

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

<p>MEMBER WILLIAMS, <i>et al.</i></p> <p style="text-align: center;"><i>Plaintiffs,</i></p> <p>vs.</p> <p>KISLING, NESTICO & REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;"><i>Defendants</i></p>	<p>Case No. 2016-CV-09-3928</p> <p>Judge James A. Brogan</p> <p>Defendants’ Reply to Plaintiffs’ Brief in Opposition to Defendants’ Joint Motion for Reconsideration And Objection to Order of April 19, 2024.</p>
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The issue before this Court is whether Plaintiffs’ pending cross-appeal divests this Court of jurisdiction to conduct a hearing on the admissibility of Julie Ghoumbrial’s prior testimony in the divorce proceedings with her former husband, Defendant Sam Ghoumbrial (hereafter “the Transcript”). Putting aside the bluster and rhetoric of Plaintiffs’ Brief in Opposition to Defendants’ Joint Motion for Reconsideration and Objection to Order of April 19, 2024 (hereafter “Plaintiffs’ Brief in Opposition”), the resolution of this issue is clear. This Court is divested of jurisdiction because Plaintiffs have confirmed the basis of their cross-appeal is that this Court should have had the hearing now scheduled for June 10, 2024, *before* issuing a ruling on class certification.

“Plaintiffs do intend to argue that given the acknowledged relevance of Julie’s transcript to the class certification question,¹ *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.*”

Plaintiffs’ Brief in Opposition at p. 5 (emphasis added).

¹ Note that this preamble incorrectly represents this Court has already determined that the testimony is relevant to the issue of class certification. In fact, this Court made precisely the opposite determination. *See*, Order of May 31, 2019, stating: “[t]his Court will however not examine *in camera* Julie Ghoumbrial’s deposition filed under seal until this Court rules on the certification question.” The circumstances resulting in this Order are discussed in greater detail herein.

In other words, Plaintiffs' pending cross-appeal asks the Court of Appeals to direct this Court to conduct the evidentiary hearing this Court is now scheduled for June 10, 2024. It should be axiomatic that a trial court is divested of jurisdiction to provide a party the precise relief they are asking the Court of Appeals to provide them. If Plaintiffs prevail on their pending cross-appeal, this Court will be required to conduct the hearing and consider any admissible, relevant evidence in the Transcript on the issue of class certification, if any.

Plaintiffs' Brief in Opposition is unjustifiably critical of Defendants for allegedly not addressing the issue of the cross-appeal as a threat to jurisdiction during the phone conference of April 11, 2024. After the phone conference of April 11, Defendants prepared a Response to Plaintiffs Motion to Consolidate Appeals (filed April 18, 2024, in the Ninth District Court of Appeals). In the process of preparing this filing in the aftermath of the phone conference, Plaintiffs' "probable issue for appeal" for their pending cross-appeal came under scrutiny and took on new meaning. Specifically, Plaintiffs' first probable issue for appeal states, "[w]hether the trial court erred in failing to account for evidence demonstrating the appropriateness of the remedy of disgorgement of all fees collected by Defendants in cases where KNR clients were treated by Defendants Ghoubrial, Floros, and other participants in Defendants' cash kickback scheme."

Plaintiffs did not identify the specific "evidence" they intended to argue, but as stated in the instant motion, "[t]o the extent the 'evidence' referenced by Plaintiffs is the Julie Ghoubrial deposition transcript," this Court lacks jurisdiction. Thus, it was *Plaintiffs* who failed to disclose to the Court and Defendants during the April 11 phone conference that, while agreeing to dismiss the *nunc pro tunc* appeal because the Court recognized it did not have jurisdiction, Plaintiffs fully intended to nevertheless pursue the same issue on their cross-appeal which is currently pending in the Ninth District Court of Appeals. The instant Motion filed by Defendants forced Plaintiffs in

response to *admit and confirm* that the “evidence” they intend to argue on the pending class action cross-appeal is, in fact, the Transcript at issue herein. Plaintiffs did not disclose their intentions during the telephone conference, likely because this Court would (or should) have had the same reservations about jurisdiction and declined to hold the hearing requested by Plaintiffs.

Regardless of whether Plaintiffs’ intentions were honest or nefarious, it should be clear to this Court that it cannot create a new evidentiary record on class certification for a case that is on its third trip to the Court of Appeals. If the *nunc pro tunc* appeal divested this Court of jurisdiction because the Transcript was the subject of the appeal, the same must be true when the Transcript is the subject of yet another pending appeal. It is now in the hands of the Court of Appeals to determine; (1) whether Plaintiffs waived the issue by failing to cross-appeal in 2020 or 2023; and (2) if they have not waived, whether this Court must conduct a hearing on the relevance and admissibility of the Transcript.

A review of procedural history provides perspective on the current posture of this issue. On April 3, 2019, Appellants moved to compel the production of “relevant portions” of deposition testimony provided by Defendant Dr. Ghoubrial’s ex-wife, Julie Ghoubrial, in a domestic relations divorce matter. On April 26, 2019, a Magistrate’s Order granted Plaintiffs’ motion in part, requiring the transcript be submitted for *in camera* review. The trial court overruled Defendants’ objections to the Magistrate’s Order on May 14, 2019, and clarified that order on May 31, 2019, stating: “[t]his Court will however not examine *in camera* Julie Ghoubrial’s deposition filed under seal *until this Court rules on the certification question.*” (emphasis added). On June 18, 2019, the Trial Court instructed Julie Ghoubrial to provide a hard copy of the Transcript for filing under seal. On March 23, 2020, the Trial Court noticed that “as previously ordered,” the Transcript was

delivered to the Trial Court for later *in camera* review. On the same day, the Transcript was ordered to be sealed.

Almost five years after the Court determined it would not review the Transcript *in camera* until after the class certification issue was determined, the Transcript was inadvertently disclosed to Counsel prior to *in camera* review and while Defendants' third appeals on class certification were pending. This Court issued a *nunc pro tunc* entry on February 24, 2024, in an effort to return the Transcript issue to status quo. Two days later, on February 26, 2024, Plaintiffs filed a notice of their cross-appeal which seeks to have the Court of Appeals direct this Court to conduct a hearing on the admissibility of the Transcript. On April 19, 2024, this Court issued an Order setting a hearing on Defendant Dr. Ghoubril's Motion for Contempt and Plaintiffs' "Motion for Access to Julie Ghoubril's deposition testimony" [sic].² However, the Court does not have jurisdiction to proceed on the Transcript issue.

Plaintiffs concede that once an appeal is perfected a trial court is divested of jurisdiction over "that part of the final order, judgment, or decree which is sought to be reviewed." *See*, Plaintiffs' Brief in Opposition at p. 4, citing *Cramer v. Fairfield Med. Ctr.*, 5th Dist. Fairfield No. 2007 CA 62, 2008-Ohio-6706; *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. Here, Plaintiffs are asking the Court of Appeals to review the issue of whether this Court ***should have held a hearing*** and determined that the Transcript is relevant to class certification and admissible. Therefore, on its face, Plaintiffs' cross-appeal divests this Court of jurisdiction to hold that same hearing and determine whether the Transcript is relevant and admissible.

² Plaintiffs' Motion which the Court set for hearing is actually captioned "Plaintiffs' Motion for Hearing and Ruling on whether the Inadvertently Disclosed Deposition Transcript of Julie Ghoubril is Protected by Privilege."

It is ironic that Plaintiffs' (incorrectly) suggest Defendants are seeking a "second bite at the apple" by challenging jurisdiction at this time when it is obvious Plaintiffs are attempting a "second bite at the apple" by seeking review of this Court's 2019 evidentiary order regarding the Transcript. As for the Defendants, this is the first time (not the second) they have formally raised the issue of this Court's jurisdiction to conduct the evidentiary hearing via motion. This challenge is timely because "subject matter jurisdiction cannot be waived and may be raised at any time[.]" *Weber v. Devanney*, 9th Dist. Summit Nos. 28876, 28938, 2018-Ohio-4012, ¶ 11; quoting, *Falah v. Falah*, 9th Dist. Medina No. 15CA0039-M, 2017-Ohio-1087, ¶ 15, 87 N.E.3d 763. Thus, it is not improper or untoward "gamesmanship" to raise the issue now; in advance of the scheduled hearing, and with time to allow the issue to be fully briefed under the timeframes allotted by Civ. R. 6(C).

The same cannot be said of Plaintiffs' efforts to seek review of this Court's orders in 2019 regarding the Court's decision to determine the admissibility of the Transcript *after* class certification. If Plaintiffs intended to appeal that 2019 decision, they should have done so via cross-appeal when this case was appealed for the first time in January of 2020. The Plaintiffs failed to do so, and likewise failed to do so when the case was appealed a second time in February, 2023. The bottom line is that Plaintiffs have waived this issue on appeal and are now pushing this Court to exceed its jurisdiction in a desperate attempt to resuscitate a waiver that is almost five years old.

It is important to note again that it is Plaintiffs – not Defendants – who divested this Court of jurisdiction. *Plaintiffs* are expressly seeking to have the Court of Appeals order this Court to consider the Transcript as evidence *on the issue of class certification*. Defendants should not be unfairly painted with the brush of "gamesmanship" for making a timely challenge to the jurisdiction of the Court to do so while the Court of Appeals considers the same issue. The

maneuvers of Plaintiffs' counsel following the inadvertent disclosure of the Transcript and this Court's *nunc pro tunc* order of February 24, 2024, have divested this Court of jurisdiction over the admissibility of the transcript. A party cannot ask the Court of Appeals and the Trial Court for the same relief at the same time.

Further, Defendants respectfully suggest that, with a new judge likely inheriting this matter after the appeal, it would be prudent to allow the Court of Appeals to direct the new judge on how to proceed with regard to the Transcript. The Court of Appeals will provide clear direction to the prospective new judge on whether a hearing on the Transcript is required for purposes of class certification; or whether there is discretion to have the hearing for such purposes; or whether Plaintiffs have waived. The sensible, judicious decision here is to allow the Court of Appeals to decide precisely what Plaintiffs have asked them to decide, so that the new judge can properly proceed with the guidance provided by the appellate decision and opinion.

For the reasons stated herein, Defendants respectfully submit that this Court is divested of jurisdiction to conduct the hearing on the deposition transcript set by the Court's Order of April 19, 2024. In the alternative, Defendants request that this Court exercise its discretion to reconsider conducting a hearing on the transcript on June 10, 2024, so that the presiding judge who will sit for trial can consider and address this evidentiary issue. The Court should proceed on June 10, 2024, solely on the issue of Dr. Ghoubrial's show cause motion regarding contempt of court by counsel for Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the Court on the 29th day of May, 2024. The parties may access this document through the Court's electronic docket system.

/s/ James M. Popson

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