

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 140312-U

NO. 4-14-0312

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 31, 2014
Carla Bender
4th District Appellate
Court, IL

WAYNE VERHAGEN and CHERYL VERHAGEN,)	Appeal from
Plaintiffs-Appellees,)	Circuit Court of
v.)	Macon County
ANGELA CRUE,)	No. 13SC528
Defendant-Appellant,)	
and)	Honorable
WILLIAM E. HOURIGAN,)	Scott B. Diamond,
Contemnor-Appellant.)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court found the trial court erred in granting plaintiffs' motion to disqualify defendant's attorney and in holding him in contempt.

¶ 2 In March 2013, plaintiffs, Wayne Verhagen and Cheryl Verhagen, filed a small-claims complaint against defendant, Angela Crue, following an auto accident with injury. In July 2013, plaintiffs sought to disqualify William E. Hourigan as defendant's attorney due to a conflict of interest. In September 2013, the trial court disqualified Hourigan and barred him from representing defendant. In March 2014, the court found Hourigan in contempt for refusing to withdraw and fined him \$100.

¶ 3 On appeal, Hourigan argues the trial court erred in granting plaintiffs' motion to disqualify him and in holding him in direct civil contempt. We reverse and remand for further proceedings.

¶ 4

I. BACKGROUND

¶ 5 In March 2013, plaintiffs filed a *pro se* small-claims complaint against defendant, alleging she caused an auto accident that resulted in property damage and bodily injury. In May 2013, Hourigan entered his appearance on behalf of defendant.

¶ 6 In July 2013, plaintiffs filed a *pro se* handwritten motion, seeking to disqualify Hourigan from representing defendant due to a conflict of interest. Plaintiffs claimed Hourigan still represented Cheryl Verhagen in a class-action suit in Macon County case No. 10-L-50 and the case would not be finalized until October 2013. On the following page in the record is a letter signed by Hourigan dated July 1, 2013, in which he advises his class-action clients regarding the provisional settlement. He addressed the letter "[t]o all of my clients who have a claim against Macon County, Kenneth Webb and Tamara Younker for the illegal practice of dentistry at the Macon County Dental Clinic."

¶ 7 In August 2013, defendant, by and through her attorney Hourigan, filed a response to the motion to disqualify. The motion alleged Hourigan had no recollection of meeting with Cheryl Verhagen and no one by the first name of Cheryl was listed as a client in the class action. The motion claimed Hourigan never represented Cheryl in the class action or any other case. Moreover, even if Cheryl was a member of the class and filed a claim, Hourigan claimed he only received a weekly spreadsheet with the number of claimants, not their names, which did not create a conflict of interest.

¶ 8 In September 2013, the trial court noted its order was based "solely upon a form letter in the file from attorney William E. Hourigan which does not contain reference to Cheryl Verhagen, but was received by her." The court found an attorney-client relationship existed between Hourigan and Cheryl, who was a claimant but not a named party in the class action.

The court stated the representation violated Rule 1.7 of the Illinois Rules of Professional Conduct of 2010 (eff. Jan. 1, 2010), as Hourigan's representation of a class of which Cheryl was a member was directly adverse to his representing defendant in the present case. The court ordered Hourigan disqualified and barred him from representing defendant. The court stated the order was final and appealable and no just reason existed for delaying enforcement or appeal.

¶ 9 Defendant, by and through her attorney Hourigan, filed a motion to reconsider. Hourigan attached to the motion an affidavit from attorney Ronald Kanoski. Therein, Kanoski stated Kanoski & Associates began representing clients involved in the dental class action in 2010. Kanoski stated Hourigan was not employed by the firm but agreed to accept referrals of the dental clients and filed a small claim for each one. The firm also received calls from people who were not accepted as clients because the firm believed the statute of limitations had run. Those callers were given the option to provide their contact information so that their names could be added to the list of potential claimants if the class action was successfully certified. Kanoski believed Cheryl contacted the firm after the statute of limitations had expired for filing individual claims. The firm declined representation but she elected to leave her contact information. In June 2013, Hourigan asked law-firm staff to send a form letter to all clients indicating they must complete the claim form to receive a settlement. Kanoski stated the staff inadvertently sent the form letter not only to the clients but also to those on the nonclient list.

¶ 10 In January 2014, defendant filed a supplement to the motion to reconsider, stating the cause in Macon County case No. 10-L-50 had been dismissed with prejudice in October 2013 and no appeal had been taken. Further, the motion alleged all of the funds had been distributed and Hourigan was no longer involved as attorney. Thus, the conflict, if there was one, no longer existed.

¶ 11 In March 2014, the trial court held a hearing on the motion to reconsider. The court began by noting its prior language to allow an appeal was inappropriate under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Instead, the court stated it could order counsel to withdraw, and if counsel refused, the court would hold him in contempt and fine him \$100. The case would then be appealable under Illinois Supreme Court Rule 304(b)(5) (eff. Feb. 26, 2010). As to the issue on reconsideration, the court stated it had "a problem" with counsel "just sending out letters like this to the general public," and a reasonable person in receipt of the letter would think she was a client of counsel. In its written ruling, the court stated it appeared Cheryl and Hourigan "have several possible disputes between them in the near future." The court refused to alter its ruling. When Hourigan refused to withdraw as counsel, the court held him in contempt and fined him \$100. This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Hourigan argues the trial court erred in granting plaintiffs' motion to disqualify him as defendant's attorney and in holding him in direct civil contempt for not withdrawing as counsel. We agree.

¶ 14 A. Lack of an Appellee Brief

¶ 15 Initially, we note appellees have not filed a brief in this case. A reviewing court is not compelled to serve as an advocate for the appellee and is not required to search the record for the purpose of sustaining the trial court's judgment. However, if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court should decide the merits of the appeal. On the other hand, if the appellant's brief demonstrates *prima facie* reversible error and the contentions in the brief find support in the record, the trial court's judgment may be reversed. *First Capitol Mortgage Corp. v. Talandis*

Construction Corp., 63 Ill. 2d 128, 133, 345 N.E.2d 493, 495 (1976).

¶ 16 B. Motion To Disqualify

¶ 17 Courts have vital interests in "protecting the attorney-client relationship, maintaining public confidence in the legal profession and ensuring the integrity of judicial proceedings." *S K Handtool Corp. v. Dresser Industries, Inc.*, 246 Ill. App. 3d 979, 989, 619 N.E.2d 1282, 1289 (1993). To protect those interests, courts have the authority to disqualify an attorney from representing a particular client. *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 12-13, 909 N.E.2d 848, 860 (2009).

"However, because attorney disqualification is a 'drastic measure,' which bars a party from retaining and being represented by the counsel of its choice, courts must exercise caution in reviewing a motion to disqualify counsel to ensure that the motion is not being used as a tool by one party to harass the other party. [Citations.] A trial court's ruling on a motion to disqualify counsel will not be reversed absent an abuse of discretion." *Kensington's Wine*, 392 Ill. App. 3d at 13, 909 N.E.2d at 860.

¶ 18 In the case *sub judice*, the trial court cited Rule 1.7 in disqualifying Hourigan as counsel. Rule 1.7(a) provides as follows:

"Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Ill. S. Ct. R. Prof'l Conduct R. 1.7(a) (eff. Jan. 1, 2010).

¶ 19 1. *Attorney-Client Relationship*

¶ 20 "A party seeking to disqualify counsel bears the burden of proving a conflict of interest." *In re Commissioner of Banks and Real Estate*, 327 Ill. App. 3d 441, 478, 764 N.E.2d 66, 98 (2001). First, the party seeking disqualification must "prove the existence of the former attorney-client relationship." *Gagliardo v. Caffrey*, 344 Ill. App. 3d 219, 226, 800 N.E.2d 489, 494 (2003); see also *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 174, 685 N.E.2d 871, 875 (1997) (stating the party seeking to disqualify an attorney bears "the burden of proving the existence of a former attorney-client relationship").

"An attorney-client relationship arises only when both the attorney and the client consent to its formation. [Citations.] Thus, the client must explicitly authorize the attorney to work on his behalf and the attorney must indicate an acceptance of that authority to work on the client's behalf in order to establish an attorney-client relationship. [Citations.]" *Kensington's Wine*, 392 Ill. App. 3d at 13, 909 N.E.2d at 860.

See also *People v. Simms*, 192 Ill. 2d 348, 382, 736 N.E.2d 1092, 1117 (2000) (stating "[t]he attorney-client relationship is a voluntary, contractual relationship that requires the consent of

both the attorney and client").

¶ 21 In this case, the evidence fails to establish an attorney-client relationship existed between Cheryl and Hourigan. Hourigan stated he never represented Cheryl in the dental class action or in any other action. No contract for legal services or retainer agreements appear in the record. Although Cheryl claimed to have received Hourigan's letter addressed "to all of my clients," Hourigan explained the letter was mailed in error. Moreover, the letter does not constitute the assumption of legal representation. We find plaintiffs failed to meet their burden to establish Cheryl was Hourigan's current or former client pursuant to Rule 1.7.

¶ 22 *2. Adverse Relationship*

¶ 23 Even if we assumed an attorney-client relationship existed between Cheryl and Hourigan, as the trial court so found based on the letter, we still must determine whether Hourigan's representation would be directly adverse to Cheryl or whether a significant risk exists that his representation of one client would be materially limited by his responsibilities to the other or former client. We find it would not.

¶ 24 Here, Hourigan stated that even assuming he met with Cheryl, no information was taken from her that would be pertinent or advantageous to the small-claims case. Also, no evidence indicated Hourigan, acting as the attorney for the class representative, was in a position to or did in fact engage in any acts that were directly adverse to Cheryl in either case.

¶ 25 As noted, plaintiffs bear a "heavy burden" in seeking to disqualify an attorney, as it amounts to a drastic measure. *Macknin v. Macknin*, 404 Ill. App. 3d 520, 530, 937 N.E.2d 270, 279 (2010). "[C]ounsel should not be disqualified 'unless there is a substantial basis for believing that *actual*, rather than merely potential, conflicts of interest are afoot.' " (Emphasis in original.) *In re Commissioner of Banks*, 327 Ill. App. 3d at 478, 764 N.E.2d at 99 (quoting

Guillen v. City of Chicago, 956 F. Supp. 1416, 1422 (N.D. Ill. 1997)).

¶ 26 We find plaintiffs failed to sustain their burden that a conflict of interest existed under Rule 1.7. Thus, the trial court abused its discretion in granting the motion to disqualify Hourigan as defendant's attorney and entering the corresponding contempt citation and fine.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 29 Reversed and remanded for further proceedings.