

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

MEMBER WILLIAMS, <i>et al.</i> , Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, <i>et al.</i> , Defendants.	Case No. CV-2016-09-3928 Judge James A. Brogan Plaintiffs' Brief in Opposition to Defendants' Joint Motion for Reconsideration and Objection to Order of April 19, 2024
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Introduction

Defendants' joint motion for reconsideration is yet another attempt to delay and obstruct proceedings in this case and to keep Plaintiffs' from bringing to bear on their claims the evidence of the cash kickbacks that were integral to Defendants' scheme. For more than four years, Defendants have vehemently and repeatedly asserted that Julie Ghoumbrial's October 12, 2018 deposition transcript is protected by a spousal privilege and otherwise completely irrelevant to Plaintiffs' claims. Yet, instead of embracing an opportunity to have their argument finally heard, Defendants have at every turn attempted to prevent adjudication of this issue. Indeed, Defendants have pulled out all the stops to keep Julie's deposition transcript out of this case, which is unsurprising given the damning evidence contained therein that supports Plaintiffs' allegations of an illegal kickback scheme among Defendants.

The procedural history of this issue is telling: Defendants initially opposed discovery of Julie's transcript back in 2018 and had to be compelled to produce it. They sought a protective order but were unsuccessful. They moved to set aside the magistrate's decision ordering production but were unsuccessful. They sought a writ of prohibition from the Ninth District Court of Appeals but were unsuccessful. Then, after being forced to provide Julie's transcript to this Court for *in camera*

review, Defendants tried to stay the case based on the pretext of a pending appeal. But that too was unsuccessful. Remarking on Defendants' tactics, this Court noted Defendants' "unprofessional gamesmanship and obstruction" to cause "significant delays." The Court further remarked that "[n]o party should benefit from such behavior and further delay will not serve the interests of justice in this litigation." (See Jan. 8, 2020 Order, at p.2.) Four years later, Julie's transcript was inadvertently disclosed to Plaintiffs' counsel, and Defendants' pattern of obstruction resumed. While the Defendants scrambled to try to undo the damage through a "nunc pro tunc" order, Plaintiffs appropriately requested a hearing to address the privilege issues implicated by the inadvertent disclosure. Plaintiffs' request was supported by extensive briefing (over 40 pages) setting forth clear Ohio law that mandates a prompt hearing to determine whether inadvertently disclosed material is actually protected by privilege and whether any such privilege has been waived. (Plaintiffs' Mot. for Hearing, Mar. 11, 2024, at pp. 25-27.)

In response, Defendants did not address the merits of Plaintiffs' motion, nor did they raise any purported conflict between Plaintiffs' motion and their pending cross-appeal of the Court's Jan. 30, 2024 class-certification order, as they are attempting to do now. Indeed, Defendants had a full and fair opportunity to make this argument in response to Plaintiffs' motion for hearing, but they chose not to do so. Instead, the case proceeded to a telephonic status conference on April 11, 2024, where Defendants made objections that were overruled and Plaintiffs' motion was granted. Thus, the Court scheduled a hearing to finally determine the admissibility of Julie's transcript for June 10, 2024, at 10:00 a.m. Unhappy with this outcome, Defendants now seek a second bite at the apple in the form of a motion for reconsideration, which offers nothing new and simply rehashes old arguments that could have been but were not previously raised. More importantly, the arguments offered in Defendants' motion are also without merit and should be rejected on that basis as well. For these reasons, Defendants' motion for reconsideration must be denied.

Response

Although a trial court generally may reconsider its interlocutory orders at any time, it is a waste of judicial resources when such a motion states arguments that have already been or could have been presented before rather than presenting any new facts, evidence, or authority. *See, e.g., Coykendall v. Husky Energy, Inc.*, C.P. No. CI-19-4767, 2022 Ohio Misc. LEXIS 58, at *4 (Mar. 3, 2022) (denying motion for reconsideration that restates those arguments which have already been presented and offering nothing new for the Court's consideration). In this case, Defendants had a full and fair opportunity to raise the arguments made in their motion for reconsideration both (1) in briefing in response to Plaintiffs' motion for hearing and (2) at the telephonic status conference held on April 11, 2024. In any case, for the reasons discussed below, Defendants' motion also fails on the merits and should be denied.

- I. This Court is not divested of jurisdiction to consider the admissibility of Julie Ghoubrial's October 12, 2018 deposition testimony because the issue of spousal privilege and admissibility is not being reviewed by the Court of Appeals. The trial court has never made a ruling on spousal privilege or admissibility, and Plaintiffs' cross appeal is limited to the trial court's decision to enter an order on certification while those issues remained unresolved.**

Defendants, in their joint motion for reconsideration, now suggest for the first time that Plaintiffs' cross-appeal of this Court's January 30 class certification order divests this Court of jurisdiction to proceed with the scheduled June 10 hearing on the admissibility of Julie Ghoubrial's deposition transcript.¹ Specifically, Defendants point to language in the docketing statement accompanying Plaintiffs' notice of cross appeal that assigns error to the trial court's failure to account for certain evidence relating to Defendants' illegal cash kickback scheme. From this,

¹ Defendant Ghoburial previously opposed Plaintiffs' motion for hearing by claiming a lack of jurisdiction due to a pending appeal of the Court's February 20, 2024 Nunc Pro Tunc Order. Plaintiffs' cross-appeal of the Court's class-certification order was also pending at the same time, but Ghoubrial's opposition made no mention of it.

Defendants make an unwarranted leap to argue that the spousal privilege issue relating to Julie Ghoubrial's deposition transcript is somehow being reviewed by the appellate court. Such a conclusion is unwarranted, and proceeding with the June 10 hearing and adjudicating issues of spousal privilege and admissibility would not interfere with the appellate court's pending review of the Court's Jan. 30 class-certification order. First, there has never been any ruling on spousal privilege or admissibility concerning Julie's transcript, so there is no basis for appellate review of that issue. Secondly, Plaintiffs' cross-appeal merely assigns error to the trial court's ruling on class certification while critical issues relating to Julie's transcript remained unresolved.

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. Cuyahoga 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*).

Courts in this State 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.* 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.*

Defendants' jurisdictional argument fails because nothing about Plaintiffs' cross-appeal requires the appellate court to make any determination of spousal privilege or admissibility. Indeed, the trial court never adjudicated those questions, so it cannot have been presented to the appellate court for review. Plaintiffs do intend to argue that given the acknowledged relevance of Julie's transcript to the class-certification question, it was an abuse of discretion for the trial court to make any decision regarding class certification while such an important question (and potentially dispositive one) remained unadjudicated. But an abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment." *E.g., State v. Zielinski*, 12th Dist. Warren No. CA2014-05-069, 2014-Ohio-5318, ¶ 16. Here, the appellate court need not make any findings regarding the admissibility of Julie's transcript to conclude that the trial court acted unreasonably in ruling on class certification without resolving any privilege issues relating to Julie's transcript first. *See, e.g., State Auto Ins. v. Wilson*, 9th Dist. Summit No. 29678, 2020-

Ohio-4456, ¶ 4 (finding abuse of discretion where trial court ruled on Civ.R. 60(B) motion without holding evidentiary hearing to verify facts relevant to motion). And upon finding such an abuse of discretion, the appellate court would simply remand the matter so that the trial court can address those issues as part of a renewed class-certification analysis. There is no procedure for the appellate court to take up the privilege question on its own before the trial court rules on it. Thus, there is no circumstance here where the trial court would be divested of jurisdiction to proceed with the June 10 hearing. And if the result of the June 10 hearing could render any part of Plaintiffs' cross-appeal moot, that does not divest the trial court of jurisdiction on that question. *See Olen Corp.*, 43 Ohio App.3d at 199-200 ("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.").

Therefore, because adjudication of issues related to privilege and admissibility of Julie Ghoumbrial's transcript would not interfere with any actual issue being reviewed by the appellate court in Plaintiffs' cross-appeal of the Court's Jan. 30 class-certification order, the Court is not divested of jurisdiction to proceed with the June 10 hearing regarding Julie's transcript. Defendants' motion for reconsideration should be denied.

II. There is no justification for further delay relating to the admissibility of Julie Ghoumbrial's deposition transcript simply because another judge will eventually be assigned to this case. Nothing prohibits a new judge from revisiting any interlocutory ruling relating to Julie's transcript, and Defendants are just hoping to avoid an adverse ruling from a judge has not been receptive to their previous delay tactics and obstruction.

Finally, Defendants offer no reason *why* it would be more appropriate to leave the pending spousal privilege issues for a new judge. They simply note the fact that a new judge will ultimately try this case. As mentioned above, the spousal privilege question has been unresolved for years, which has prejudiced Plaintiffs in this case. Further delay is unwarranted. As this Court previously remarked when rejecting similar arguments previously made by Defendants, "further delay will not

serve the interests of justice in this litigation.” To the extent an immediate ruling on the privilege and admissibility issues regarding Julie’s transcript could conceivably affect the case after a new judge is assigned, that interlocutory ruling can be revisited by the new judge at any time. Given Defendants’ history of “unprofessional gamesmanship and obstruction” as noted by this Court, it seems apparent that Defendants’ concern for “judicial discretion” is nothing more than further gamesmanship to avoid a potentially adverse ruling from the currently assigned judge who has ruled against them on similar issues before.

Conclusion

For the reasons stated above, the Court should deny Defendants’ joint motion for reconsideration and proceed with the scheduled June 10 hearing so that the issues of spousal privilege and admissibility of Julie Ghoubril’s October 12, 2018 deposition transcript, which first arose nearly 6 years ago, can be finally adjudicated once and for all.

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.

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