

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

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| <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' Opposition to Defendant Sam Ghoubrial, M.D.'s Motion to Stay Ruling Pending Appeal</p> |
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Plaintiffs hereby oppose *Defendant Sam Ghoubrial, M.D.'s Motion to Stay Ruling Pending Appeal* (the "Motion to Stay"), which was filed on July 8, 2024, and which the KNR Defendants have joined.

The Motion to Stay is Defendants' fourth bite at the same apple. On April 11, 2024, the Court held a telephonic conference in which it indicated that it would hold a hearing to consider whether spousal privilege applies to all or part of Julie Ghoubrial's Oct. 12, 2018 deposition transcript. **First**, Defendants verbally objected on the call, but their concerns were overruled, and the hearing was scheduled. **Second**, Defendants filed a "Motion for Reconsideration" on the same issue, which was denied after extensive briefing, and the hearing was allowed to proceed. **Third**, on the day of the hearing, while discussing the matter in chambers, Defendants again asked the trial court to not go forward with the hearing based on the same jurisdictional arguments. Now, Defendants are making the same argument again, for the **fourth** time, offering no new facts or legal authority. Enough is enough. Clearly, Defendants are terrified at the prospect of Julie's deposition being made public (especially now that the June 10 hearing placed evidence into the record that a representative for a third party, David Best, appeared at Julie's deposition—at Sam Ghoubrial's behest—thus destroying any claim of alleged spousal privilege).

Contrary to what the Motion to Stay claims, there are no new facts that should change this Court's prior rulings regarding its jurisdiction to determine issues of spousal privilege related to Julie's deposition. The Motion to Stay is based on a related appeal, in which Plaintiffs requested leave to file parts of their appellate briefing under seal so that they can discuss Julie's deposition without running afoul of this Court's sealing orders. But this is not new information. Indeed, Defendants assumed this was Plaintiffs' intent when they originally filed their Motion for Reconsideration on May 10, 2024, and Plaintiffs' opposition to that motion confirmed that their argument to the appellate court would include discussion of Julie's transcript. (*See* Br. in Opp. to Mot. for Reconsideration, May 24, 2024 ("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 adjudicated."))

Just as before, this Court is not divested of jurisdiction to consider the admissibility of Julie Ghoubrial's October 12, 2018 deposition testimony. The issue of spousal privilege and admissibility is not being reviewed by the Court of Appeals because this Court has never made a ruling on spousal privilege or admissibility.

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 (again) because there is nothing new about Plaintiffs’ cross-appeal that requires the appellate court to make any determination of spousal privilege or admissibility. 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 this Court would be divested of jurisdiction to rule on whether Julie’s deposition or any parts thereof are not protected by spousal privilege. *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.”).

For the reasons stated above (and as fully argued in *Plaintiffs’ Brief in Opposition to Defendants’ Joint Motion for Reconsideration and Objection to Order of April 19, 2024*, filed on May 24, 2024, which is incorporated herein by reference), the Motion to Stay must be denied.

Respectfully submitted,

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Certificate of Service

The foregoing document was filed on July 22, 2024, using the Court's e-filing system, which will serve copies on all necessary parties.

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