Ghoubrial nor Dr. Ghoubrial voluntarily waived spousal immunity by their actions in the divorce matter.

CONCLUSION

For the reasons stated herein, as well as those articulated in Dr. Ghoubrial's previously filed Motion to Reconsider the Court's April 18, 2019 Oral Orders, which is incorporated herein by reference, Dr. Ghoubrial respectfully requests this Honorable Court uphold his statutorily protected right to assert the spousal privilege, if and when necessary, if Julie Ghoubrial is forced to testify in this matter.⁷ Dr. Ghoubrial has never waived the right to assert the privilege. Moreover, the crime-fraud exception relied upon by Plaintiffs does not apply to the spousal privilege. Even if such an exception did apply, it would only operate to except those communications relating to crimes or frauds being contemplated in the future, not to acts allegedly occurring in the past.⁸ As Plaintiffs seek to question Julie Ghoubrial regarding the allegations in the Fifth Amended Complaint (things that allegedly occurred years ago), the crime-fraud exception would be irrelevant, even if it were

⁷Julie Ghoubrial filed a Motion to Reconsider the Court's April 18, 2019 Oral Orders on April 25, 2019, wherein she clearly indicated she does not want to be forced to testify in this matter. She further indicated if she is forced to testify in this matter against her will she intends to assert her statutory spousal privilege where appropriate. Like Dr. Ghoubrial, she has an absolute right to assert the spousal privilege.

⁸The crime-fraud exception to the confidentiality of attorney-client communications only applies to on-going or future contemplated crimes or frauds. It does not apply to past conduct as that would essentially eviscerate the attorney-client privilege in the criminal context or in civil fraud cases.

applicable to spousal privilege. As such, Julie Ghoubrial cannot be compelled to testify to matters protected by the spousal privilege.

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 26th day of April, 2019. The parties, through counsel, may also access this document through the Court's electronic docket system:

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