



of the events that occurred on April 17 and April 18, 2019. Two motions to quash the subpoena were filed by the parties in this case, including Dr. Sam Ghoubrial asserting his spousal privilege on April 17, 2019. (Ex. B). Requiring a third motion to quash would be superfluous. It was the filing of the Motions to Quash that caused Plaintiffs' counsel to request an "emergency hearing" over the phone with the Court on April 18, 2019.

The KNR Defendants did not "unilaterally cancel" the deposition of Julie Ghoubrial, and had no authority or ability to do so.<sup>2</sup> Julie Ghoubrial has her own counsel, and is not subject to the control of any KNR Defendant. The Court goes on to describe the cancelation of the deposition wrongly attributed to KNR as "sanctionable." It is troubling that the Court chose to describe a party's conduct as sanctionable without first establishing that the party actually engaged in the conduct at issue. Moreover, no defendant in this case "canceled" Julie Ghoubrial's deposition. The Court itself postponed the deposition via verbal order, (Ex. C, Transcript of Proceedings at p. 20-22),<sup>3</sup> and then properly allowed the parties time to brief the issue given the importance of an assertion of privilege. (Ex. D, Magistrate's Order of April 23, 2019).<sup>4</sup>

The KNR Defendants object to the Court's factually inaccurate description of the conduct of the KNR Defendants and the events that transpired as it relates to the deposition of Julie Ghoubrial, and respectfully request the Court correct the record by amending the order to reflect the events that actually occurred. KNR did not engage in any nefarious or "sanctionable"

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<sup>2</sup> The KNR Defendants have not unilaterally cancelled any depositions in this case, and have been forced to conduct them in the order dictated by Plaintiffs throughout this litigation. Plaintiffs have unilaterally cancelled multiple depositions in this case, several on the day prior to the deposition without any motion for protective order being filed.

<sup>3</sup> During the phone hearing Attorney Best stated that some of the lawyers were not in Akron at the time of the phone hearing regarding the deposition of Ms. Ghoubrial and asked the court to allow the parties to set a date. The court stated, "I agree with Attorney Best on that. Okay. So get that settled. If you're in two different cities -- I thought you were all sitting pretty close -- you were close, but I realize you're some distance away, so get that set up appropriately or all of you, okay? On the Ghoubrial deposition." (Id., at p.22).

<sup>4</sup> The Magistrate then proceeded to rule before the parties' briefs were due.

conduct by “unilaterally cancelling” the deposition of April 18, 2019, and the record should so reflect.

## II. Clarification regarding the prior testimony of Julie Ghoubrial

At one point, the Decision of May 14, 2019, states that the issue of Julie Ghoubrial’s testimony is being held in abeyance until the issue of class certification is resolved. This was based upon Plaintiffs’ motion indicating that the testimony is not necessary as it relates to class certification. Likewise, the Decision noted it would be improper for the Court to consider Ms. Ghoubrial’s prior transcript at this stage of the litigation. “It is well settled that this Court cannot consider evidence or testimony that is outside the record in determining any substantive issue.” (Ex. A, Decision of May 14, 2019, p. 4). Moreover, it is clear from Plaintiffs’ Motion that the testimony was not necessary for Plaintiffs’ to seek class certification, and was merely an attempt to influence the Court outside the record evidence necessary to resolve class certification.

The KNR Defendants respectfully submit that because the Court has ruled that the information in the transcript should not be considered on class certification, that production of the transcript be held in abeyance until such time as the issue of class certification has run its course. This would avoid the possibility of an appeal and prevent inadvertent prejudice to any of the Defendants.

Respectfully submitted,

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Counsel for Defendants

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was filed electronically with the Court on this 22nd 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)

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 LLC, et al.	)	<u>DECISION</u>
	)	
Defendants	)	

- - -

Defendant Ghoubrial, joined by the KNR Defendants (“Defendants”), and non-party Julie Ghoubrial 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 Ghoubrial’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 Ghoubrial 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.<sup>1</sup> 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.*

<sup>1</sup> Attorney David Best represents the KNR Defendants in this case. In the Domestic Relations Court case he represented the Ghoubrial’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.



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

CC: ALL COUNSEL AND PARTIES OF RECORD

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

**KNR Defendants' Motion to Quash  
and Motion for Protective Order re:  
Deposition of Julie Ghoubrial**

Now come the KNR Defendants, by and through undersigned counsel, pursuant to the Ohio Rules of Civil Procedure, and hereby join in Defendant Ghoubrial's Motion for a Protective Order and/or Motion to Quash to preclude the deposition of Julie Ghoubrial from moving forward on April 18, 2019.

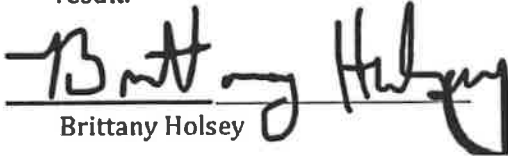
The KNR Defendants were promised by Attorney Pattakos that he would produce certain witnesses, whom he also represents, for deposition. Attorney Pattakos made these promises for months. However, despite over 50 requests for these depositions, Attorney Pattakos sandbagged the Defendants and then refused to produce the witnesses, including intentionally violations valid Notices of Deposition and validly issued and served subpoenas. The Defendants hereby incorporate their Motions to Compel previously filed on the depositions of Brittany Holsey, Thera Reid, and Monique Norris into this brief, as if fully incorporated herein.

Moreover, since those briefs were filed, Plaintiffs' counsel expressly induced Brittany Holsey, an important non-party witness whom Attorney Pattakos did not represent at the time he so induced her, into ignoring a validly issued and served subpoena. In fact, he told her she could essentially ignore the subpoena and helped her send the following objection on the eve of the deposition, which was set for today:



April 16, 2019

I, Brittany Holsey, object to the subpoena that the KNR Defendants served on me on April 11, 2019 in Summit County Case No. CV-2016-0 as unduly burdensome under the circumstances, given the relative unimportance of my testimony to class-certification issues. Further, I understand that the discovery deadline for class-certification is April 15, 2019, and that the subpoena served on me is untimely as a result.

  
Brittany Holsey

Please note such objection specifically violates the Ohio Civil Rules regarding subpoenas, which expressly state an objection relating to undue burden may not be filed absent an attempt to resolve the issue, with Ms. Holsey did not do. Moreover, the reasons for the alleged burdensome nature have nothing to do with a “burden”, but have to do with legal issues that clearly Attorney Pattakos advised Ms. Holsey on despite not representing her at the time. Specifically, she claimed her testimony has “relative unimportance” to the “class-certification issues”, a fact or opinion she would have no idea about and which is entirely inaccurate. Moreover, while she cites to the discovery deadline, Ms. Holsey may have been completely unaware that Attorney Pattakos had told us all communications with her should go through him, even though he did not represent her, and that he would agree to produce and Ms. Holsey agreed to attend a deposition. He made this promise for over two months, ever since February 5, 2019. He even told all Defendants her schedule was flexible and she could easily be worked in with other witnesses. However, he refused to provide a single proposed date for her deposition, forcing Defendants to Notice the deposition and serve a subpoena on her (which Attorney Pattakos accepted service of per her authorization). Then, on the eve of the deposition, the objection was sent.

Of course, an objection is not valid grounds not to appear, and we so advised Ms. Holsey and Attorney Pattakos. Moreover, although he threatened to file a Motion to Quash, he never did. Instead, he told Ms. Holsey she did not need to appear, even though the subpoena was validly issued and served. This morning, Ms. Holsey and Attorney Pattakos both failed to show for that deposition. She is also subpoenaed for tomorrow morning, and Attorney Pattakos has advised Ms. Holsey will not honor that subpoena as well.

Importantly for this motion, when Defendants' counsel objected to these very same grounds on Ms. Ghoubrial's deposition, Attorney Pattakos claimed these are not valid objections (despite the fact he used these very objections the night before). Attorney Pattakos specifically stated this Honorable Court had previously ruled depositions on issues not related to class-certification were proper. We understood the Court to mean if a witness was being deposed on class-certification issues, counsel would not be prohibited from questioning on overlapping issues as well. The Defendants did not see an Order from the Court indicating witnesses ONLY being deposed on credibility issues or issues unrelated to class certification could go forward.

Regardless of the Court's intent in that regard, the ruling has to apply to all parties. Plaintiffs' counsel cannot object to Ms. Holsey's deposition as irrelevant to class-certification issues<sup>1</sup> and not show for a validly noticed and subpoenaed deposition but then threaten sanctions against Defendants and the non-party witness herself, Ms. Ghoubrial, for raising the same objection. The Defendants will abide by the scope of discovery this Court orders, whatever that scope is in this regard, but it simply needs to be followed by all parties, not just Defendants. Plaintiffs' counsel cannot decide on his own whim which Civil Rules and Court Orders he will follow or not follow.

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<sup>1</sup>Ms. Holsey's testimony is actually highly relevant to class-certification issues on Classes "A", "B", "C", and "D", at a minimum, as will be outlined in briefing regarding her deposition.

As with Defendant Sam Ghoubrial, M.D., the KNR Defendants are not moving the Court to preclude the deposition of Julie Ghoubrial forever. Rather, this Motion requests the Court issue an Order staying the deposition until a ruling on class certification, as her testimony does not impact class certification issues.

Based on the foregoing, and in the interests of justice, the KNR Defendants respectfully request this Court to enter a Protective Order and Order quashing the subpoena to Julie Ghoubrial and precluding the deposition from going forward at this time. Plaintiffs can certainly notice the deposition if a class is certified, and Ms. Ghoubrial, through counsel, has agreed to appear if so noticed.

Respectfully Submitted,

/s/ Thomas P. Mannion

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**CERTIFICATE OF SERVICE**

The foregoing motion on behalf of the KNR Defendants was filed on this 17<sup>th</sup> day of April, 2019 using the Court's electronic filing system and sent via electronic correspondence to all counsel listed below. Notice of this filing will also be sent to all parties by operation of the Court's electronic filing system.

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/s/ Thomas P. Mannion

Thomas P. Mannion (0062551)

*Counsel for KNR Defendants*

1 do what you want to do.

2 MR. PATTAKOS: Your Honor, if I  
3 may clarify that --

4 MR. MANNION: Your Honor --

5 MR. PATTAKOS: -- Your Honor, this  
6 is Peter Pattakos, if I may clarify, the  
7 Julie Ghoubrial's attorney has notified the  
8 Court, he sent a letter this morning that  
9 Julie is available to be deposed today and  
10 that she can be at my office for the  
11 deposition within 30 minutes.

12 Is this an order that this  
13 deposition, in fact, get done today since  
14 the witness is ready and all defendants  
15 have been on notice and should also be  
16 available and we have the court reporters  
17 here and I can get this done by the end of  
18 the day today easily?

19 THE JUDGE: Yeah, that's fine with  
20 me.

21 MR. PATTAKOS: Okay. Then we'll  
22 see everyone at my office as soon as  
23 everyone can get here --

24 MR. BEST: Wait a minute --

25 MR. PATTAKOS: Can we say everyone





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MR. MANNION: Wait a minute, wait a minute. Attorney Best was saying something and you cut him off, Peter.

MR. BEST: We don't even have the lawyers here, we're in different cities right now, so Pattakos you think you're the judge, but you're not, the judge --

THE JUDGE: Yeah, I heard that --

MR. BEST: -- said (unintelligible) 15 days, so we'll get a date that works for everybody.

THE JUDGE: Okay. I agree with Attorney Best on that. Okay. So get that settled. If you're in two different cities -- I thought you were all sitting pretty close -- you were close, but I realize you're some distance away, so get that set up appropriately for all of you, okay? On the Ghoubrial deposition.

MR. MANNION: Thank you, Your Honor.

THE JUDGE: And all these other orders I'll put on, but right now I'm not in a position to do that. And the lady

1 that's helping up in Akron, will put those  
2 orders on pursuant to my decision.

3 Let's get these depositions done  
4 that KNR wants done, no more delays, let's  
5 get the Ghoubrial deposition done, file it  
6 under seal for my in-camera inspection and  
7 I'll put an order on to that effect, okay?

8 MR. PATTAKOS: Thank you, Your  
9 Honor.

10 MR. MANNION: Thank you, Your  
11 Honor.

12 MR. BEST: Judge, you know, one of  
13 the problems we have here is Mr. Pattakos  
14 doesn't care about confidentiality orders.  
15 He puts stuff on his website, he puts it  
16 out in the public, he gives it to  
17 reporters. If he would ever get that  
18 confidential information -- and I was  
19 involved in a separate capacity during the  
20 divorce for the corporate defendants --

21 THE JUDGE: Uh-huh.

22 MR. BEST: -- I know Mr. Pattakos  
23 will not care about your order and he will  
24 violate it --

25 THE JUDGE: Well --

**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	)	<b><u>MAGISTRATE'S ORDER</u></b>
	)	

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.<sup>1</sup> 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.

<sup>1</sup> *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.**



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MAGISTRATE PATRICIA A. HIMELRIGH

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

lcb