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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

K.J.P., a minor, et al.,
Plaintiffs,
v.
COUNTY OF SAN DIEGO, SAN
DIEGO COUNTY SHERIFF'S
DEPARTMENT, et al.,
Defendants.

Case No.: 15cv2692-H-MDD

**ORDER ON JOINT MOTION
FOR DETERMINATION OF
DISCOVERY DISPUTE RE
DEPOSITION OF LOAN
NGUYEN**

[ECF NO. 100]

A joint motion for determination of a discovery dispute re the deposition of Plaintiff Loan Nguyen was filed on June 30, 2017. (ECF No. 100). In this motion, Defendants seek to compel deposition testimony from Loan Nguyen about her conversations with her husband, decedent “Lucky” Phounsy, concerning his use of drugs and alcohol prior to his death. Plaintiff objects to providing the testimony on marital communications privilege grounds.

I. Background Facts

In this civil rights action, Plaintiffs allege “Lucky” Phounsy died as a result of alleged excessive force by San Diego County Sheriff’s Deputies and

1 as a result of the alleged failure of Santee and Lakeside Fire Emergency
2 Medical Services personnel to provide adequate medical care. The alleged
3 misconduct occurred on April 13, 2015, when Defendants were responding to
4 emergency calls concerning Mr. Phounsy's erratic and dangerous behavior,
5 which Defendants argue stemmed from his use of alcohol and illegal drugs.
6 Defendants allege Mr. Phounsy used illegal drugs at Coachella Music
7 Festival in the days before April 13, 2015.

8 Plaintiff Loan Nguyen was Mr. Phounsy's wife. Plaintiff Nguyen
9 witnessed some of the underlying events, and spoke with Mr. Phounsy about
10 what happened at Coachella before he died.

11 On May 24, 2017, Plaintiff Nguyen's deposition proceeded as noticed.
12 (ECF No. 100). In this motion, Defendants present four lines of examination
13 from her deposition that are in dispute. (ECF No. 100 at 5-10¹).

14 **II. Disputed Testimony**

15 **a. Line of Examination #1**

16 In the first line of examination, Defendants asked Plaintiff Nguyen
17 what Mr. Phounsy told her happened at Coachella. (*Id.* at 5). Plaintiff
18 Nguyen's attorney, Mr. McBride, did not object. Plaintiff Nguyen responded
19 "[o]h, he just told me that he walked around by himself and that he went into
20 a room and he got on stage and was singing and a lot of people where [*sic*]
21 applauding him because he was rapping. And that's pretty much it."

22 Defendants then asked "[a]t what point did he tell you that he had been
23 using drugs?" Mr. McBride objected on grounds of marital privilege and
24 stated "I'm going to have her not respond about any communications they
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27 ¹ Pincites refer to the automatically-generated CM/ECF pagination rather
than the pagination in the original document.

1 had.” Defendants disagreed about the applicability of the privilege and
2 further argued that if the privilege applied “it’s waived because this witness
3 already gave this information to police investigators.” Mr. McBride
4 responded, “Well, we dispute what is in a lot of these police records that she’s
5 ever said that.” Mr. McBride stated “I’m not going to allow her to talk about
6 communications between her and Lucky while they were married.”

7 After further discussion, the parties agreed to go off the record to
8 attempt to contact the Magistrate Judge to resolve the dispute. The
9 Magistrate Judge was unavailable.

10 **b. Line of Examination #2**

11 The second line of examination concerns Plaintiff Nguyen’s
12 conversations with deputies and Mr. Phounsy about drug use. (*Id.* at 6-7).
13 The testimony in dispute follows:

14 Q: Did you tell her [the deputy] anything like that,
15 about any drug use?

16 A: I just told her [the deputy] –I just named Ecstasy
17 and what was the other one she said.

18 Q: She [the deputy] said—described it as acid?

19 A: Yes. I just named it out because what I thought
20 Lucky was probably on.

21 Q: So that’s not something he [Lucky] told you?

22 A: Not something—

23 Q: He [Lucky] didn’t tell you anything about using
24 those drugs?

25 MR. MCBRIDE: Objection. Marital privilege. She’s not
26 going to respond regarding any communications between her
27

1 and Lucky.

2 (*Id.*).

3 **c. Line of Examination #3**

4 The third line of examination involves the following testimony:

5 Q: At any time prior to the incident in April of 2015, did
6 you and Lucky ever discuss Lucky getting some sort of
7 assistance for his alcohol use?

8 A: Yes.

9 MR. MCBRIDE: Objection. Other than communications
10 you guys had during the marriage. So you can answer prior
11 to the marriage if you guys discussed that, but not during the
12 marriage.

13 (*Id.* at 7).

14 **d. Line of Examination #4**

15 The fourth line of examination includes the following excerpts:

16 Q: So you didn't tell anybody in the family about
17 Lucky's drug use at Coachella—

18 MR. MCBRIDE: Objection.

19 Q: —that evening before 911 was called?

20 MR. MCBRIDE: Lacks foundation. Calls for speculation.
21 Assumes facts.

22 THE WITNESS: I told them that—I told them what I
23 assumed Lucky was on.

24 BY MR. OSTERBERG [Defendant's attorney]:

25 Q: Okay. What did you tell them.

26 A: That I think Lucky has done Ecstasy and acid while
27 he was in Coachella.

1 Q: And what did you base that assumption on?

2 MR. MCBRIDE: Objection. Marital/spousal privilege. You
3 can answer with regard to anything other than confidential
4 communications between you and Lucky.

5 ...

6 Q: And let me ask you a new question. Why did you
7 assume—you said—you used the word “assumption.” Why
8 did you assume that Lucky had used acid, Ecstasy, and other
9 drugs at Coachella?

10 MR. MCBRIDE: Objection. Misstates testimony.
11 Marital/Spousal privilege. You can answer insofar as it
12 doesn't include any confidential communications between you
13 and Lucky. If you saw or heard anything else other than
14 communications between you and Lucky, you can go ahead
15 and answer.

16 (Witness shakes head)

17 BY MR. OSTERBERG:

18 Q: Go ahead.

19 A: That was between me and Lucky.

20 Q: So the conversation you have about the drug use was
21 just between you and Lucky?

22 MR. MCBRIDE: No, no. Same objections. She's not
23 answering any questions about any conversations they may or
24 may not have had. If you have something about things other
25 than those communications, you can go ahead and ask. But
26 she's not going to testify about her and Lucky's confidential
27 communications.

...

(ECF No. 100 at 8-10).

1 **III. Legal Standard**

2 In accordance with Federal Rule of Evidence 501’s provision that “[t]he
3 common law—as interpreted by the United States courts in the light of
4 reason and experience—govern a claim of privilege,” the Ninth Circuit
5 recognizes the “marital communications” privilege. FED. R. EVID. 501; *U.S.*
6 *v. Marashi*, 913 F.2d 724, 729 (9th Cir. 1990); *see also Brown v. Wimberly*,
7 Case No. 1:14cv1812-JLT, 2016 WL 3569618, *2 (E.D. Cal. June 30, 2012).

8 The marital communications privilege “bars testimony concerning
9 statements privately communicated between spouses.” *Marashi*, 913 F.3d at
10 729. “This privilege (1) ‘extends only to words or acts intended as
11 communication to the other spouse’; (2) ‘covers only those communications
12 made during a valid marriage’; and (3) ‘applies only to those marital
13 communications which are confidential.’” *Ross v. Santa Clara Cnty. Sheriff’s*
14 *Dep’t (SCCSD)*, Case No. 5:14cv1770-EJD-HRL, 2015 WL 4484152, *3 (N.D.
15 Cal. July 22, 2015) (quoting *Marashi*, 913 F.3d at 729). The privilege
16 continues to apply to communications made during the marriage even after
17 the marriage has ended. *Marashi*, 913 F.3d at 729.

18 Although courts must “narrowly construe the marital communications
19 privilege because it obstructs the truth-seeking process,” “[m]arital
20 communications are presumptively confidential.” *Marashi*, 913 F.2d at 730.

21 The privilege applies to words or communicative conduct, but does not
22 apply to observations of non-communicative conduct. *See, e.g., Marashi*, 913
23 F.3d at 729; *Brown*, 2016 WL 3569618, at *3 (collecting cases).

24 “The privilege does not extend to statements which are made before, or
25 likely to be overheard by, third parties.” *Marashi*, 913 F.3d at 729. But
26 involuntary disclosures to third parties do not automatically waive the
27 attorney-client privilege. *United States v. de la Jara*, 973 F.2d 746, 749–750

1 (9th Cir. 1992); *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1130 (9th Cir. 2012).
2 The spouse may selectively waive the privilege, “but the waiver, once it
3 occurs, is as to the *entirety* of... that particular *subject* not simply as to that
4 particular time the subject was discussed.” *Brown*, 2016 WL 3569618, at *4.

5 **IV. Parties’ Contentions**

6 The parties disagree about the application of the marital
7 communications privilege to Plaintiff Nguyen’s testimony. Defendants
8 contend that the communications were not made in confidence because they
9 were later disclosed to third parties. Defendants further argue that even if
10 the marital communications were privileged, Plaintiff Nguyen waived the
11 privilege by disclosing information Mr. Phounsy told her regarding his drug
12 use at the Coachella Music Festival to third parties during the underlying
13 incident. (ECF No. 100-1). Defendants offer evidence to show that Ms.
14 Nguyen disclosed marital communications to each of these third parties:

- 15 1) San Diego Sheriff’s Deputy Sandra Janet Carbajal;
 - 16 • Carbajal Deposition (ECF No. 100-3 at 25-26 (Exh. B));
- 17 2) San Diego Sheriff’s Detective Carpenter;
 - 18 • Transcript of Audio Recorded Interview (ECF No. 100-3 at 43-
19 46 (Exh. D));
- 20 3) Lakeside Fire Protection Firefighter/Paramedic David Csik;
 - 21 • Csik Deposition (ECF No. 100-3 at 34-36 (Exh. C));
- 22 4) Sharp Grossmont Hospital Acute Patient Intake Form;
 - 23 • (ECF No. 100-3 at 52 (Exh. E));
- 24 5) Donate Life California Organ & Tissue Donor Registry;
 - 25 • (ECF No. 100-3 at 59 (Exh. E));

1 6) Plaintiff’s retained Vocational Rehabilitation Expert, Behnush B.
2 Mortimer, Ph.D., CRC, CVE.

- 3 • Expert’s notes (ECF No. 100-5 at 17 (Exh. A));
- 4 • Expert’s Report (ECF No. 100-6 at 4 (Exh. B)).

5 (ECF No. 100-1 (memorandum), 100-2 (Osterberg declaration authenticating
6 exhibits B-E), ECF No. 100-3 (Exhs. B-E), 100-4 (Dean declaration
7 authenticating exhibits A and B), 100-5 (Exh. A), 100-6 (Exh. B)).

8 Plaintiff takes the position that “[n]one of the statements Ms. Nguyen
9 made following the incident giving rise to this event, with respect to any
10 drugs Lucky may or may not have taken in the days leading up to this
11 incident, were based on communications that Lucky made to Ms. Nguyen in
12 confidence.” (ECF No. 100-7 at 3:4-7). Instead, Plaintiff argues, her
13 statements to these third parties were based on her personal observations
14 and assumptions, as she testified during her deposition. *Id.* at 3:7-8 and 4
15 (citing to Nguyen Depo. at 67:3-11). Plaintiff Nguyen supports this
16 proposition with a declaration that none of the statements she made to third
17 parties following the incident were based on communications with Mr.
18 Phounsy; “[r]ather such statements were made based on my personal
19 observations and assumptions regarding Lucky.” (ECF No. 100-9).

20 Accordingly, Plaintiff argues Defendants are not harmed in their
21 defense if they are prevented from obtaining Plaintiff Nguyen’s testimony
22 about the alleged marital conversations, because Defendants may offer
23 evidence regarding Plaintiff Nguyen’s observation-based statements to third
24 parties instead. (ECF No. 100-7 at 5 (citing *U.S. v. Lefkowitz*, 618 F.2d 1313,
25 1318 (9th Cir. 1980)). Plaintiff Nguyen suggests that perhaps no marital
26 communication concerning Mr. Phounsy’s use of drugs or alcohol occurred.

1 Plaintiff Nguyen does not argue that the statements to third parties
2 were involuntary disclosures or protected by a second layer of privilege (e.g.,
3 doctor-patient privilege) or are otherwise excepted from waiver.

4 V. Analysis

5 The Court is not persuaded by Plaintiff's suggestion that no marital
6 communications concerning Mr. Phounsy's drug and alcohol use occurred.
7 Plaintiff Nguyen, in her deposition, stated that she told Mr. Phounsy's family
8 that she thought he had done Ecstasy and acid while he was in Coachella
9 before 911 was called. (ECF Nos. 100 at 8 (Line of Examination #4) and 100-
10 3 (Nguyen Depo. at 13:3-15). When asked why she thought he had used acid
11 and Ecstasy at Coachella, Plaintiff Nguyen shook her head that she was
12 unable to identify any basis for her statement besides marital
13 communications and responded "[t]hat was between me and Lucky." (ECF
14 Nos. 100 at 9 and 100-3 at 14:23-15:12).

15 Her response unequivocally shows that Plaintiff Nguyen and her
16 husband discussed his drug use at Coachella. Having found that at least one
17 communication occurred, the Court next considers whether such
18 communications are protected by the marital communications privilege.

19 The Court finds that the marital communications privilege applies to
20 the marital conversations between Plaintiff Nguyen and Mr. Phounsy about
21 his drug and alcohol use. There is no dispute that Plaintiff Nguyen and Mr.
22 Phounsy were married at the time of the disputed communications between
23 them. Further, the communications are presumed privileged. *Marashi*, 913
24 F.2d at 730; *see also Fodor v. Blakey*, Case No. 11cv8496-MMM-RZX, 2012
25 WL 12893986, at *8 (C.D. Cal. Dec. 31, 2012) (burden is on movant to show
26 that statements were not made in confidence). Defendants have not
27 overcome the presumption of confidence. They do not argue or show that

1 these communications occurred in the presence of a third party. And
2 Defendants' bare assertion that later disclosure to third parties somehow
3 disrobed the communications of confidence at the time of the conversation is
4 unavailing.

5 Defendants' argument that Plaintiff Nguyen waived the privilege by
6 disclosure to third parties requires further analysis. The waiver analysis is
7 complicated by Plaintiff's assertion that all of the statements she made to
8 third parties are based on observations and assumptions rather than on
9 privileged communications. Plaintiff admitted, however, in her undisputed
10 deposition testimony that she disclosed to "the family" that Mr. Phounsy was
11 on Ecstasy and acid before calling 911, and that her disclosure was based on
12 marital communications "between [Plaintiff] and Lucky"—not observations or
13 assumptions. (ECF Nos. 100 at 8-9 and 100-3 at 13-15 (Line of Examination
14 #4)).

15 Plaintiff's declaration in support of this motion does not compel a
16 different result. Her declaration does not conflict with her testimony
17 admitting disclosure before the 911 call, because it only attests to "the
18 statements [she] made *following* the incident." (ECF No. 100-7 at 2).
19 Consequently, the Court finds that Plaintiff's disclosure of the marital
20 communications to the family before the 911 call waived the marital
21 communications privilege.

22 A question remains as to the scope of Plaintiff's waiver of the privilege.
23 "[T]here may be a selective waiver but the waiver, once it occurs, is as to the
24 *entirety* of the subject." *Brown, supra*, 2016 WL 3569618, at *4 (emphasis in
25 original). Even if Plaintiff disclosed only part of one conversation with her
26 husband about his drug and alcohol use in the days before the incident, "the
27 marital privilege is waived as to that particular *subject* not simply as to" that

1 part of the conversation or “that particular time the subject was discussed.”
2 *Id.* (emphasis in original). Consequently, the Court finds Plaintiff waived the
3 marital communications privilege as to the entire subject of Mr. Phounsy’s
4 drug and alcohol use in the days leading up to the April 13, 2015, incident.


5 **VI. Conclusion**

6 Plaintiff waived the marital communications privilege as to the subject
7 of Mr. Phounsy’s drug and alcohol use in the days before the April 13, 2015,
8 incident. Defendants’ request for an order requiring further deposition
9 testimony from Plaintiff Nguyen regarding this subject is **GRANTED**.

10 The Court finds that Plaintiff’s deposition objections and nondisclosures
11 were substantially justified, and therefore Defendants’ request for Rule
12 37(a)(5)(A) fees and costs is **DENIED**.

13
14 **IT IS SO ORDERED.**

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16 Dated: August 2, 2017

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18 Hon. Mitchell D. Dembin
19 United States Magistrate Judge
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