

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

**MEMBER WILLIAMS, et al.**

**Plaintiffs,**

**vs.**

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

**Defendants.**

**CASE NO: CV-2016-09-3928**

**JUDGE JAMES BROGAN**

**THIRD PARTY JULIE GHOUBRIAL'S  
MOTION TO QUASH PLAINTIFF'S  
SUBPOENA**

***“To be clear, during the Court’s in camera review  
the Court will determine whether the Ghoubrials  
engaged in conversations or conduct in private  
or in the presence of third parties or others.”  
(Decision, filed 6/18/19).***

Now comes third party Julie Ghoubrial, and respectfully requests that this Honorable Court quash the subpoena served upon her by Plaintiff on April 25, 2024. The subpoena requests production of documents as well as testimony at a hearing scheduled before this Court on June 10, 2024 at 10:00 a.m. That hearing was scheduled to address a pending Motion for Contempt as well as motions “to access to Julie Ghoubrial’s deposition testimony.”

The subpoena should be quashed because the Court can make the determination as to whether Julie’s deposition testimony is privileged based upon the transcript itself and the arguments of counsel:

- The Court's order did not indicate whether it intended for the hearing to be an evidentiary hearing or an oral hearing, but the Court previously recognized "during the Court's in camera review the Court will determine whether the Ghoubrials engaged in conversations or conduct in private or in the presence of third parties or others. See Court's previous orders on this issue." (Decision, filed 6/18/19).
- Each of Plaintiff's arguments in support of disclosure of the deposition transcript can be determined by this Court as a matter of law based upon a review of the deposition transcript itself and with the aid of the argument of counsel, who have been briefing this discovery dispute for more than five years.
- Any testimony would only be duplicative of the deposition testimony, which Sam and Julie have asserted is protected by the spousal privilege.

For each of these reasons, Julie Ghoubrial respectfully requests that this Honorable Court quash Plaintiff's subpoena and proceed to determine whether Ms. Ghoubrial's prior deposition testimony is privileged based upon a review of that testimony and with the assistance of the argument of counsel, as this Court previously indicated it would do.

The attached memorandum more fully supports this request.

Respectfully Submitted,

**PLAKAS MANNOS**

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**MEMORANDUM IN SUPPORT**  
**Preliminary Statement**

After a five-and-a-half year discovery dispute, this Court is poised to provide a ruling on whether or not Julie's domestic relations deposition transcript is subject to spousal privilege.

Despite a complicated procedural history, the path ahead at this juncture is simple: the Court has been provided a copy of Julie Ghoubrial's deposition transcript. Due to inadvertent disclosure, Plaintiff's counsel has also accessed such transcript. It is now in the hands of the Court to determine whether the spousal privilege applies. None of Plaintiff's arguments require Julie's testimony to do so.

**Procedural History**

**I. After a More than 20 Year Marriage, Sam and Julie Divorce, and Julie is Forced to Disclose Personal and Sensitive Information During a Confidential Deposition in the Course of Divorce Proceedings.**

Defendant Sam Ghoubrial and non-party Julie Ghoubrial were married for more than twenty years. Julie in 2018 and the final judgment in their divorce was issued thereafter. During the course of the divorce proceedings, Julie was deposed. This Court and counsel have had an opportunity to review that deposition and no doubt appreciate the personal and sensitive information shared during those proceedings.

The Domestic Relations Court likewise recognized the sensitive nature of the proceedings, ordering that the proceedings be considered confidential. This Court previously recognized the Domestic Relation's confidentiality order, noting: "This Court has respect for Judge Quinn's confidentiality order over Julie's transcript and has previously recognized the comity between the Courts." (Decision, filed 6/18/19). Should any deposition testimony be unsealed, it should be narrowly tailored to protect the legitimate privacy concerns of Julie and her then-minor children.

## **II. A Five-and-a-Half Year Discovery Dispute Over Julie Ghoubrial's Deposition Testimony Ensues.**

Plaintiffs first subpoenaed Julie Ghoubrial for deposition in the above-captioned case on October 3, 2018. The first set of briefing regarding's Plaintiff's motion to compel Sam Ghoubrial to produce the deposition ensued, with the Court ultimately ordering Plaintiffs to intervene in the divorce proceeding to seek relief from the Domestic Court Judge's confidentiality order. (Order, filed 2/5/19).

The Domestic Relations Court denied Plaintiffs' request to intervene, thus beginning a second round of briefing seeking to compel Julie Ghoubrial's deposition. Among other reasons, Sam Ghoubrial objected to the deposition because he was asserting his spousal privilege. (Dr. Sam Ghoubrial's Motion to Quash and Motion for Protective Order re: Deposition of Julie Ghoubrial, 4/17/19). The Court ultimately ordered the deposition to be produced to the Court for *in camera* inspection, but indicated that it would not review such testimony when considering class certification. (Decision, filed 5/14/19). A writ was taken to resolve jurisdictional arguments. That writ was dismissed on February 12, 2020. The Ninth District declined to stay trial court proceedings pending one of three certification-related appeals in this matter on March 19, 2020. Julie's counsel submitted her deposition transcript under seal with the Court on March 23, 2020. (Notice of Filing Deposition Transcript Under Seal, filed 3/23/20). Various appellate matters ensued.

## **III. The Court Lays Out its Plan to Determine Privilege Based Upon an *In Camera* Review.**

When the Court ordered Julie's deposition produced *in camera*, the Court indicated that "during the Court's in camera review the Court will determine whether the Ghoubrials engaged

in conversations or conduct in private or in the presence of third parties or others.” (Decision, filed 6/18/19). **This is a sound procedure, and should proceed as planned.**

**IV. The Clerk of Courts Inadvertently Discloses Julie’s Deposition, and Plaintiffs’ Counsel Improperly Accesses, Disseminates, and Uses the Wrongfully Obtained Information Despite Knowing Claims of Privilege Remain Unresolved.**

On February 12, 2024, this Court ordered the Clerk to file Julie’s deposition “under seal.” (Order, filed 2/12/204). The “under seal” emphasis was the Court’s own. By that point, Plaintiffs’ counsel had exchanged dozens of briefs with the various parties regarding whether this deposition was privileged and knew this Court intended to inspect the deposition *in camera* to make that various determination, as the Court laid out in numerous orders.

Nevertheless, Plaintiffs’ counsel accessed the sealed deposition in spite of the claims of privilege. The Court has expressed concerns that Plaintiff’s counsel disseminated the deposition, and discussed the contents of the deposition in filings with this Court without submitting that briefing under seal. This conduct is the subject of a Motion for Contempt, which is set for hearing before this Court on June 10, 2024. While an evidentiary hearing is required for that motion, this Court previously indicated it planned to determine whether Julie’s deposition is privileged based upon a review of the deposition transcript itself. This process should not be altered merely because Plaintiff’s counsel has gained an advantage to the Clerk’s inadvertent disclosure.

**V. Plaintiffs Subpoena Julie to Produce the Deposition and Testify at a Hearing, Despite the Fact That the Privilege Determination Can be Made Based Upon the Face of the Deposition Itself.**

The deposition transcript speaks for itself and contains the information necessary to evaluate each party’s arguments with respect to privilege. Plaintiffs’ subpoena runs the risk of eliciting further improper and inadvertent disclosure of privileged information before this Court

makes a determination as to whether the communications described in the deposition are privileged.

Plaintiffs' counsel never should have had access to the *in camera* deposition in the first place. It was only through the Clerk's inadvertence that he learned the details of its content. It would be inappropriate to double-down on the inadvertent disclosure by requiring Julie to be subject to questions that Plaintiffs' counsel would not have even had but for the mistake.

As the Court recognized, it is more than capable of assessing the privilege claims based upon a review of the deposition transcript itself.

### **CERTIFICATION**

On May 16, 2024, the undersigned called and emailed Attorney Pattakos to attempt to resolve this discovery dispute. On May 17, 2024, counsel held a telephone conference. Attorney Pattakos agreed that Julie need not produce her domestic relations deposition transcript in response to the subpoena as it was already in his possession. Counsel were otherwise at an impasse, with Julie believing that the determination of whether her prior deposition is privileged can be based on the deposition itself and the argument of counsel, and Attorney Pattakos believing additional questioning is necessary.

### **LAW AND ARGUMENT**

#### **I. Plaintiff's Subpoena Seeks Privileged Deposition Testimony and the Public Disclosure of the Same Testimony at a Hearing Before this Court.**

Plaintiff's subpoena requests the following:

1. "Any documents, including electronic recordings, in your possession, custody, or control related to the "olives" kickback scheme involving Sam Ghoubril, Minos Floros, and/or Rob Nestico, which you have previously described in your conversations with the undersigned counsel."
2. ATTEND AND GIVE TESTIMONY AT A HEARING before Judge James A. Brogan, or any other judge sitting in his stead, on **June 10, 2024, at 10:00 a.m.** in the Visiting

Judge Courtroom at the Summit County Court of Common Pleas, 205 S. High Street, Akron, OH 44308.

With respect to the documents requested, the deposition from her domestic relations case has been submitted to the Court and is already in possession of counsel. As has been exhaustively briefed, that deposition is subject to a claim of privilege, which this Court plans to determine following the June 10, 2024 hearing. Both Sam and Julie have asserted spousal privilege with respect to the contents of Julie's deposition. Counsel have agreed that because Plaintiffs are already in possession of the deposition transcript, Julie need not produce it.

It is Julie's position that a determination of whether the deposition transcript is privileged can be made from the deposition transcript itself. It would be inappropriate for Plaintiff to attempt to elicit testimony at the hearing based upon information he improperly gleaned from the inadvertently disclosure procedures. Such testimony could only be repetitive of what was disclosed in the deposition, which is the subject of the spousal privilege claim. Had the inadvertent disclosure not occurred, the Court would unquestionably be determining the privilege issue based upon the transcript alone.

**II. Each of Plaintiff's Arguments Present Legal Issues For the Court's Determination for Which No Testimony is Required.**

The question before the Court is whether Julie's deposition testimony is covered by the spousal privilege.

This Court has previously noted that the relevant privilege is set forth in R.C. 2945.42, and that it applies to all communications made during coverture, even after the marriage has ceased. (Order, filed 3/4/24).

Moreover, the privilege may be asserted by either party, such that even if Julie had discussed the topics disclosed during her deposition with others, Sam would still nevertheless retain the right to assert the privilege himself.

Each of the arguments made by Plaintiff may be addressed by this Court based upon the deposition testimony itself.

**A. Plaintiff argues that the Spousal Privilege Does Not Apply to Communications Which Are Routine in Nature—The Deposition Itself Discloses the Content of the Communications.**

Plaintiff first argues that not all communications in a marriage are automatically privileged, and that the privilege does not apply to communications of a “routine” nature. (Plaintiff’s Brief Regarding Julie Ghoubril’s Testimony and Spousal Privilege, p.1-4). The Court can readily tell from the nature of the communications expressed in the deposition whether they were “routine,” or were in fact the type of confidential conversations one has with a spouse. The deposition itself is the best evidence of whether the statements contained therein are the type of communications protected by R.C. 2945.42. Requiring Julie to testify in this regard only risks further inadvertent disclosure prior to the Court’s privilege determination.

**B. The Crime-Fraud Exception Does Not Apply, But in Any Event, is a Legal Determination for the Court.**

The crime-fraud exception does not apply to the spousal privilege. If it did, spouses of alleged criminals everywhere would be forced onto the witness stand in each criminal case in the country. This Court certainly has more experience than the parties to this case with knowing that this simply does not occur. And for good reason: there is no crime-fraud exception to the spousal privilege. *See United States v. Sims*, 755 F.2d 1239, 1243 (6th Cir. 1985) and Dr. Sam Goubrial’s Motion for Reconsideration, filed 4/23/19. The Court recognize this nuance in the application of the crime-fraud exemption when a marital relationship is involved, indicating that it misspoke

in citing to the *Zollin* case under these particular circumstances. (Magistrate's Order, filed 4/23/19). Plaintiff cites *State v. Mowery*, for the proposition that the spousal privilege does not apply, but inexplicably fails to point out that the Court's syllabus was dependent on the fact that the alleged crime was "committed in the known presence of a third person." *State v. Mowery*, 1 Ohio St.3d 192 (1982), at paragraph two of the syllabus. *Mowery* stands for the proposition that the spousal privilege does not apply to prohibit a spouse who wishes to testify from testifying about criminal conduct that occurred in the presence of a third party. That is not the case with respect to the confidential marital communications at issue in Julie's deposition. Additionally, *Mowery* involved a criminal, as opposed to a civil, case.

Nevertheless, the applicability or non-applicability of the crime-fraud exception is a legal issue for the Court's determination, and the Court certainly does not require Julie's testimony to aid in that consideration.

**C. Testifying at a Domestic Relations Deposition With a Confidentiality Order in Place and Where No Spousal Privilege Applies Is Not a Waiver of the Spousal Privilege.**

Plaintiff's final argument<sup>1</sup> is that answering questions at the domestic relations deposition in and of itself constitutes a waiver. This argument is unavailing for two reasons.

First, as the parties have briefed, and the Court has acknowledged, Judge Quinn had a confidentiality order in place in the domestic relations case, and all parties had a reasonable belief that the deposition communications would be held in confidence.

Secondly, and more importantly, the spousal privilege *does not apply in divorce proceedings*. See *City of Fairfield v. Profitt*, 12th Dist. Butler No. CA96-11-260, 1997 WL 451382

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<sup>1</sup> Plaintiff also argues that Sam cannot prospectively assert the privilege for Julie's anticipated *future* deposition testimony. That argument is not pertinent to Julie's Motion to Quash Plaintiff's Subpoena, and is therefore not addressed here.

(Aug. 11, 1997). Divorce proceedings would be completely unworkable otherwise. If the privilege does not apply, there is no reason to assert it. And if there is no obligation to assert it, the failure to assert it is not a waiver.

Yet again—this is a legal determination by the Court, and Julie’s testimony at a hearing would be of no assistance.

### **CONCLUSION**

While an evidentiary hearing is certainly required on the pending Motion for Contempt, with respect to the release of Julie’s domestic relations deposition there is no factual testimony that Julie could offer beyond what is contained in the deposition itself which could permissibly aid this Court in determining whether it is confidential.

Plaintiffs should allow this Court to complete the task at hand without further sideshows. All parties have access to the transcript, and this Court is more than capable of making the determinations of law raised by Plaintiff precisely as it planned: “To be clear, during the Court’s in camera review the Court will determine whether the Ghoubrials engaged in conversations or conduct in private or in the presence of third parties or others.” (Decision, filed 6/18/19). While Julie will certainly abide by any determination made by the Court, she submits that Plaintiffs’ counsel should not be permitted to alter the Court’s planned procedure as a result of an inadvertently disclosure that never should have occurred in the first place.

DATED: May 20, 2024

Respectfully Submitted,

**PLAKAS MANNOS**

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*Attorney for Third-Party Julie Ghoubril*

**NOTICE OF SERVICE**

A copy of the foregoing was filed and served electronically on the 20<sup>th</sup> day of May, 2024 through the Clerk's electronic filing system.

/s/ Kristen S. Moore

Kristen S. Moore (0084050)

*Attorney for Third-Party Julie Ghoubril*