

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
Magistrate Patricia A.
Himelrigh

**Dr. Ghoumbrial's Motion to Stay
April 26, 2019 Magistrate's Order**

Now come Defendant, Dr. Sam Ghoumbrial ("Dr. Ghoumbrial"), and hereby respectfully requests this Court stay execution of the April 26, 2019 Magistrate's Order ("Magistrate's Order") mandating that non-party Julie Ghoumbrial produce her confidential deposition transcript from her divorce action within 15 days until the Court has ruled on Dr. Ghoumbrial's Motion to Set the Magistrate's Order Aside ("Motion to Set Aside") has been ruled upon.¹ As indicated in the Magistrate's Order, the Motion to Set Aside does not stay the effectiveness of the Order. *See* Civ. R. 53(D)(2)(b). If the Magistrate's Order requiring Julie Ghoumbrial to produce the transcript for an in camera inspection within 15 days (by May 13, 2019) is not stayed pending a ruling on Dr. Ghoumbrial's Motion to Set Aside, both Julie and Dr. Ghoumbrial's rights will be severely prejudiced and they will have no effective remedy at law. Therefore, the Magistrate's Order should be stayed until such time as the Motion to Set Aside is ruled upon.

Civ. R. 53(D)(2)(b) states in pertinent part:

Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed no later than ten days after the

¹ Dr. Ghoumbrial's Motion to Set Aside is being filed contemporaneously and is incorporated herein by reference.

magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

Here, both the Magistrate and the Trial Court have the authority to stay the effectiveness of the Magistrate's Order as a result of the contemporaneous filing of Dr. Ghoumbrial's Motion to Set Aside. Civ R. 53(D)(2)(b); *see also, Colley v. Colley*, 2009-Ohio-6776, Nos. 09AP-333, 335, 336, (10th Dist., 2009). Because a failure to stay the effectiveness of the Magistrate's Order will result in a substantial injustice, the Magistrate's Order should be stayed pending resolution of Dr. Ghoumbrial's Motion to Set Aside.

The stated purpose of the Magistrate's Order relative to Julie Ghoumbrial's deposition transcript from her divorce proceeding warrants a stay pending resolution of the Motion to Set Aside. The Magistrate's Order compels the production of the subject transcript for an in camera inspection "to determine (1) whether Julie Ghoumbrial was in fact questioned about the allegations in the Fifth Amended Complaint, by Attorney David Best, and, if so (2) whether such testimony results in a waiver of the Ghoumbrials' spousal immunity." *See* Magistrate's Order, pg. 3. However, and as stated in Dr. Ghoumbrial's Motion to Set Aside, because the spousal privilege is not available in divorce proceedings, there could not have been a waiver by either Julie or Dr. Ghoumbrial. *See* Motion to Set Aside which is incorporated herein by reference. At the same time, the Magistrate's Order places Julie Ghoumbrial in the untenable position of being subject to a finding of contempt for violating a court order no matter what she does relative to the production of the transcript.

However, because there could not have been a waiver of the spousal privilege in the divorce proceeding, there is no need for an in camera inspection for the specific purpose of determining whether a waiver occurred. At a minimum, the Magistrate's Order compelling Julie Ghoumbrial to produce the transcript for an in camera inspection should be stayed until the Motion to Set Aside is

determined and the Magistrate's Order is either set aside, or Judge Brogan issues an Order adopting it. Considering Julie Ghoubrial has already indicated she has no information relative to class certification, no Party will be prejudiced by the granting of a stay while the failure to grant a stay will cause substantial prejudice to both Julie Ghoubrial, a non-party to this action, and to Dr. Ghoubrial.² See Julie Ghoubrial's Motion for Reconsideration, filed April 25, 2019.

The timing of Magistrate's Order further warrants a stay pending resolution of Dr. Ghoubrial's Motion to Set Aside. In a phone conference on April 23, 2019 with all counsel and Magistrate Himelrigh to discuss the deposition of non-party Julie Ghoubrial and the spousal privilege issue, Plaintiffs' counsel Peter Pattakos requested until Friday April 26, 2019 in which to brief the issue. During that call Magistrate Himelrigh specifically requested the Parties address the waiver issue in their briefs. Magistrate Himelrigh also granted Defendants, particularly Defendant Dr. Ghoubrial, the right to file supplemental briefs addressing the waiver issue by the April 26, 2019 deadline.³ The Parties were then granted two days in which to respond to the opposing Parties' briefs. Magistrate Himelrigh further indicated the deposition of Julie Ghoubrial would not go forward until the Court ruled on the briefs.

Notwithstanding the directives from Magistrate Himelrigh during the call on April 23, 2019, the Magistrate's Order was issued on April 26, 2019, before Dr. Ghoubrial's supplemental brief was filed and despite the fact Plaintiffs never filed anything by the agreed-to deadline.⁴ The Magistrate's

² As indicated in the Motion to Set Aside, mandating that Julie Ghoubrial comply with the Magistrate's Order necessary forces her to violate the 1/25/19 Confidentiality Order of Judge Quinn.

³ See Defendant Dr. Ghoubrial's April 24, 2019 Motion for Reconsideration and Julie Ghoubrial's April 25, 2019 Motion for Reconsideration of the Court's April 18, 2019 Oral Orders, both accepted as Bench Briefs by the Court.

⁴ Despite having requested the opportunity to brief the issues and suggesting the 4/26/19 deadline, Plaintiffs have yet to file anything addressing spousal privilege or the waiver. Defendant Ghoubrial's Supplemental Brief was timely filed on April 26, 2019.

Order inexplicably reversed the Magistrate's position from the call on April 23, 2019 and, intentionally or not, appears to reinstate Judge Brogan's Oral Orders of April 18, 2019 we were previously told were abrogated.

Based on the foregoing, Dr. Ghoubrial respectfully requests the Magistrate's Order be stayed pending resolution of his Motion to Set Aside. The stated purpose of the Magistrate's Order as it relates to the subject transcript is moot considering the spousal privilege is inapplicable in divorce proceedings. Moreover, compelling Julie Ghoubrial to comply with the Magistrate's Order at this time necessarily forces her to violate a Court Order subjecting her to a finding of contempt by either Judge Quinn or by this Court. While no Party will be prejudiced by the staying of the Magistrate's Order pending resolutions of the Motion to Set Aside, the consequences of not staying the Magistrate's Order to both Julie and Dr. Ghoubrial, whether intended or not, will be severe. As such, the Magistrate's Order should be stayed pending resolution of Defendant Ghoubrial's Motion to Set Aside.

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 29th day of April, 2019. The parties, through counsel, may also access this document through the Court's electronic docket system:

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