

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. CV-2016-09-3928

Judge James Brogan

**DEFENDANT SAM GHoubrial,**  
**M.D.'S POST-HEARING BRIEF**

Now comes Defendant Dr. Sam N. Ghoubrial (“Dr. Ghoubrial”), by and through counsel, and hereby submits this post-hearing brief, in accordance with this Court’s order, given at the hearing of June 10, 2024. The transcript of said hearing is attached as Exhibit A (“Ex. A”). The second part of the same hearing, concerning contempt, is attached as Exhibit B (“Ex. B”).

**I. STATEMENT OF FACTS**

Julie (“Julie”) and Dr. Ghoubrial underwent divorce proceedings in 2018 in the Summit County Domestic Relations Court. Judge John P. Quinn applied a universal confidentiality order to those proceedings. *See* Ex. A, Page 70, Line 17. Julie provided deposition testimony in the divorce.

In deposition, Julie was questioned about factual allegations arising in the instant lawsuit. In response, Julie testified about communications she shared with her then-husband, Dr. Ghoubrial, and she has invoked her privilege against disclosure of that testimony in this case. *See* Ex. A, Page 70, Lines 2-12. Concurrently, Dr. Ghoubrial has invoked his own privilege over the same testimony, in accordance with his mutual and equally enforceable right to do so. *See id.*; *see also* R.C. 2317.02(D) (“Husband or wife, concerning any communication made by one to the

other...and such rule is the same if the marital relation has ceased to exist”); *see also Sessions v. Trevitt*, 39 Ohio St. 259, 265-266 (1883) (“Based upon reasons of public policy, the law prevents the betrayal, by either husband or wife, of a trust or confidence reposed by one in the other in privacy”). Accordingly, testimony from Julie’s deposition reflecting confidences reposed in her by Dr. Ghoumbrial is privileged, not admissible, and not discoverable. Nevertheless, Plaintiffs mistakenly urge this Court to make the transcript of Julie’s deposition (the “Transcript”) a part of the evidentiary record.

## **II. LAW AND ARGUMENT**

### **A. Both spouses enjoy spousal privilege; Dr. Ghoumbrial has not waived his privilege.**

According to the Ohio Supreme Court, “it is a well-settled general principle that no party has the power to waive matters that affect third parties, because the holder of the privilege is the only one who has the power to relinquish it.” *State ex rel. Wallace v. State Med. Bd.*, 89 Ohio St.3d 431, 435, 732 N.E.2d 960 (2000). Dr. Ghoumbrial holds his own privilege over information he communicated to his wife in privacy. *See* R.C. 2317.02(D); *see also Sessions v. Trevitt*, 39 Ohio St. 259, 265-266 (1883). Plaintiffs argue that because Julie discussed Dr. Ghoumbrial’s communication at deposition, in the presence of third parties, she waived the effect of R.C. 2317.02(D). *See* Ex. A, Page 42, Line 21. However, Plaintiffs’ argument is futile, because Julie is not empowered to waive the privilege Dr. Ghoumbrial himself enjoys in his own communications, which he made to Julie in confidence under R.C. 2317.02(D).

In *State ex rel. Wallace v. State Med. Bd.*, the Ohio Supreme Court held, “when someone who is not authorized to waive the privilege discloses privileged information, the information remains privileged.” *See* 89 Ohio St.3d 431 at 435. In *Wallace*, privileged information known to the Ohio State Medical Board was discussed in the presence of third parties, *without the consent*

of the individuals entitled to privacy in that information. *Id.* at 436. Thus, the Ohio Supreme Court held, “the Medical Board cannot unilaterally waive others’ privileges to confidentiality, because the Medical Board is not the holder of those privileges.” *Id.* Similarly, Julie is not the holder of Dr. Ghoumbrial’s R.C. 2317.02(D) spousal privilege, and her discussion of Dr. Ghoumbrial’s privileged communication in the presence of others has no effect on its confidentiality. She cannot unilaterally waive it on Dr. Ghoumbrial’s behalf. Plaintiffs continue to ignore this reality because they know it is dispositive of the issue. Because Dr. Ghoumbrial never waived his privilege, it is ultimately irrelevant if Julie Ghoumbrial did waive, which she maintains she did not.

Dr. Ghoumbrial has continued to affirmatively asserted the privilege he enjoys over his own words spoken to his then-wife in privacy, and he has never waived that privilege. *See* Ex. A, Page 70, Lines 2-12. Accordingly, the contents of the Transcript which disclosed Dr. Ghoumbrial’s marital communications without his knowledge or consent is and remains privileged.

**B. Separation does not extinguish coverture.**

The privilege shielding marital communications from disclosure applies only when communications are made “during coverture.” *See* R.C. 2317.02(D). In this case, Plaintiffs wish to discover the content of communications between Julie and Dr. Ghoumbrial during their marriage, which Julie recounted during the deposition. Accordingly, the privilege does apply.

As Plaintiffs will surely point out, Julie and Dr. Ghoumbrial were separated at the time of these communications, and they ultimately divorced. *See* Ex. A, Page 72, Line 21. However, the fact that Julie and Dr. Ghoumbrial were living apart does not extinguish coverture, nor the spousal privilege applicable in this case. At the time these communications were made, Dr. Ghoumbrial and Julie were married, and their relationship retained a confidential character. Julie and Dr. Ghoumbrial had been separated for less than a month. *See* Ex. A, Page 72, Line 21. Additionally, Julie and Dr.

Ghoubrial had not committed to divorcing, and at the time of the relevant communications in the Transcript, Julie and Dr. Ghoubrial were having conversations about reconciling and resuming their domestic life as husband and wife. *See* Ex. A, Page 73, Line 7.

As the Third District Court of Appeals explained in *State v. VanHoy*, the Ohio Supreme Court never intended to establish a rule that the physical separation of spouses would, *per se*, overcome the spousal privilege. 3d Dist. Henry No. 7-2000-01, 2000 Ohio App. LEXIS 2771, \*19 (June 22, 2000); *cf. McEntire v. McEntire*, 107 Ohio St. 510, 523, 140 N.E. 328 (1923) (“We do not mean hereby to curtail the rule of privileged communications between husband and wife, but we do think where husband and wife have been living separate and apart **for some months** and **enter into an oral agreement for separation**...and all marital relations incident to coverture are abandoned...under such circumstances communications between them...are not privileged” (emphasis added)). Rather, “an assessment of the totality of circumstances surrounding the marital relationship is required to determine if [privileged] communications were indeed made between the parties during coverture.” *State v. VanHoy*, 3d Dist. Henry No. 7-2000-01, 2000 Ohio App. LEXIS 2771, \*19 (June 22, 2000).

The incorrect notion that coverture cannot survive physical separation originates with *McEntire v. McEntire*, wherein spouses had been separated for a time spanning **multiple months**, with an agreement **made** to separate and to divide their property. *See* 107 Ohio St. 510, syllabus, 140 N.E. 328 (1923). The *McEntire* Court found it prudent to disregard the spousal privilege in such cases – *with regard to the divorce and alimony action before it* – under the authority of the now-defunct Ohio General Code § 11988. *See id.* at 521. In other words, *McEntire* did *not* hold that domestic separation defeated spousal privilege outside of divorce proceedings, such as the instant unrelated lawsuit. Indeed, as the Twelfth District Court of Appeals holds, “the legislature

has not chosen to exempt estranged spouses from the rule of marital privilege as set forth in R.C. 2317.02(D).” *City of Fairfield v. Profitt*, 12<sup>th</sup> Dist. Butler No. CA96-11-240, 1997 Ohio App. LEXIS 3649, \*14 (August 11, 1997).

In this case, the disputed communications recounted in the Transcript were made while Julie and Dr. Ghoumbrial were married, and while both spouses remained hopeful their marriage could be restored to harmony. *See* Ex. A, Page 73, Line 7. Their physical separation had begun less than one month before. *See* Ex. A, Page 72, Line 21. The totality of circumstances indicates that Dr. Ghoumbrial’s communications were made to Julie in a spirit of “confidence resulting from their intimate marriage relationship,” and they should therefore “receive protection” despite the then-incipient physical estrangement of husband and wife. *State v. VanHoy*, 3d Dist. Henry No. 7-2000-01, 2000 Ohio App. LEXIS 2771, \*14 (June 22, 2000).

**C. The intentional violation by Plaintiffs’ counsel of this Court’s order merits a finding of criminal contempt.**

Contempt is a disregard of, or disobedience to, an order or command of judicial authority. *State v. Finn*, 7 Ohio App.3d 294, 295, 455 N.E.2d 691 (9<sup>th</sup> Dist. 1982); *see also* R.C. 2705.02(A) (“Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer. To establish contempt, it must be shown that the defendant willfully, and for an improper purpose, disobeyed a lawful court order. *State v. Finn*, 7 Ohio App.3d 294, 295, 455 N.E.2d 691 (9<sup>th</sup> Dist. 1982) (citing Ohio Jurisprudence 3d 317, Contempt, § 3).

Criminal contempt, as distinguished from civil contempt, is punitive in character, and serves as a punishment for past refusal to obey a court order. *Schrader v. Huff*, 8 Ohio App.3d 111, 113, 456 N.E.2d 587 (9<sup>th</sup> Dist. 1983). *Intent* to defy a court order elevates disobedience to criminal contempt, and it must be proven beyond a reasonable doubt. *In re Carroll*, 28 Ohio App.3d 6, 10, 501 N.E.2d 1204 (8<sup>th</sup> Dist. 1985).

In this case, Plaintiffs' Counsel has disobeyed and resisted this Court's lawful sealing Order of February 12, 2024, by including in a public filing of February 19, 2024, the content of the Transcript. Plaintiffs' disclosure of the content of the Transcript intentionally flouted this Court's Order of February 12, 2024, as well as directives of this Court given at the telephone hearing of February 15, 2024 – that the Transcript should “remain private and not available to the public, the Parties, and/or their counsel” (quoting from this Court's Nunc Pro Tunc Order of February 20, 2024, which Plaintiffs' counsel also admittedly and willfully violated).

Plaintiffs' Counsel admittedly has “no doubt in [his] mind” that this Court's intended effect of the February 12, 2024, was to shield the Transcript from public view. *See* Ex. B, Page 50, Line 22. He admittedly did understand that this Court intended to restrict his publication of the contents of the Transcript, but he proceeded to intentionally frustrate this Court's stated intention while serving his own legal interpretation. *See id.*, Page 52, Line 20 – Page 53, Line 4. However, as this very Court has held in the past, “an order issued by a Court with jurisdiction must be obeyed until it is reversed by orderly and proper proceedings.” *See McCarty v. Kimmel*, 62 Ohio App.3d 775, 777, 577 N.E.2d 665 (2d Dist. 1989).

After admitting he violated this Court's February 20, 2024, Nunc Pro Tunc Order, Plaintiffs' Counsel invited this Court to find him in contempt. *See id.*, Page 13, Line 20. He was correct to do so, and this Court would properly oblige him. After all, Plaintiffs' Counsel admitted to understanding that this Court's February 12, 2024 Order applied to him, and he admitted to knowing the Court intended by its Order to restrict public access to the content of the Transcript. Nevertheless, Plaintiffs' Counsel communicated the content of the Transcript to the public docket in his filing of February 19, 2024. Doing so was plain disobedience of a lawful court order, about which there is no doubt. Plaintiffs' counsel is therefore subject to a finding of criminal contempt.

### III. CONCLUSION

For the foregoing reasons, an Order is requested affirming the privilege and confidentiality applicable to the Transcript's contents, to the extent they reveal marital communication. This Court should also issue an Order holding Plaintiffs' Counsel, Mr. Pattakos, in criminal contempt of this Court's February 12, 2024, Order to file the Sealed Deposition under seal, as well as this Court's February 20, 2024, Nunc Pro Tunc Order. All sanctions available under Ohio law should be considered, and the most severe are warranted, to include an award to Dr. Ghoumbrial of attorneys' fees for the preparation of this post-hearing brief and his earlier-filed Motion for Mr. Pattakos to Show Cause.

Respectfully submitted,

/s/ Bradley J. Barmen

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing was filed electronically with the Court on this 1st day of August, 2024. The parties may access this document through the Court's electronic filing system.

/s/ Bradley J. Barmen  
Bradley J. Barmen (0076515)  
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EXHIBITS

FILED

UNDER

SEAL