

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

JOANNE F. MAHONSKI, INDIVIDUALLY : IN THE SUPERIOR COURT OF
AND AS EXECUTRIX OF THE ESTATE : PENNSYLVANIA
OF FRANCIS J. MAHONSKI, BERNICE :
WINDER, INDIVIDUALLY AND AS :
ADMINISTRATRIX OF THE ESTATE OF :
WALTER J. WINDER, DIANE K. :
MASTERS, ADMINISTRATRIX OF THE :
ESTATE OF ROBERT C. MAHONSKI AND :
EXECUTRIX OF THE ESTATE OF :
ELEANOR B. MAHONSKI, LEONA A. :
KLEMENTOVICH, INDIVIDUALLY AND :
AS ADMINISTRATRIX OF THE ESTATE :
OF LEO A. KLEMENTOVICH, AND LEO :
F. KLEMENTOVICH, :

Appellants

v.

CAROLINE M. ENGEL, INDIVIDUALLY :
AND AS EXECUTRIX OF THE ESTATE :
OF HOWARD A. ENGEL; JOSEPH L. :
RIDER, INDIVIDUALLY, TRADING AND :
DOING BUSINESS AS LAW OFFICES OF :
JOSEPH L. RIDER, AND AS TRUSTEE :
AD LITEM FOR LAW OFFICES OF :
JOSEPH L. RIDER, PAUL A. ROMAN, :
INDIVIDUALLY, TRADING AND DOING :
BUSINESS AS LAW OFFICES OF :
JOSEPH L. RIDER, AND AS TRUSTEE :
AD LITEM FOR LAW OFFICES OF :
JOSEPH L. RIDER, LAW OFFICES OF :
JOSEPH L. RIDER, RANGE RESOURCES :
APPALACHIA, LLC AND RANGE :
RESOURCES CORPORATION, :

Appellees

No. 2029 MDA 2012

Appeal from the Order entered November 5, 2012,
Court of Common Pleas, Lycoming County,
Civil Division at No. 11-01-458

BEFORE: BENDER, DONOHUE and STRASSBURGER*, JJ.

*Retired Senior Judge assigned to the Superior Court.

MEMORANDUM BY DONOHUE, J.:

FILED SEPTEMBER 24, 2013

Appellants appeal from the order of November 5, 2012 disqualifying Appellant Leo F. Klementovich ("Klementovich") as counsel in this action. We vacate and remand.

As of the date of the order on appeal, this action remained in the pleadings stage. We begin with a review of the relevant allegations of fact, as gleaned from Appellants' complaint. Appellants allege that Appellee defendants have infringed in various ways on Appellants' rights in a 358-acre tract of real estate ("the Property") in Lycoming County. As of 1990, the Property was owned in equal one-ninth shares by nine siblings.¹ Complaint, 8/23/11, at ¶ 16. The property was deeded to the nine siblings in 1956 by their parents, Bruno J. and Anna M. Mahonski. *Id.* at ¶ 17. Appellants, other than Klementovich, are the siblings or the representatives of the siblings' estates and/or the estates of the siblings' spouses (collectively the "Appellant Siblings"). Klementovich is the son of Appellant Sibling Leona A. Klementovich and was granted an interest in the Property

¹ The nine siblings are: Bruno Chester Mahonski (not participating in this action), Robert C. Mahonski (estate represented by Diane K Masters), Francis J. Mahonski (estate represented by Joanne F. Mahonski), Bernice Winder (participating in her own right and on behalf of the estate of Walter J. Winder), Phyllis M. Griggs (not participating in this action), Leona A. Klementovich (participating in her own right and on behalf of the estate of Leo A. Klementovich), Helen M. Churba (not participating in this action), Eugenia E. Woltz (not participating in this action) and Appellee Caroline M. Engel (named a defendant in her own right and as representative of the estate of Howard A. Engel).

from his mother. **Id.** at 105. He has been serving as counsel to all Appellants throughout this action. Appellee/Defendant Caroline Engel (“Engel”) is a sister of the Appellant Siblings.

According to Appellants’ complaint, Engel retained Appellees Joseph L. Rider (“Rider”) and Paul A. Roman (“Roman”) and their law firm in 1990 to represent her in a transaction through which she would acquire a controlling interest in the subsurface mineral rights of the Property (“the 1990 Transaction”). **Id.** at 14. Engel recruited the siblings’ mother, Anna M. Mahonski to urge the siblings to sell the Property, either to Engel or to offer it for sale to the general public. **Id.** at 28-29. According to the complaint, Engel was unwilling to engage in any transaction unless she and her husband were the buyers. **Id.** at 34.

Appellants allege that Engel told the Appellant Siblings that Rider and Roman would represent all nine siblings in connection with the 1990 Transaction. **Id.** at 22. Appellants also allege that they relied on the expertise of Rider and Roman in connection with the 1990 Transaction. **Id.** at 24-25, 40. Klementovich was a licensed attorney in 1990 but he believed that Rider and Roman were serving as counsel to his mother and the other Appellant Siblings. **Id.** at 36. Klementovich informed all parties in 1990 that he was not serving as counsel to any party and he informed Roman that he had no expertise in real estate transactions or oil and gas leases. **Id.** at 37-39. Nonetheless, Klementovich drafted a Terms Sheet (“the Terms

Sheet”) for the 1990 transaction in reliance on advice and representations from Rider and Roman. **Id.** at 42-43. Pursuant to the Terms Sheet, Engel was to receive 51% of the mineral rights. **Id.** at 42, 48. The Terms Sheet also governed the distribution of proceeds from then-existing oil and gas leases for the Property. **Id.** at 51. Appellants allege that Rider and Roman drafted a sales agreement that gave Engel a greater share of the mineral rights and lease proceeds than was contemplated in the Terms Sheet. **Id.** at 53, 55. In response to the discrepancies, Klementovich drafted his own sales agreement that he believed comported with the parties’ original understanding as set forth in the Terms Sheet and provided it to Roman and Rider and each of the siblings. **Id.** at 59. Engel refused to sign Klementovich’s draft sales agreement. **Id.** at 63.

Based on conversations with Engel, Klementovich prepared a revised draft sales agreement that allegedly was signed by all nine siblings and their spouses. **Id.** at 65-67. The complaint alleges that, as of the signing of this draft agreement, all nine siblings and their spouses continued to believe they were represented by Rider and Roman, and Rider and Roman did nothing to convey that they were not acting on behalf of all of the siblings. **Id.** at 68, 86-90. The closing and deed transfer took place while Klementovich was out of the country. **Id.** at 73-75. The complaint alleges that the deed granted Engel a larger share of the Property than was contemplated in the final sales agreement. **Id.** at 77, 84. Further, the complaint alleges that Rider and

Roman failed to explain to the Appellant Siblings the implications of the deed and assignment of lease that they signed. *Id.* at 79-83, 85.

Klementovich filed the complaint on behalf of Appellants on August 23, 2011. Appellants allege causes of action in, among other things fraud, breach of fiduciary duty, breach of contract, and professional negligence against the various defendants/Appellees. Appellees have filed answers and new matters, to which Appellants have responded with preliminary objections. The record also reflects numerous discovery motions, petitions for injunctive relief, and motions for sanctions filed by Klementovich on behalf of Appellants. On September 6, 2012, Engel filed a motion to disqualify Klementovich as counsel. The trial court conducted a hearing on Engel's motion on November 1, 2012. At that hearing, of which no record was made,² the trial court apparently listened to oral argument but did not permit the introduction of evidence. The trial court entered an order granting Engel's motion on November 5, 2012.

Before we address the merits of Appellants' argument, we must address Appellees' argument in favor of quashing this appeal. Appellees argue that this Court lacks jurisdiction to address the merits of the trial court's order because it is an interlocutory order not subject to immediate

² No court reporter was present at the hearing, and the courtroom's audio recording system apparently did not work or was not turned on. We cannot discern from the record whether this was the fault of any party or simply an accident.

appeal. Appellants respond that the trial court's order is collateral, pursuant to Pa.R.A.P. 313. Rule 313 provides:

Rule 313. Collateral Orders

(a) General rule. An appeal may be taken as of right from a collateral order of an administrative agency or lower court.

(b) Definition. A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa. R.A.P. 313.

The parties dispute the applicability of ***Vertical Resources, Inc. v. Bramlett***, 837 A.2d 1193 (Pa. Super. 2003), in which this Court held that an order disqualifying counsel was immediately appealable pursuant to Rule 313. In ***Vertical Resources***, the disqualified attorney contacted the opposing party while the opposing party's attorney was unavailable. ***Id.*** at 1198. The disqualified attorney did not seek opposing counsel's permission prior to contacting the party directly, and therefore violated Rule 4.2 of the Pennsylvania Rules of Professional Conduct.³ ***Id.*** On that basis, the trial court granted a motion to disqualify him. The disqualified attorney's client sought immediate appeal of the trial court's order.

³ "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Pa.R.P.C. 4.2.

This Court concluded that an order disqualifying an attorney was separable from the main cause of action since review of such an order requires no analysis of the merits of the underlying case. *Id.* at 1199. We also concluded that the client's ability to obtain review would be irreparably lost absent an immediate appeal, inasmuch as the case would proceed without the client's chosen counsel. *Id.* Finally, the record indicated that the disqualified lawyer had agreed to represent the client for a substantially reduced fee, and that the client could afford no other lawyer. *Id.* at 1200. This Court therefore concluded that the right involved was too important to be denied immediate review. *Id.* Thus, the order disqualifying counsel was appealable as a collateral order pursuant to Pa.R.A.P. 313. *Id.*

Instantly, the trial court's order is not as clearly separable as was the case in *Vertical Resources*. The trial court disqualified Klementovich in part because of his significance as a witness, and the significance of Klementovich's testimony is intertwined with the merits of the case. In *Vaccone v. Syken*, 587 Pa. 380, 899 A.2d 1103 (2006), the Supreme Court held that a disqualification order was not separable in part because the disqualified attorney would be a witness in the case. *Id.* at 386, 899 A.2d at 1107. The Supreme Court reasoned that "it would be impossible to determine the impact that the attorney's testimony would have on the outcome of the case." *Id.* In *Vaccone*, the appellant did not allege that any hardship would occur. *Id.* The *Vaccone* appellant could have

proceeded to final judgment with substitute counsel and obtained appellate review of the trial court's decision to disqualify the appellant's choice of counsel. ***Id.*** 386-87, 899 A.2d at 1108.

Instantly, as set forth more fully below, it is unclear to us that Klementovich's testimony will have an impact on the outcome of the case seems to depend on whether the terms of a deed vary from the terms of an earlier agreement that was documented in writing. Thus, unlike ***Vaccone***, our review of the disqualification order is separable from the merits.

Appellees argue that ***Vertical Resources*** is nonetheless distinguishable because the record contains no evidence that disqualification of Klementovich will deny assistance of counsel to the remaining Appellants. Klementovich asserts that he is representing the other Appellants for a very low fee and that the other Appellants will be unable to afford other counsel if the trial court's order stands. In ***Vertical Resources***, the record contained an affidavit from the client confirming her inability to obtain other counsel. Instantly, Klementovich filed a verified motion for reconsideration of the trial court's order, in which he asserted:

Had the Court conducted a hearing, [Appellants] would have been afforded the opportunity to establish their prior efforts to obtain alternate counsel on a contingency basis were unavailing, that each is financially unable to hire alternate counsel on other than a contingency basis, and that each will almost certainly be forced to proceed *pro se* in this litigation unless they have the assistance of the Undersigned as their counsel.

Motion for Reconsideration, 11/15/12, at ¶ 23. Thus, the instant record indicates that, unlike **Vaccone** but similar to **Vertical Resources**, several parties will be unable to retain counsel to proceed to final judgment and eventual appellate review of the disqualification order. We therefore conclude that, given the similarity between the unique facts of this case and **Vertical Resources**, our analysis in **Vertical Resources** is controlling. We therefore decline to quash this appeal.

Appellants raise four issues for our review:

1. Whether the lower court erred and/or denied Appellants procedural due process of law in failing to conduct an evidentiary hearing and/or permit Appellants to file a brief prior to disqualifying their counsel?
2. Whether the lower court erred in disqualifying Appellants' counsel without investigating and/or determining whether they had given their informed consent to the representation, notwithstanding the existence of a concurrent conflict or conflicts of interest?
3. Whether the lower court erred in disqualifying Appellants' counsel without investigating and/or determining whether the disqualification would work substantial hardship on them?
4. Whether the lower court erred on the merits in its judgment disqualifying counsel for Appellants?

Appellants' Brief at 8.

We will address Appellants' issues together, beginning with a review of the trial court's analysis:

3. The concern here is evident, [Klementovich] is a party plaintiff along with four other persons that he is undertaking to represent in this litigation as to their individual capacities and as personal representatives of five separate estates, a total of nine other co-plaintiffs.

4. [Klementovich], as a co-plaintiff, has a direct, personal interest in the outcome of the case, including his own claims for damages and monetary relief, which places his own interest in a competing position with the other nine plaintiffs he is also representing in this litigation.

5. The pleadings in this matter make it clear that [Klementovich] was engaged in communications with the various parties, and particularly [Rider and Roman], back in 1990. [Klementovich] had direct involvement in the transaction that is at the core of the controversy resulting in this suit; clearly, counsel will be a key witness as to substantive matters and his deposition has been noticed by [Appellees].

6. The interests of this Court in the litigation proceeding in an expeditious manner, to avoid delay at the time of trial by a late substitution of counsel, and to minimize prejudice to the [Appellees'] interests that can occur where discovery may be required to be supplemented with involvement by new counsel, as well as the confusion that will likely arise at depositions over distinctions between counsel's triple role here as advocate, witness and party, this Court finds that the best course is to require disqualification at this early stage of these proceedings.

7. Any concern for financial hardship upon the co-plaintiffs in obtaining other counsel is overridden by due consideration of the conflict in interest of counsel posed by the circumstances that form the basis of this case, and particularly where counsel is not just a key witness but an interested party plaintiff.

Trial Court Order, 11/5/12, at ¶¶ 3-7 (legal citations omitted). In denying Appellants' motion for reconsideration, the trial court found that the allegations in the complaint "reveal, on their face, the problematic nature of [Klementovich's] continued representation of the other [Appellants]." Order, 11/29/12, at 1. "No evidentiary hearing was required for the Court to ascertain the serious concerns as this matter progresses as set forth in said Order, which could only be resolved by severing [Klementovich's] representation of all [Appellants]." **Id.**

Trial courts have inherent power to dismiss counsel from a case for a violation of the Rules of Professional Conduct. **Vertical Resources**, 837 A.2d at 1201. Nonetheless, the trial court's power to disqualify an attorney is "severely limited," and our review of the trial court's decision is plenary. **Id.** Our Supreme Court has written that disqualification is a "serious remedy which must be imposed with an awareness of the important interests of a client in representation by counsel of the client's choice." **McCarthy v. SEPTA**, 772 A.2d 987, 991 (Pa. Super. 2001) (quoting **Slater v. Rimar**, 462 Pa. 138, 149-50, 338 A.2d 584, 590 (1975)), *appeal denied*, 571 Pa. 707, 812 A.2d 1230 (2002).

The **Slater** Court upheld an order disqualifying counsel where counsel's continued representation of one party was inappropriate based on counsel's prior representation of the opposing party in a related matter. **Slater**, 462 Pa. at 151-52, 338 A.2d at 590-91. There, the disqualified

attorney provided the plaintiff with the information that formed the basis for the lawsuit. *Id.* The disqualified attorney gained that information through his representation of the defendant. *Id., see also Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 602 A.2d 1277 (1992) (holding that a law firm could be enjoined from representing the competitors of a long-time former client). In contrast, in *Vertical Resources*, this Court reversed the order disqualifying counsel, concluding that enjoining the attorney from using any information gleaned during his conversation with the opposing party was a sufficient and less drastic remedy than disqualification. *Vertical Resources*, 837 A.2d at 1202.

Instantly, the trial court based its disqualification order on a perceived violation of Rule 1.7 of the Rules of Professional Conduct. Rule 1.7 provides that a lawyer “shall not” represent a client if that client’s interests conflict with another client, or if “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.” Pa.R.P.C. 1.7(a). The trial court also relied on Rule 3.7, which provides that a lawyer “shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness[.]” Pa.R.P.C. 3.7(a). Rule 3.7 makes an exception where “disqualification of the lawyer would work a substantial hardship on the client.” Pa.R.P.C. 3.7(a)(3).

Applying these rules, the trial court found that Klementovich’s personal interest in the Property created a potential conflict between Klementovich

and the other Appellants in violation of Rule 1.7. Likewise, the trial court found that any hardship to Appellants resulting from Klementovich's disqualification was offset by the need to eliminate confusion resulting from Klementovich's tripartite role as counsel, party, and witness.

Klementovich's conduct in the instant matter plainly is not as egregious as the conduct at issue in *Slater* or *Maritrans*, as he is not exploiting information gleaned from former representation of any of his party opponents. Likewise, our review of the record fails to confirm the trial court's concern that Klementovich, as a party, has a personal interest that conflicts with the other Appellants. According to the complaint, the 1990 Transaction left each Appellant with a lesser share than expected. Each Appellant stands to gain if the requested relief is obtained, and nothing in the complaint supports a conclusion that any Appellant's interest is in conflict with any other. The argument section of Appellants' brief, in highlighting the aforementioned points, is somewhat inconsistent with the statement of questions presented, where Klementovich asserts that the other Appellants signed informed consent disclosures addressing potential conflicting interests. Irrespective of the informed consents – which do not appear in the certified record – the record in its current state simply fails to support the trial court's reliance on Rule 1.7.

More problematic is Klementovich's potential dual role as counsel and witness, which Rule 3.7 prohibits under most circumstances. As set forth

above, Klementovich drafted the Terms Sheet and exchanged several draft sales agreements with Roman and Rider. Discrepancies between the deed and Klementovich's draft sales agreement executed by all of the parties appear to form the basis for Appellants' various causes of action.⁴

Nonetheless, we fail to discern how the trial court's disqualification of Klementovich will alleviate any confusion resulting from Klementovich's tripartite role as lawyer, witness, and plaintiff. If Klementovich proceeds *pro se*, that role will continue. Moreover, the trial court's discussion of the need for Appellants to obtain substitute counsel sooner rather than later is unconvincing, as the record does not support a conclusion that Appellants can or will obtain substitute counsel. As referenced above, the record indicates that the opposite is true.

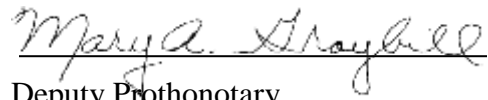
The trial court's authority to disqualify counsel, as we have explained, is severely limited. ***Vertical Resources***, 837 A.2d at 1201. In this case, the trial court's reasoning for its decision lacks support in the record. We do not doubt that the unusual circumstances of this case might create some challenges to the trial court's case management. On the other hand, the record fails to support the trial court's conclusion that disqualification of

⁴ We are also not convinced based on the allegations in the complaint that Klementovich's role as a witness is all that critical to the Appellant's case. It appears that the gravamen of Appellant's complaint is that the deed documents vary from terms of the sales agreement (a document). If the document proves the Appellants' case, Klementovich's role as a witness is limited.

Klementovich will alleviate any of those difficulties. We therefore conclude that the record before us is insufficient to support the trial court's exercise of its severely limited authority to disqualify counsel. As such, we are constrained to vacate the trial court's order and remand for further proceedings.

Order vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in cursive script, reading "Mary A. Graybill", is written over a horizontal line.

Deputy Prothonotary

Date: 9/24/2013