

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

**Sam Ghoumbrial, M.D.'s Motion to Stay
May 14, 2019 Decision Re: *In Camera*
Review of Deposition Transcript**

Now comes Defendant, Dr. Sam Ghoumbrial ("Dr. Ghoumbrial"), by and through counsel, and hereby respectfully requests this Court to stay execution of the May 14, 2019 Decision ("Decision") mandating production and *in camera* inspection of the confidential deposition transcript from non-party Julie Ghoumbrial's divorce proceedings until after the Court has decided on issues of class certification. In addition to the Court acknowledging the impropriety of utilizing the deposition transcript to make rulings on class certification, Plaintiffs also acknowledge that the deposition transcript is unnecessary for purposes of ruling on substantive class-certification issues. *See* Plaintiffs' Motion to Stay Ruling on Certain Discovery Issues relating to Julie Ghoumbrial, filed 05/01/2019, at p. 2.¹ Thus, staying execution of the Decision until ruling on issues of class certification poses no risk of delay to any substantive issue in this matter.

Importantly, in its Decision, the Court explicitly stated that it would be inappropriate for the Court to utilize or be influenced in any manner by any information gleaned from an *in camera*

¹ Dr. Ghoumbrial has never waived spousal privilege and he is unwilling to do so now. While he did discuss certain aspects of his business practices with his wife during their marriage, those discussions were always held in private and never in the presence of any third party. *See* Affidavit of Dr. Sam Ghoumbrial, M.D., attached as Exhibit A.

review of the deposition transcript when ruling on issues of class certification and held Julie's deposition in abeyance until the conclusion of the class-certification process. *See* May 14, 2019 Decision, attached hereto as Exhibit B, at p. 4. Moreover, the Court recognized that "[i]t is well settled that this Court cannot consider evidence or testimony that is outside the record in determining any substantive issue." *Id.* Consequently, Dr. Ghoumbrial requests that the Court stay execution of the Decision as it pertains even to the production of Julie Ghoumbrial's deposition transcript until after ruling on the pressing issues of class certification. Such a stay is necessary to avoid the appearance of impropriety arising from the Court possessing the outside-the-record deposition transcript of Julie Ghoumbrial in the midst of ruling on substantive issues of class certification, even if the Court did not review it prior to ruling.

The Court must avoid any appearance or existence of impropriety. Canon 1 of the Ohio Code of Judicial Conduct provides "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Further, Rule 1.2 of the Ohio Code of Judicial Conduct states that "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Comment 5 to Rule 1.2 provides:

The test for appearance of impropriety is an objective standard that focuses on whether the conduct would create, in reasonable minds, a perception that the judge violated this code, engaged in conduct that is prejudicial to public confidence in the judiciary, or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Under the present circumstances, the Court's possession of the outside-the-record deposition transcript prior to determining substantive issues of class certification would create a perception, in reasonable minds, that the Court engaged in conduct (considering information outside the record)

that reflects adversely on the Judge's impartiality when determining issues of class certification. Thus, because it is inappropriate for the Court to consider such information—as the Court acknowledges—the Court must not possess it prior to ruling on issues of class certification.

Accordingly, Dr. Ghoumbrial respectfully requests that the Court stay execution of the May 14, 2019 Decision mandating production of the deposition transcript of non-party Julie Ghoumbrial for an *in camera* review until it has ruled on issues of class certification. The Court must avoid any potential or appearance of impropriety. Quite simply, the Court can easily avoid this quagmire by waiting to possess the deposition transcript until *after* ruling on the substantive issues of class certification. Thus, just as Julie Ghoumbrial's deposition is held in abeyance, any production and/or *in camera* review should also be stayed pending a ruling on issues of class certification.

Respectfully Submitted,

/s/ Bradley J. Barmen

Bradley J. Barmen (0076515)

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Counsel for Defendant

Dr. Sam Ghoumbrial

CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of May, 2019, I electronically filed the foregoing with the Clerk of Courts using the CM/ECF system which will send notification of this filing to all attorneys of record.

/s/ Bradley J. Barmen

Bradley J. Barmen

Counsel for Defendant

Dr. Sam N. Ghoubril

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,)	Case No. CV-2016-09-3928
)	
Plaintiffs,)	Judge James A. Brogan
)	
vs.)	<u>AFFIDAVIT OF SAM N. GHOUBRIAL</u>
)	
KISLING, NESTICO, & REDICK,)	
LLC, et al.,)	
)	
Defendants.)	

Now comes Affiant, Sam N. Ghoubrial, having first been sworn upon his oath, and attests as follows:

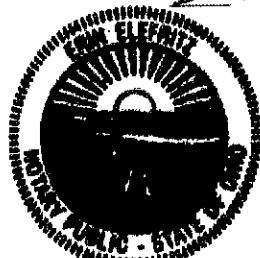
- 1) I am of legal age, sound mind, and otherwise competent to testify.
- 2) I am familiar with the allegations set forth in the 5th Amended Complaint filed in the matter of *Williams v. Kisling, Nestico & Redick, LLC*, in the Summit County Common Pleas Court Case Number CV-2016-09-3928.
- 3) During the course of my marriage to Julie Ghoubrial I never discussed the allegations set forth in the 5th Amended Complaint, with Julie in the presence of a third party.
- 4) I have never waived my spousal privilege, and do not wish to waive that privilege.

FURTHERMORE AFFIANT SAYETH NAUGHT.



SAM N. GHOUBRIAL

STATE OF OHIO)
) SS:
COUNTY OF SUMMIT)

SWORN TO AND SUBSCRIBED in my presence by SAM N. GHOUBRIAL this
20 day of May, 2019.



Erin Elefritz
Notary Public
In and For the State of Ohio
My Commission Expires
16 January 2022


NOTARY PUBLIC



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)	

- - -

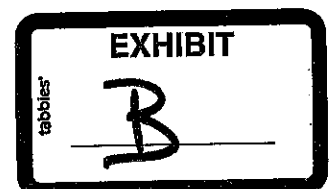
Defendant Ghoubril, joined by the KNR Defendants (“Defendants”), and non-party Julie Ghoubril moved this Court to stay and set aside an April 26, 2019 Magistrate’s Order.

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 lead 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 product 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 Ghoumbrial 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).

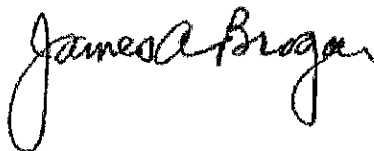
After thorough review, the Court OVERRULES the parties' and non-party's Motions to Stay and Set Aside the April 26, 2019 Magistrate's Order.

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