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Defendant's Brief in Opposition to Plaintiff's Motion to Exclude Testimony of David Doughton

William D. Mason
Cuyahoga County Prosecutor

Marilyn B. Cassidy
Cuyahoga County Assistant Prosecutor

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ALAN DAVIS, EXECUTOR, ET. AL.

V

STATE OF OHIO,

Defendant



CASE NO. 312322

JUDGE: SUSTER

**DEFENDANT'S BRIEF IN
OPPOSITION TO PLAINTIFF'S
MOTION TO EXCLUDE
TESTIMONY OF DAVID
DOUGHTEN**

Defendant, State of Ohio, by and through counsel, William D. Mason, Cuyahoga County Prosecutor, and Assistant Prosecutor, Marilyn B. Cassidy, submits herewith its brief in opposition to plaintiff's motion to exclude testimony of attorney David Doughten. The grounds for this motion are that Richard Eberling expressly waived attorney -client privilege, all as is set forth in the memorandum of law and affidavit attached hereto and expressly incorporated herein by reference.

Respectfully submitted,

WILLIAM D. MASON, CUYAHOGA COUNTY
PROSECUTOR

A handwritten signature in cursive script, appearing to read "Marilyn B. Cassidy", written over a horizontal line.

Marilyn B. Cassidy (0014647)
Assistant Prosecutor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7785

MEMORANDUM IN SUPPORT

INTRODUCTION

Plaintiff has moved to exclude testimony of David Doughten, an attorney who represented Richard Eberling. Ohio law provides that testimony is permissible where an express waiver has occurred. The facts and evidence in this case amply demonstrate that Eberling expressly waived the attorney- client privilege and, accordingly, Doughten should be permitted to testify.

LAW AND ARGUMENT

Ohio Revised Code Section 2317.02 (A) provides the parameters of the attorney client testimonial privilege. It provides that waiver of privilege occurs by express consent of the client. Plaintiff concedes in his brief that the Ohio Supreme Court held in *State v. Mc Dermott*, (1995), 72 Ohio St. 3d 570, that the statute on the testimonial privilege regarding communication between attorney and client provides that the client can waive the privilege. *Swetland v. Miles* (1920), 101 Ohio St. 501, 504.

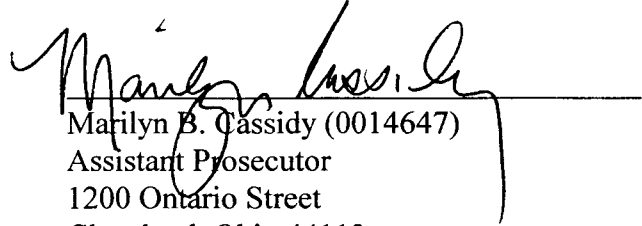
In the case herein, Mr. Doughten represented Richard Eberling in a criminal proceeding. . In the course of Doughten's representation of Eberling, Eberling expressly waived attorney- client privilege. See attached affidavit of David Doughten. Eberling's express waiver of attorney- client privilege satisfies the requirements set forth in R.C. 2317.02 and renders Mr. Doughten's testimony admissible.

CONCLUSION

In light of the foregoing facts and principles of law, defendant respectfully requests that plaintiff's motion be denied.

Respectfully submitted,


WILLIAM D. MASON, CUYAHOGA
COUNTY PROSECUTOR

A handwritten signature in cursive script, appearing to read "Marilyn B. Cassidy", is written over a horizontal line.

Marilyn B. Cassidy (0014647)
Assistant Prosecutor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7785

CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition to Plaintiff's Motion to Exclude Testimony of David Doughten was served upon Terry Gilbert and George Carr , 1370 Ontario Street, Suite 1700, Cleveland, Ohio 44113, attorneys for Plaintiff, via ordinary U.S. mail, and via facsimile transmission, this 20 day of January, 2000.



Marilyn B. Cassidy
Assistant Prosecutor

STATE OF OHIO)
 : ss. AFFIDAVIT OF DAVID L. DOUGHTEN
COUNTY OF CUYAHOGA)

Now comes DAVID L. DOUGHTEN, being first duly sworn according to law,
and states as follows:

1. I am a licensed attorney in the State of Ohio. My registration number is 0002846.
2. I am in the private practice of law. My address is 4403 St. Clair Avenue, Cleveland, OH 44103.
3. I represented Richard Eberling in the appeal from Cuyahoga County Common Pleas Case No. CR 232316, a criminal case wherein Richard Eberling was convicted of the murder of Ethel May Durkin. This representation included the appeal in the Eighth District Court of Appeals (Case Nos. 58559 and 58560), the Ohio Supreme Court and other related matters.
4. During the course of my representation, Mr. Eberling provided a written waiver of attorney/client privilege so that James Neff could review my files relating to Eberling.
5. The written direction memorialized prior verbal authorization/directive from Richard Eberling to me to disseminate the contents of all the files to James Neff. I was also authorized to answer any follow-up questions Mr. Neff had, which I did.

6. Pursuant to Mr. Eberling's authorization and direction, I provided James Neff access to all of my files related to Richard Eberling. This included all materials, notes, draft pleadings, correspondence between Richard Eberling and myself, etc. related to my representation of Eberling in the Durkin criminal case and Eberling's claimed information regarding the homicide of Marilyn Sheppard.
7. I have not been able to locate a copy of the written waiver. I have been informed by Mr. Neff that he does not have a copy of the written waiver.
8. I cannot presently recall any topic of communication between Mr. Eberling and myself which was not also a topic reflected in the file materials and/or my authorized conversations with James Neff.
9. There is no doubt in my mind about the fact that the attorney/client privilege was waived by Mr. Eberling by his verbal and written authorization to me to disseminate all of my files concerning him to Mr. Neff and to answer any questions Mr. Neff had regarding my Mr. Eberling.

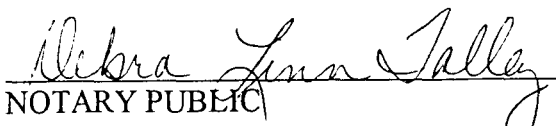
Further Affiant Sayeth Naught.



DAVID L. DOUGHTEN

SWORN TO AND SUBSCRIBED in my presence this 20th day of

January, 2000.



NOTARY PUBLIC

DEBRA L. TALLEY, ATTORNEY
NOTARY PUBLIC - STATE OF OHIO
MY COMMISSION HAS NO EXPIRATION DATE
SECTION 147.03 R.C.