

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

MEMBER WILLIAMS, *et al.*,

Plaintiffs,

vs.

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

Defendants.

Case No. CV-2016-09-3928

Judge James A. Brogan

**Plaintiffs' Combined Response to
(1) Defendant Sam Ghoubrial M.D.'s Motion
to Quash Subpoena Served to Julie Ghoubrial
and (2) Third Party Julie Ghoubrial's Motion
to Quash Plaintiff's Subpoena**

Following a telephone conference conducted on April 11, 2024, the Court entered an order on April 19, 2024, setting a hearing to determine whether the statements made by Julie Ghoubrial in her October 12, 2018 deposition are protected by a spousal privilege. Although the Court's order did not specifically indicate that it would be an "evidentiary" hearing, based on the context of the Court's order and the law on spousal privilege, it is apparent that the Court expects and needs to hear evidence in order to make a proper determination on privilege related to the content of Julie's deposition. To that end, Plaintiffs have served Julie with a subpoena to appear and give testimony at the upcoming June 10 hearing and provide relevant documentation in advance of the hearing. Both Sam and Julie Ghoubrial have separately moved to quash Plaintiffs' subpoena to Julie. For the reasons set forth herein, the Court should deny both motions.

I. Determination as to whether Julie Ghoubrial's Oct. 12, 2018 deposition transcript or any portion thereof is protected by spousal privilege requires consideration of evidence beyond what is contained in the transcript itself.

Both Sam and Julie, in their respective motions to quash, argue that the issue of spousal privilege to be determined at the June 10 hearing is a purely legal question that does not require any evidence other than what is contained in the transcript of Julie's Oct. 12, 2018 transcript. However,

this argument does not comport with Ohio law regarding spousal privilege under R.C 2317.02(D).¹

R.C. 2317.02(D) does not categorically protect all communications between spouses, and the Court must hear evidence from Julie Ghoubrial 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.” *Muebrucke 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

¹ Julie’s Motion to Quash repeatedly references R.C. 2945.42, which governs spousal privilege in criminal cases. R.C. 2317.02 controls in civil cases such as this one.

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 Ghoubrial 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. Julie's testimony is required for Plaintiffs to show that Sam Ghoubrial discussed aspects of his illegal cash kickback scheme with Julie at times while they were separated and not living together as husband and wife.

Julie's testimony is also necessary to establish the extent to which her participation in the illegal kickback scheme was a routine part of Sam's business, making discussion of the matter not protected by spousal privilege. Determination of whether communications are routine or not necessarily requires evaluation of the surrounding context involved in those communications. None of this can be determined solely from the content of Julie's deposition testimony. Thus, the evidence sought through Plaintiffs' subpoena to Julie is not duplicative and is extremely relevant to the issues to be decided at the June 10 hearing.

II. Testimony from Julie is required to establish that she waived any claim of spousal privilege over the contents of her deposition by voluntarily disclosing the same information to third parties.

Additionally, in her motion to quash, Julie explains that both she and Sam are attempting to assert spousal privilege with respect to the contents of Julie's Oct. 12, 2018 deposition. (Julie's Mot. to Quash 7.) Therefore, Plaintiffs are entitled to present evidence showing that Julie has waived her spousal privilege by voluntarily sharing the contents of her deposition with third parties, including Plaintiffs' counsel, after her deposition testimony was given.

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). “To be privileged, the communication at issue must be ‘confidential.’” *Reo v. Univ. Hosps. Health Sys.*, 2019-Ohio-1411, 131 N.E.3d 986, ¶ 43 (11th Dist.) quoting *State v. Rahman*, 23 Ohio St.3d 146, 149, 23 Ohio B. 315, 492 N.E.2d 401 (1986). And the Supreme Court of Ohio “has explained that the spousal-privilege statute [is] generally understood not to provide protection to spousal communications that had been disclosed to a third party.” *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 129-130. Furthermore, in *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104 the Supreme Court of Ohio held that spousal privilege did not apply to evidence introduced through a third party, and further clarified that the privilege is waived “if either [party to the marriage] divulge[s allegedly privileged communications] to another, or if that communication is disclosed by a robbery of the mails, or otherwise, and it gets into the hands of a third person, and the issue be raised, it is clear that that third person may, if he be a witness in the case, offer that communication.” *Jones*, ¶ 125-128, quoting *Perez*. “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. These principles are all “in accord with the fundamental principle of construing privileges narrowly,” as “they impede the search for truth and contravene the principle that the public has a right to everyone’s evidence.” *Jones* at ¶ 125 quoting *Perez* at ¶ 121.

Not only has Julie discussed Sam’s illegal cash kick-back scheme with Plaintiffs’ counsel, outside of a privileged setting, Plaintiffs have reason to believe that she has also discussed the matter with various other third parties. Thus, Plaintiffs must be allowed to question Julie Ghoubrial regarding the extent to which any allegedly privileged communications or acts were made or done in

the presence of a third party and to extent to which she has voluntarily disclosed (and thus waived any otherwise applicable privilege over) the communications or acts she seeks to protect. This goes well beyond this information contained within Julie's transcript and is thus not duplicative of information that is already before the Court, as Julie and Sam allege in their respective motions.

III. Evidence of the context and nature of allegedly privileged communications is not itself privileged, and privilege objections do not excuse blanket refusal to comply with a lawful subpoena

Sam and Julie also oppose Plaintiffs' subpoena to Julie on the grounds that it allegedly calls for disclosure of information that is itself protected by spousal privilege. Sam and Julie's concerns about the risk of disclosure of privileged information are misplaced, and they certainly do not warrant a blanket refusal to comply with a duly executed subpoena.

First, it is clear from their motions that Sam and Julie misunderstand Plaintiffs' subpoena, as the intent of Plaintiffs' subpoena is not to seek any actually privileged communications between them, but rather is to uncover the context and nature of Sam and Julie's communications so that the Court can actually determine whether and to what extent a spousal privilege exists in this case, in particular, with regard to the contents of Julie's deposition transcript. Clearly, information *about* an allegedly privileged communication is not the same as privileged information itself.

As to Sam and Julie's blanket claims of "privilege," it is well settled that privileges must be asserted in response to specific questions or the production of specific documents, such that a blanket assertion of privilege cannot and does not relieve a witness of complying with a duly issued subpoena. Courts do not quash subpoenas based on such blanket assertions. *See, e.g., Weierman v. Mardis*, 101 Ohio App.3d 774, 777, 656 N.E.2d 734 (1st Dist. 1994) (affirming trial court order that a deposition occur despite objections based on privilege, because the status or identity of a party does not "exempt him from the normal discovery procedures ... If a dispute arises between the parties concerning the nature of" deposition "testimony, the trial court, at that time, may determine

whether specific statements amount to privileged communications."); *Carroll v. Student Transp., Inc.*, E.D.Pa. No. 10:1439, 2011 U.S. Dist. LEXIS 11470, at *10 (Feb. 4, 2011) (denying motion to quash subpoena based on assertion of spousal privilege, because parties may not use the privilege to "prospectively" limit another party's ability to access or obtain evidence and such determinations must instead be based on "the nature and subject matter of the communication at issue before determining" the privilege's application); *Briley v. U.S. Barge Line, LLC*, W.D.Ky. No. 5:10-CV-00046-R, 2011 U.S. Dist. LEXIS 92694, at *407 (ordering that a deposition take place despite a party's asserting "the marital confidential communication privilege" because "a blanket claim of privilege" is "insufficient" to determine whether the communication at issue "merits protection"); *United States v. Cordes*, E.D.Mich. No. 15-CV-10040, 2016 U.S. Dist. LEXIS 37528, at *8-9 (neither spouse "may assert a blanket spousal communication privilege that would justify quashing the subpoenas ... whether the privilege applies must be determined on a question-by-question, and document-by-document basis.").

Therefore, Plaintiffs' subpoena to Julie cannot simply be quashed just because Sam and Julie anticipate that examination of Julie at the June 10 hearing *might* call for disclosure of any privileged information. Those issues must be resolved as they arise. The Civil Rules provide for a variety of mechanisms to address privilege concerns. Protective orders may serve to protect the parties' interest in the confidentiality of information produced in discovery. *Cadlerock* at *3; *accord Thomas v. Marker*, 2008 WL 3200642 at *3; *Splater v. Thermal Ease Hydronic Sys., Inc.*, 169 Ohio App.3d 514, 2006- Ohio-5452, 863 N.E.2d 1060, ¶ 11 (8th Dist.) ("The rules require the court to balance the need to preserve a trade secret with a party's right to discover material that is relevant and reasonably necessary. Moreover, since the trial judge will be present during the examination, the Court can address any privilege issues that arise in real time and may even fashion guidelines to account for any genuine concerns about privilege. Finally, any claim of privilege would be amply

protected Julie's own understanding that she need not answer questions which would ostensibly reach privileged matters and ability to raise objections to the Court at any time.

IV. Conclusion

For the reasons stated above, Sam and Julie Ghoubrial's respective motions to quash Plaintiffs' subpoena served upon Julie Ghoubrial must be denied. Instead, this Court should require Julie to comply with Plaintiffs' subpoena so that it can hear evidence that is both relevant and necessary to this Court's determination of spousal privilege at the upcoming June 10 hearing.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on May 31, 2024, using the Court's e-filing system, which will serve copies on all necessary parties.

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