

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Christine (Haas) Baldonado

Court of Appeals No. WD-08-079

Appellant

Trial Court No. 2006-CV-0825

v.

Ryan M. Tackett, et al.

DECISION AND JUDGMENT

Appellees

Decided: August 28, 2009

* * * * *

George C. Rogers, for appellant.

William P. Lang, for appellee Ryan M. Tackett; Timothy C. James
and Brad A. Everhardt, for appellee Ralph Thayer Chevrolet, Inc.

* * * * *

HANDWORK, P.J.

{¶ 1} This appeal is from the December 1, 2008 judgment of the Wood County Court of Common Pleas, which granted a motion to disqualify George C. Rogers from serving as counsel for appellant, Christine Baldonado. Upon consideration of the

assignments of error, we affirm the decision of the lower court. Appellant asserts the following single assignment of error on appeal:

{¶ 2} "THE TRIAL COURT ERRED IN DISQUALIFYING PLAINTIFF'S COUNSEL AS TRIAL COUNSEL FOR PLAINTIFF WHEN THERE IS NO EVIDENCE IN THE RECORD THAT PLAINTIFF'S COUNSEL IS A 'NECESSARY' WITNESS PURSUANT TO Rule 3.7 OF THE OHIO RULES OF PROFESSIONAL CONDUCT."

{¶ 3} Appellant brought a malicious prosecution action against appellee, Ryan M. Tackett and Ralph Thayer Chevrolet, Inc., jointly and severally, in 2006. Both defendants moved for summary judgment, which was granted to appellees on all of appellant's claims on April 5, 2007. This decision was overturned on appeal by this court on December 21, 2007, and the case was remanded to the trial court for further proceedings. The trial court's grant of summary judgment was reversed because this court found that there was a question of fact raised as to whether the underlying criminal action was dismissed in favor of appellant. This conclusion was based upon the affidavits of appellant and her counsel who attested that there had not been any compromise agreement. Tackett attested that the prosecutor had sought his consent to dismiss the charges, which implied that Tackett's agreement was necessary.

{¶ 4} On January 28, 2008, appellee Tackett moved to disqualify appellant's counsel, and any other lawyer from his firm, from representing appellant. Tackett argued that appellant's counsel was likely to be called as a witness at trial regarding the facts

surrounding the termination of the criminal action and, therefore, he could not also serve as her counsel.

{¶ 5} While discipline of lawyers falls within the exclusive jurisdiction of the Ohio Supreme Court, *Mentor Lagoons, Inc. v. Rubin* (1987), 31 Ohio St.3d 256, 259-260, lower " * * * courts have the inherent power to disqualify an attorney from acting as counsel in a case where the attorney cannot or will not comply with the Code of Professional Responsibility and such action is necessary to protect the dignity and authority of the court." *Horen v. City of Toledo Public School Dist.*, 6th Dist. No. L-07-1131, 2007-Ohio-6883, ¶ 21 (citations omitted). In the case before us, it is alleged that appellant's counsel will violate Prof. Cond. Rule 3.7 by acting as her counsel in a case where he will be called as a witness.

{¶ 6} Prof. Cond. Rule 3.7 provides that:

{¶ 7} "(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:

{¶ 8} "(1) the testimony relates to an uncontested issue;

{¶ 9} "(2) the testimony relates to the nature and value of legal services rendered in the case;

{¶ 10} "(3) the disqualification of the lawyer would work substantial hardship on the client.

{¶ 11} "(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or 1.9.

{¶ 12} "(c) A government lawyer participating in a case shall not testify or offer the testimony of another lawyer in the same government agency, except where division (a) applies or where permitted by law."

{¶ 13} The trial court agreed with Tackett and concluded in its February 20, 2008 judgment entry that the testimony of appellant's counsel was central to the issue of whether or not the criminal action was resolved in appellant's favor. Therefore, the trial court granted the motion to disqualify appellant's counsel. At a pretrial conference, however, appellant's counsel indicated that he would not be a witness in the action. Therefore, the trial court set aside its order of disqualification. Because appellant's counsel indicated that he would not testify in the case, the court granted Tackett's motion to strike the attorney's affidavit from the record in which he attested that no plea bargaining occurred in the underlying criminal action.

{¶ 14} Appellant and Tackett again moved for summary judgment. In an August 7, 2008 judgment entry, the trial court denied summary judgment to appellant and granted in part and denied in part summary judgment to Tackett. The trial court granted summary judgment to Tackett only with respect to appellant's Section 1983, Title 42, U.S.Code claim.

{¶ 15} Thereafter, Ralph Thayer Chevrolet, Inc. moved for summary judgment and both defendants renewed their motion to disqualify appellant's attorney on November 14, 2008, because of the need to depose appellant's counsel regarding the events leading up to the dismissal of the underlying criminal case. On December 1, 2008, the court ruled again that it was necessary to disqualify appellant's counsel, George Rogers, from acting as her counsel in this case because of the need for his testimony to resolve the issues of the case. The court then reinstated its February 20, 2008 judgment of disqualification.

{¶ 16} Appellant sought an appeal from this order (as well as the February 20, 2008 judgment) on December 12, 2008. Appellant also sought to appeal from the August 7, 2008 judgment, which denied partial judgment to appellant on the only issue for which her counsel could be called as a witness and directed that her counsel's affidavit be stricken from the record. This second appeal was dismissed by this court because it was not a final, appealable order.

{¶ 17} On appeal, appellant asserts a single assignment of error. She argues that appellees did not demonstrate that her counsel was a "necessary" witness in this case since she has indicated that she will not call him as a witness and that the facts relating to the dismissal of the underlying criminal action can be ascertained from the facts of the criminal record. Furthermore, that there is no basis for disqualification of her counsel because his prior affidavit makes it clear that there was no plea bargaining in the underlying criminal case and, therefore, he had nothing about which to testify.

{¶ 18} Appellee Tackett argues that the existence of a voluntary settlement or agreement of compromise is the central factual issue in this case. Since there was a payment of restitution prior to the dismissal of the case, Tackett argues that there was evidence that the criminal action was not resolved by dismissal of the charges and that the testimony of appellant's counsel was critical to establishing her case and he cannot continue to serve as appellant's counsel pursuant to Prof. Cond. Rule 3.7.

{¶ 19} On appeal, this court reviews the decision of the trial court under an abuse of discretion standard of review. *155 N. High Ltd. v. Cincinnati Ins. Co.* (1995), 72 Ohio St.3d 423, syllabus. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 20} Because of the similarity between Prof. Cond. Rule 3.7 and the prior disciplinary rules governing this issue, DR 5-101(B) and DR 5-102, *Horen*, supra at 16, this court continues to apply the two-part analysis developed in prior case law: "(1) first, determine whether the attorney's testimony is admissible and, if so, (2) second, determine if disqualification is necessary and whether any of the exceptions to [Prof. Cond. Rule 3.7] are applicable." *Horen*, supra at ¶ 22. The burden of proving that disqualification is necessary falls upon the moving party and the burden of proving that one of the exceptions applies is upon the attorney seeking to claim the exception. *Horen*, id.

{¶ 21} In this case, we find that appellant has failed to establish that the trial court abused its discretion. It is clear from the record that the defense has taken the position

that the criminal case was not resolved in appellant's favor. Appellant's attorney was the only person who was part of the conversations with the prosecutor about how the case would be resolved. While the criminal record presents some evidence of how the criminal case was resolved, there is a likelihood that Rogers would be required to testify regarding the resolution of the underlying criminal action. Pursuant to the rule, the moving party does not need to establish that the attorney will be called as a witness. He only needs to establish that it is likely that the attorney would need to testify. While appellant and Rogers did not believe that Rogers' testimony was necessary because there was no plea bargaining, the very fact that he alone can testify to this fact based upon the conversations with the prosecution makes the need for his testimony likely. Therefore, we find that the trial court did not abuse its discretion by finding that it was inappropriate for Rogers to act as appellant's counsel. Appellant's sole assignment of error is found not well-taken.

{¶ 22} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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