

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,

Plaintiffs,

v.

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

Defendant.

Case No.: 2016-09-3928

Judge: James Brogan

**KNR DEFENDANTS' MOTION FOR
RECONSIDERATION OF ORDER
REDUCING DEFENDANTS' TIME TO
RESPOND TO MOTION FOR CLASS
CERTIFICATION**

Now come the KNR Defendants, by and through counsel, and hereby respectfully move this Honorable Court to reconsider the portion of its Order of May 15, 2019, reducing the previously allotted time for Defendants to respond to Plaintiffs' motion for class certification. On November 6, 2018, 2018, the Court granted the parties' Joint Motion to Modify Scheduling Order as follows:

- Deadline to Complete Discovery concerning the Class-Certification Issue – March 3, 2019
- Deadline for Plaintiffs' Motion for Class Certification - **April 3, 2019**
- Deadline for Defendants' Opposition to Class Certification - **May 3, 2019**

(Ex. A., Order of November 6, 2018, emphasis added). Since that time, multiple extensions of Plaintiffs' deadline for filing the motion have been extended on multiple occasions, most recently until May 15, 2019. (Ex. B, Magistrate's Order of April 23, 2019). None of these orders indicated that Defendants would have less than the thirty days previously allotted by the Court.

On May 14, 2019, the Court issued an order which, in part, set a deadline for Defendants to respond to the class certification motion by June 3, 2019. (Ex. C, Decision of May 14, 2019). It is anticipated Plaintiffs' motion will be lengthy and require considerable time and attention for

defense counsel to respond – there are allegedly five classes of Plaintiffs that will be the subject of the motion. The Decision of May 14, 2019, significantly reduces the time for Defendants to respond from 30 days to 19 days. Defendants have been preparing as if the 30 day time previously allotted remained in effect, and respectfully request that the Court reconsider its Decision of May 14, 2019, to the extent it reduces the time Defendants have to prepare a response to Plaintiffs' forthcoming motion. This is not a request for an "extension" of time, but merely a request to restore the time initially allotted to respond by prior Orders.

Respectfully submitted,

/s/ James M. Popson

James M. Popson (0072773)
SUTTER O'CONNELL CO.
1301 East 9th Street
3600 Erieview Tower
Cleveland, Ohio 44114
(216) 928-2200 phone
(216) 928-4400 facsimile
jpopson@sutter-law.com

Thomas P. Mannion (0062551)
Lewis Brisbois
1375 E. 9th Street, Suite 2250
Cleveland, Ohio 44114
(216) 344-9467 phone
(216) 344-9241 facsimile
Tom.mannion@lewisbrisbois.com

Counsel for KNR Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the Court on this 15th day of May, 2019. The parties may access this document through the Court's electronic docket system.

/s/ James M. Popson

James M. Popson (0072773)

SANDRA KURT

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SUMMIT COUNTY IN THE COURT OF COMMON PLEAS
CLERK OF COURTS

COUNTY OF SUMMIT

MEMBER WILLIAMS, et al.

Plaintiffs

-vs-

KISLING, NESTICO & REDICK,
LLC, et al.

Defendants

CASE NO. CV 2016 09 3928

JUDGE JAMES A. BROGAN
(Sitting by Assignment #18JA1214)**ORDER**

This matter came before the Court upon the Joint Motion to Modify Scheduling Order.


Upon due consideration, the Court hereby GRANTS said motion. The scheduling order is as follows:

Deadline to Complete Discovery concerning the Class-Certification Issue – **March 3, 2019**

Deadline for Plaintiffs' Motion for Class Certification – **April 3, 2019**

Deadline for Defendants' Opposition to Class Certification – **May 3, 2019**

IT IS SO ORDERED.


JUDGE JAMES A. BROGAN
Sitting by Assignment #18JA1214
Pursuant to Art. IV, Sec. 6
Ohio Constitution

The Clerk of Courts shall serve all parties of record.

JAB:lcb
16-3928e

EXHIBIT

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IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

MEMBER WILLIAMS, et al.)	CASE NO. CV-2016-09-3928
)	
Plaintiffs)	JUDGE JAMES A. BROGAN
-vs-)	
)	MAGISTRATE PATRICIA A.
KISLING NESTICO & REDICK)	HIMELRIGH
LLC, et al.)	
)	
Defendants)	<u>MAGISTRATE'S ORDER</u>
)	

On April 23, 2019, at approximately 3:00 p.m., the undersigned Magistrate participated in a conference call with counsel concerning the impending deposition of Julie Ghoumbrial, (scheduled for April 24, 2019 at 9:30 a.m.). Attorneys Pattakos, Barmen, Popson, Rosen, and Best participated in the call.

The Court, through Judge Brogan, previously participated in a conference call with counsel on April 18, 2019, and made several orders concerning certain depositions of parties and non-parties to this lawsuit. A specific issue of law was raised regarding non-party Julie Ghoumbrial's deposition – as Defendant Dr. Ghoumbrial is asserting spousal immunity/spousal privilege concerning that deposition. The Court has since determined that it misspoke on the issue, specifically in reference to the mentioned *Zolin* case.¹ Accordingly, the Court VACATES AND HOLDS FOR NAUGHT any prior oral Orders it made during the conference call on April 18, 2019. In the future, the Court will speak only through its written orders on the docket. Although Ms. Ghoumbrial has since been re-subpoenaed to appear for deposition tomorrow at 9:30, the Court postpones the deposition until the parties have had sufficient opportunity to brief all of the legal issues (spousal privilege, crime-fraud exception and waiver) surrounding this specific witness.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the oral Orders issued on April 18, 2019 are VACATED AND HELD FOR NAUGHT. The Court will speak only through its written orders filed on the docket.

Further, Defendants have filed for reconsideration of some of the oral Orders – those briefs will be treated as bench briefs regarding the legal issues raised – and counsel have leave to file any supplemental briefs on the issue.

¹ *United States v. Zolin*, 491 U.S. 554 (1989).
Sandra Kurt, Summit County Clerk of Courts



Finally, the Court GRANTS Plaintiffs' motion for extension of time to file their Class Certification brief. Plaintiffs shall file their class-certification brief on **May 15, 2019**.

It is so ordered.



MAGISTRATE PATRICIA A. HIMELRICH

CC: JUDGE JAMES A. BROGAN
ALL COUNSEL AND ATTORNEYS OF RECORD

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**IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT**

MEMBER WILLIAMS, et al.)	CASE NO.: CV-2016-09-3928
)	
Plaintiffs)	JUDGE JAMES A. BROGAN
)	
-vs-)	
)	
KISLING NESTICO & REDICK)	<u>DECISION</u>
LLC, et al.)	
)	
Defendants)	

- - -

Defendant Ghoubril, joined by the KNR Defendants (“Defendants”), and non-party Julie Ghoubril moved this Court to stay and set aside an April 26, 2019 Magistrate’s Order.

First, Defendants state the Magistrate’s Order should be set aside because an *in camera* review is “unnecessary” and would somehow violate Defendant Ghoubril’s and Julie’s spousal privilege.

The necessity of the *in camera* review is well-documented in the record of this case and the reasoning set forth in the Magistrate’s order. Specifically:

Julie and Defendant Ghoubril were involved in divorce proceedings in 2018 in the Summit County Domestic Relations Court. Julie was deposed in those proceedings and she was questioned by Attorney David Best about the allegations of Plaintiffs’ Fifth Amended Class Action Complaint in this Court.¹ This line of questioning, if it occurred, is “highly relevant, probative, and subject to discovery in this case.” February 5, 2019 Court Order, p. 5; April 26, 2019 Magistrate’s Order. However, the Domestic Relations Court designated the deposition “confidential” – even though the transcript was never filed with the Court, Julie objected to the designation, and the Court made no findings of necessity for the order. *Id.*

¹ Attorney David Best represents the KNR Defendants in this case. In the Domestic Relations Court case he represented the Ghoubril’s businesses (named third-party defendants in the divorce).



Court Order, p. 4-5; and April, 26, 2019 Magistrate's Order. Plaintiffs' attempted to intervene in the Domestic Relations Court for the limited purpose of obtaining the transcript for *in camera* review by this Court (and subject to the Protective Order already in place in this case). The Domestic Relations Court denied intervention so Plaintiffs subpoenaed Julie to be deposed in this case, and to produce a copy of her "confidential" deposition transcript. Julie never moved to quash the subpoena, nor did she seek a protective order to limit the scope of the subpoena. Instead, the day before her deposition was scheduled to be conducted in this case (and she was scheduled to produce the transcript under subpoena), Defendants unilaterally cancelled Julie's deposition and production of the transcript. This sanctionable conduct led to the appointment of a Magistrate. See April 23, 2019 Magistrate Specific Order of Reference and April 23, 2019 Magistrate's Order.

Julie's impending deposition was postponed by the Magistrate in order to review the parties' supplemental briefs concerning Julie and Defendant Ghoubril's spousal immunity/privilege. See April 23, 2019 Magistrate's Order. The Magistrate then compelled production of the deposition transcript for *in camera* review by this Court, and held Julie's impending deposition testimony in abeyance. See April 26, 2019 Magistrate's Order. Julie was compelled to produce a hard copy of the deposition transcript in a sealed envelope to the Court for *in camera* inspection. *Id.* An *in camera* inspection is the appropriate procedure for reviewing confidential materials and/or matters that may be privileged in any fashion. *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993) ("[In camera review] is precisely the mechanism available to determine whether a claim of privilege in a discovery dispute is justified.").

In order to resolve the issues before the Court, and to determine the Julie's and Defendant Ghoubrial's spousal privilege concerns, the Magistrate limited the *in camera* inspection to determine (1) whether Julie was in fact questioned by Attorney David Best about the allegations in Plaintiffs' Fifth Amended Class Action Complaint and (2) whether such testimony results in a waiver of the Ghoubrial's spousal privilege.

The potential for a waiver of the privilege is legitimate. The spousal privilege is not absolute – it can be waived. Further, R.C. 2317.02 makes clear that testimony “about communication[s] made or act[s] done in the known presence or hearing of a third person competent to be a witness” are not protected by the privilege. Thus, testimony about such acts or communications may be relevant and subject to discovery in this case. When conducting an *in camera* review, the Court must look to the nature and subject matter of the communication at issue to determine whether spousal privilege applies.

Further, *in camera* review does not affect a substantial right of a party – it is only the disclosure of the information that effects a substantial right. *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60. Under all of these circumstances, Defendants argument that an *in camera* review is “unnecessary” is baseless. Also, the concern that the *in camera* review, in and of itself, would violate the Ghoubrial's spousal immunity is also unsupported by law or fact.

Defendants, and Julie, also express concern that the Magistrate's Order compelling Julie to produce a confidential document to this Court under an established Protective Order would place Julie in a position where she could be sanctioned by the Domestic Relations Court for violating its “confidentiality” designation. These concerns are not supported by any fact or law. Defendants arguments concerning comity between Courts and the Full Faith and Credit Clause are also unsupported by the cases they have cited.

Separately, the KNR Defendants moved to set aside the Magistrate's Order to compel production of documents from Putative Class Plaintiff Monique Norris. The Magistrate specifically limited Ms. Norris' production in the Order. The KNR Defendants failed to demonstrate that the Magistrate abused her discretion in limiting production under the circumstances.

Finally, Plaintiffs moved the Court to stay rulings on discovery issues relating to Julie. Plaintiffs' motion to stay discovery re: Julie Ghoubril is granted. Julie's subpoenaed deposition will remain held in abeyance until after the class-certification process and this Court will not disclose to any party, nor produce to any counsel, of any portion of Julie's "confidential" transcript (if at all), until after it has ruled on the class-certification issue. However, Plaintiffs' suggestion that this Court utilize the information it gleans from the *in camera* review, or be influenced in deciding the issue of class certification, is inappropriate. It is well settled that this Court cannot consider evidence or testimony that is outside the record in determining any substantive issue.

CONCLUSION

The Magistrate's authority is fixed by this Court and Civ.R. 53. In civil cases, Magistrate Orders are effective without judicial approval and those orders may address any issue necessary to regulate the proceedings, if not dispositive of a claim or defense of a party. Civ.R. 53(D)(2)(a)(1); *Crane v. Teague*, 2nd Dist. Montgomery Co. App. No. 20684, 2005 Ohio 5782; *Sagen v. Thrower*, 8th Dist. Cuyahoga Co. App. No. 73954, 1999 WL 195665, *5 (April 18, 1999).

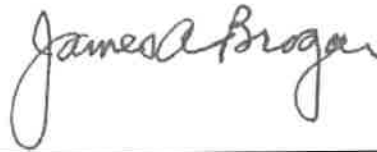
After thorough review, the Court OVERRULES the parties' and non-party's Motions to Stay and Set Aside the April 26, 2019 Magistrate's Order.

For the next 60 days the undersigned is focused upon class-certification. Counsel would be wise to do the same and complete the tasks at hand. Plaintiffs' class-certification brief is due May 15, 2019. Responses by the various Defendants are due on June 3, 2019. Plaintiffs' reply brief is due June 13, 2019. No extensions will be granted and no sur-reply briefs will be accepted. Depending on the issues raised in the briefs, the Court may schedule oral arguments.

In the meantime, the Magistrate will resolve pre-trial motions and the remaining discovery disputes filed in recent days.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Motions to Stay and Set Aside the Magistrate's Order are OVERRULED IN THEIR ENTIRETY.

IT IS SO ORDERED.



JUDGE JAMES A. BROGAN
Sitting by Assignment #18JA1214
Pursuant to Art. IV, Sec. 6
Ohio Constitution

CC: ALL COUNSEL AND PARTIES OF RECORD