

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

<p>MEMBER WILLIAMS, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>KISLING, NESTICO & REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. CV-2016-09-3928</p> <p>Judge James A. Brogan</p> <p>Plaintiffs' Reply in Support of Plaintiffs' Motion for Hearing and Ruling on whether the Inadvertently Disclosed Deposition Transcript of Julie Ghoubrial is Protected by Privilege</p>
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In response to Plaintiff's 44-page motion, which sets forth various compelling arguments as to why this Court should immediately set a hearing to determine once and for all, after more than four years of delay, whether and to what extent the highly relevant deposition testimony given by Julie Ghoubrial on October 12, 2018 is in fact protected by any privilege, Defendant Ghoubrial advances only a single specious argument that is nearly identical to one that has already been rejected by this Court and the Ninth District: That is to argue that this Court lacks jurisdiction over this matter due to Plaintiffs' pending interlocutory appeal of this Court's "Nunc Pro Tunc" Order dated February 20, 2024. Simply put, nothing about the relief sought in the Motion for Hearing would interfere with the Ninth District's jurisdiction or power to review the limited issues on appeal of the Nunc Pro Tunc Order. Therefore, as discussed more fully below this Court is not divested of jurisdiction to consider the Motion and rule on whether Julie Ghoubrial's deposition transcript is protected by privilege.

Notably, this is not the first time Defendant Ghoubrial has sought to delay proceedings in this case based on the pretext of an ongoing appeal, including as to this Court's *in camera* review of Julie's transcript. As shown in **Exhibit 4** to Plaintiffs' Motion, on January 8, 2020, this Court ordered proceedings to continue in this case, specifically with regard to *in camera* review of Julie Ghoubrial's

deposition transcript, notwithstanding the pendency of an appeal on class certification. In this order, the Court recognized that “discovery rulings” pertaining to the “production” of the Julie Ghoubrial deposition transcript “can and should proceed” during the appeal. *See* Mot., **Ex. 4**. In this order, the Court specifically noted that Julie’s transcript “has already found to be relevant and discoverable in this case.” And in declining to stay its ruling on these issues, the Court noted how Defendants used “unprofessional gamesmanship and obstruction” to cause “significant delays.” The Court thus allowed the case to proceed, noting that “[n]o party should benefit from such behavior and further delay will not serve the interests of justice in this litigation.”

The Ninth District likewise denied Defendant’s request for a stay of this Court’s proceedings on the issue of Julie’s transcript and other issues in its order of March 6, 2020 in CA Nos. 29630 and 29636 (attached as **Exhibit 5** to Plaintiff’s Motion), which it “conclude[d] that it is without authority in the context of an appeal to stay trial court proceedings or to otherwise prohibit trial court action.” *See also In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 9 (“The trial court retains jurisdiction over issues not inconsistent with the appellate court’s jurisdiction to reverse, modify, or affirm the judgment appealed from.”).

Yet here, four years later, Defendant Ghoubrial is apparently doing everything within his power to prevent disclosure of Julie’s deposition transcript from Plaintiffs, their counsel, and the public, even if it means keeping the issue in limbo indefinitely while offering no reason why such a delay would be just or reasonable. Just as the Court refused to countenance Defendant Ghoubrial’s delay tactics back in 2020, so too should it do so today. For the reasons set forth more fully below, he Motion for Hearing should be granted.

While it is true that, in general, once an appeal is perfected a trial court is divested of some jurisdiction, this only applies to “that part of the final order, judgment, or decree which is sought to be reviewed.” *Cramer v. Fairfield Med. Ctr.*, 5th Dist. Fairfield No. 2007 CA 62, 2008-Ohio-6706; *see also*

State ex rel. Electronic Classroom of Tomorrow v. Cuyaboga Cty. Court of Common Pleas, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 13 (“The filing of a notice of appeal divests the trial court's jurisdiction **over the subject matter of the appeal.**”) (emphasis added). “It is well settled that 'once an appeal is perfected, the trial court is divested of jurisdiction **over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment.**” *Quest Wellness Ohio, LLC v. Samuels*, 7th Dist. Mahoning No. 23 MA 0013, 2023-Ohio-4450, ¶ 46-47 (emphasis added, quoting *State ex rel. Electronic Classroom of Tomorrow*).

Ohio courts have repeatedly found that a trial court continues to have jurisdiction during the pendency of an appeal so long as the exercise of that judgment **does not interfere** with the power of the appellate court to review the appealed judgment. *E.g., In re: Cletus P. McCauley & Mary McCauley Irrevocable Trust*, 5th Dist. Stark No. 2013 CA 00237, 2014-Ohio-3489; *Fifth Third Bank v. L&A Invests.*, 2d Dist. Montgomery No. 23601, 2010-Ohio-3769, ¶ 12 (“[A] notice of appeal divests a trial court of jurisdiction to act except over issues not inconsistent with the appellate court's jurisdiction.”) “[W]hen only a part of a case is appealed, the original court may proceed and determine the remainder of the pending case.” *Olen Corp. v. Franklin Cty. Bd. of Elections*, 43 Ohio App.3d 189, 199-200, 541 N.E.2d 80 (10th Dist.1988). **The “correct test” is when an order of a court is appealed to an appellate court, the lower court loses jurisdiction to enter an order which would have the effect of impairing the appellate court's ability to exercise appellate jurisdiction over the issue appealed to that court. Id. “This is not just a matter of rendering certain issues moot so that a determination is not necessary but, rather, must be of a nature that actually interferes with the exercise of appellate jurisdiction by the appellate court.” Id. (Emphasis added).** Therefore, courts must reject any suggestion that all proceedings in an action must come to a stop simply because there is a pending appeal, which is especially true when dealing with interlocutory appeals because it would create an “even greater interference with the orderly administration of justice if every appeal divested

the original court of all jurisdiction over the action.” *Id.*

Defendant Ghoubrial’s opposition fails because continued exercise of jurisdiction by this Court would not impair the appellate court’s review of the Nunc Pro Tunc Order in any material way. At most, if this Court were to rule that the portions of the transcript that are actually relevant to this case were not protected by privilege, and therefore should be produced to the Plaintiffs, it would essentially render the pending interlocutory appeal moot, which would serve judicial economy. *See Olen Corp., supra* (“This is not just a matter of rendering certain issues moot so that a determination is not necessary but, rather, must be of a nature that actually interferes with the exercise of appellate jurisdiction by the appellate court.”). Otherwise, the legal issues involved in both proceedings would remain separate and in no way would this Court’s proceedings interfere with the Appellate Court’s.

Defendant Ghoubrial overstates the issues involved in the pending appeal of the Nunc Pro Tunc Order. The Docketing Statement attached to Plaintiffs’ Notice of Appeal specifically states that the issue being appealed is “[w]hether the trial court erred in granting the appealed order requiring Plaintiffs and their counsel to destroy copies of the Julie Ghoubrial deposition transcript at issue and whether the appealed order is in violation of the First Amendment rights of Plaintiffs, Plaintiffs’ counsel, and the public.” The First Amendment rights of Plaintiffs, their counsel, and the public and whether the Court may legally gag them and/or order them to destroy documents in their possession are important constitutional issues that do not depend on whether the information at issue is actually privileged or not. Indeed, the Nunc Pro Tunc Order was entered without any determination of privilege. The key issue in the appeal is whether the Court has the power to order destruction of documents in Plaintiffs’ counsel’s possession simply because those documents were inadvertently disclosed to Plaintiffs’ counsel, without any fault of Plaintiff’s counsel, contrary to the Court’s intent. The actual reason for why the Court did not want to publish Julie’s transcript to Plaintiffs or the public is irrelevant. Stated otherwise, the Nunc Pro Tunc Order is premised on an alleged general

right of a court to order destruction of inadvertently disclosed documents the court never intended to be made public (for whatever reason).

Contrast that to the Motion for Hearing, which is simply an extension of an ongoing discovery dispute regarding whether Julie's transcript is actually subject to some legal privilege. Determination of any such privilege (or the lack thereof) would not interfere with the appellate court's ability to assess whether the trial court could constitutionally enter the Nunc Pro Tunc Order to correct an inadvertent disclosure of information the court did not intend to make public.

In conclusion, the commonalities between the Motion for Hearing and the pending appeal of the Nunc Pro Tunc Order are not of the sort that would interfere with the Appellate Court's jurisdiction, and therefore not enough to divest this Court of jurisdiction to grant Plaintiffs the relief sought in their Motion. Thus, this Court is not divested of jurisdiction to determine questions of privilege and relevance related to Julie Ghoubril's deposition transcript, and the Court should grant Plaintiffs' Motion for Hearing to resolve that important question once and for all after more than four years of delay. Further delay would not serve the interests of justice and would do nothing more than cause continued prejudice to Plaintiffs in their litigation of this case and efforts toward class certification.

Respectfully submitted,

/s/ Peter Pattakos

Peter Pattakos (0082884)

Zoran Balac (0100501)

Gregory Gipson (0089340)

THE PATTAKOS LAW FIRM LLC

101 Ghent Rd., Fairlawn, Ohio 44333

P: 330.836.8533 | F: 330.836.8536

peter@pattakoslaw.com

zbalac@pattakoslaw.com

ggipson@pattakoslaw.com

Attorneys for Plaintiffs

Certificate of Service

The foregoing document was filed on April 1, 2024, using the Court's e-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos
Attorney for Plaintiffs