

**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' Response to Defendant Sam Ghoumbrial M.D.'s Motion to Quash Subpoena</p>
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Following a telephone conference conducted on April 11, 2024, the Court entered an order on April 19, 2024, setting a hearing on *Plaintiffs' Motion for Hearing and Ruling on whether the Inadvertently Disclosed Deposition Transcript of Julie Ghoumbrial is Protected by Privilege* for June 10, 2024, at 10:00 a.m. As suggested by the title of the motion, the purpose of the hearing is to determine whether the statements made by Julie Ghoumbrial in her October 12, 2018 deposition are protected by a spousal privilege, which Defendant Sam Ghoumbrial is attempting to assert under R.C. 2317.02(D). However, R.C. 2317.02(D) does not categorically protect all communications between spouses, and the Court must hear evidence from Sam Ghoumbrial in order to properly decide the issue of spousal privilege in this case.

The Ohio Supreme Court has explained that the public policy behind spousal privilege is to “prevent[] the betrayal, by either husband or wife, of a trust or confidence reposed by one in the other *in privacy*.” *Sessions v. Trevitt*, 39 Ohio St. 259, 265-266 (1883) (emphasis in original). Accordingly, Ohio courts have held that “[u]nder R.C. 2317.02(D), the statute only includes private acts and communications between spouses made in reliance on the intimacy of their marriage” and that therefore, “statements of a routine or business nature, are not privileged because they are unrelated to preservation of the marital relationship and do not contain an indicia of

confidentiality.” *Muehrcke v. Housel*, 8th Dist. Cuyahoga Nos. 85643, 85644, 2005-Ohio-5440, ¶ 25-26 (citing *State v. Taylor*, 9th Dist. Lorain C.A. No. 4280, 1988 Ohio App. LEXIS 3268 (Aug. 10, 1988)); accord *Harrison v. Harrison*, 10th Dist. Franklin No. 91AP-888 (REGULAR CALENDAR), 1992 Ohio App. LEXIS 831, at *3-5 (Feb. 25, 1992). Furthermore, the privilege under R.C. 2317.02(D) “does not apply when the husband and the wife are not living in coverture - in other words, not living as husband and wife.” *State v. Sparkman*, 6th Dist. Huron No. H-03-017, 2004-Ohio-1338, ¶ 5 (declining to apply spousal privilege to communications made between husband and wife who were not living as husband and wife when the allegedly protected statements were made). The court in *Sparkman* further noted that “Federal courts, likewise, have refused to extend this privilege to situations where the husband and wife are separated and there is no real hope of reconciliation. *Id.* (citing *United States v. Singleton* 260 F.3d 1295, 1297-1301 (11th Cir. 2001); *United States v. Porter*), 986 F.2d 1014, 1018-1019. (6th Cir. 1993).

Therefore, in order to properly decide the issue of spousal privilege at the upcoming June 10 hearing, the Court must hear factual evidence regarding the context and nature of the allegedly protected communications. Specifically, the Court must determine whether the challenged statements were made during coverture (i.e. whether they were made while Sam and Julie Ghoumbrial were living as husband and wife); whether the statements were of a routine or business nature; and whether the statements were made in reliance on the intimacy of their marriage.

Furthermore, spousal privilege does not apply to “communication[s] ... made, or act[s] done, in the known presence or hearing of a third person competent to be a witness.” R.C. 2317.02(D). And “voluntary disclosure of confidential communications is inconsistent with an assertion of privilege, so voluntary disclosure of privileged communications to a third party waives a claim of privilege with regard to communications on the same subject matter.” *See v. Haugh*, 8th Dist. Cuyahoga No. 101380, 2014-Ohio-5290, ¶ 24. Thus, Plaintiffs must be allowed to question Sam

Ghoubrial regarding the extent to which any of his allegedly privileged communications or acts were made or done in the presence of a third party and to extent to which he has voluntarily disclosed (and thus waived any otherwise applicable privilege over) the communications or acts he seeks to protect.¹

In setting the June 10 hearing, the Court's order did not explicitly compel any parties, including Sam Ghoubrial, to appear at the hearing and give relevant testimony. Given the context of the Court's order and the law on spousal privilege discussed above, Defendant Ghoubrial should know that his appearance at the June 10 hearing is required. However, for the avoidance of doubt and out of an abundance of caution, Plaintiffs issued Sam Ghoubrial a subpoena under Civ.R. 45 confirming that they expect Sam Ghoubrial to appear at the hearing and produce documents that would be relevant to the privilege issue being considered.² Sam Ghoubrial now seeks to quash this subpoena based on alleged technical defects.

First, Civ.R. 45 allows a subpoena to be served by "leaving it at the person's usual place of residence." Sam Ghoubrial's motion acknowledges that the subpoena was taped to the front door of his home. Therefore, this is not a valid basis to quash the subpoena.

Second, as to whether Plaintiffs' subpoena to Sam Ghoubrial is appropriate under Civ.R. 45 because he is a party to this action, Plaintiffs submit that the Civil Rules do not provide clear guidance on how a party may be compelled to attend an evidentiary hearing on a motion. Civ.R. 45 states that a subpoena may not be used to compel a party's attendance or the production of documents "*in discovery*." Rule 45's text only counsels against attempts to compel a party's

¹ In any case, those portions of Julie Ghoubrial's deposition testimony where she discusses cash kickbacks paid by Defendant Ghoubrial would not be privileged because that testimony pertains to acts done in the presence of third parties. R.C. 2317.02(D).

² Plaintiffs also served a similar subpoena on Julie Ghoubrial.

attendance at a deposition, in which case notice under Civ.R. 30 would be the appropriate method. The hearing on June 10 is not a deposition and is not part of discovery in this case. Therefore, Plaintiffs submit that their subpoena does not conflict with the Civil Rules, and Sam Ghoubril's motion to quash should not be granted on this basis.

However, if the Court agrees that a subpoena under Civ.R. 45 may not be served upon a party to an action for any purpose, the circumstances here show that Plaintiffs acted in good faith to effectuate the intent of the Court's prior order setting the June 10 hearing. Moreover, it was completely unnecessary for Sam Ghoubril to file a motion to quash if he intended to appear at the June 10 hearing anyway. As the party asserting the privilege, he is presumably eager to introduce factual testimony and documentation supporting his position. In any case, the Court undoubtedly has jurisdiction and authority to compel Sam Ghoubril's attendance and production of documents in connection with the June 10 hearing. Therefore, to avoid further dispute on this matter, if the subpoena to Sam Ghobrial must be quashed for technical reasons, Plaintiffs request that the Court's order include a clear directive requiring Mr. Ghobrial to attend the June 10 hearing and produce any relevant documentation that bear on the issue of spousal privilege.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on May 24, 2024, using the Court's e-filing system, which will serve copies on all necessary parties.

/s/ Peter Pattakos
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