

ORIGINAL

IN THE SUPREME COURT OF OHIO

BETH A. WILHELM KISSINGER,

Appellee,

v.

JEFFREY R. KISSINGER,

Appellant.

Case No. 2010-0992

On Appeal from the Summit County
Court of Appeals, Ninth Appellate
District

Court of Appeals Case No. 25105

BRIEF OF APPELLANT JEFFREY R. KISSINGER

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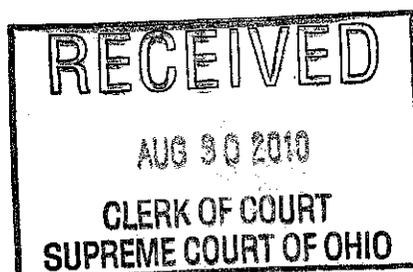
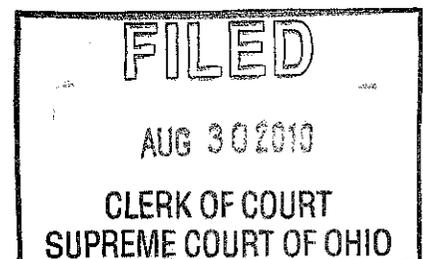


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STATEMENT OF FACTS

Appellee Beth A. Wilhelm-Kissinger (“Mrs. Kissinger”) initiated an action for divorce against Appellant Jeffrey R. Kissinger (“Mr. Kissinger”) in the Summit County Court of Common Pleas, Domestic Relation Division. (Trial Docket (“T.d.”) 1) During the course of the divorce proceeding, Mr. Kissinger filed a Motion to Disqualify and Motion in Limine (the “Motion to Disqualify”) seeking the disqualification of Mrs. Kissinger’s counsel, Attorney David H. Ferguson (“Attorney Ferguson”) and other attorneys in his office. (T.d. 57) The basis for the Motion to Disqualify was Attorney Ferguson’s possession and knowledge of materials that were unlawfully intercepted in violation of federal law and which included privileged communications between Mr. Kissinger and his attorneys. (T.d. 57) Specifically, Attorney Ferguson counseled Mrs. Kissinger to illegally break into a password-protected laptop computer owned by Mr. Kissinger’s employer to obtain information that might be useful in a divorce proceeding by Mrs. Kissinger against Mr. Kissinger. (Deposition of Beth Wilhelm Kissinger, *Brecksville Laser Eye Center v. Bevington*, N.D. Ohio Case No. 5:08CV02855 (“Depo.”), attached to T.d. 58, at 21, 24) Mrs. Kissinger then had the password broken, printed a set of the documents contained on the laptop, and provided them to Attorney Ferguson so that the documents could be used in the divorce proceeding. (Depo. at 30, 68)

The documents in Attorney Ferguson’s possession included twenty-one e-mail communications between Mr. Kissinger and his attorneys that were protected by the attorney-client privilege. (Affidavit of Defendant Regarding Documents Provided Under Seal (“Aff. of Def.”), attached to T.d. 74, at ¶16) It was not until approximately six

months after Attorney Ferguson initially received the documents, that certain privileged communications were returned to Mr. Kissinger's attorney. (Aff. of Def. at ¶5)

However, there were additional privileged documents that were on the laptop that were not returned and are believed to still be in Attorney Ferguson's possession. (Aff. of Def. at ¶16)

On November 17, 2009, the trial court entered a Judgment Order denying the Motion to Disqualify. (Appendix at A-16) On November 20, 2009, Husband timely filed his Notice of Appeal of the Judgment Order to the Court of Appeals, Ninth Appellate District. (Appeal Docket ("A.d.") 1) Following transmission of the record and the filing of the Mr. Kissinger's brief, but before the filing of Mrs. Kissinger's brief, the Court of Appeals *sua sponte* dismissed the appeal for lack of a final and appealable order without any apparent consideration of R.C. § 2505.02(B)(2). (A.d. 15) Mr. Kissinger filed a motion to certify a conflict or, in the alternative, a motion for reconsideration. (A.d. 17) The Court of Appeals granted Mr. Kissinger's motion for reconsideration, but again dismissed the appeal for lack of a final and appealable order. (Appendix at A-6) Mr. Kissinger then filed a motion to certify conflict based on the reconsidered decision. (A.d. 21) The Court of Appeals certified a conflict with the decision of the Tenth District Court of Appeals in *Crockett v. Crockett*, 10th Dist. No. 02AP-482, 2003-Ohio-585. (Appendix at A-4) Mr. Kissinger initiated this appeal based on the order certifying conflict. (Appendix at A-1) This Honorable Court determined a conflict exists. The certified question on appeal is:

Whether the denial of a motion to disqualify counsel in a divorce proceeding affects a substantial right and is a final and appealable order.

(Appendix A-5)

ARGUMENT

Proposition of Law

The denial of a motion to disqualify counsel in a divorce proceeding affects a substantial right and is a final and appealable order.

“An order that affects a substantial right made in a special proceeding” is a final order that may be appealed. R.C. § 2505.02(B)(2). The Court of Appeals and the *Crockett* court agreed that an order denying a motion to disqualify counsel in a divorce proceeding is an order “made in a special proceeding. (Appendix at A-6, A-7); *Crockett, supra*, at ¶ 10. Therefore, the only question presented by this appeal is whether denial of a motion to disqualify counsel affects a “substantial right.”

A. This Court’s Prior Opinions Have Stated That an Order Denying Disqualification of Opposing Counsel Affects a Substantial Right

A “substantial right” is “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” R.C. § 2505.02(A)(1). This Court has recognized that an order denying a motion to disqualify counsel affects a substantial right. *Bernbaum v. Silverstein* (1980), 62 Ohio St. 2d 445, 446 n.2 (finding that a determination that “an order overruling a motion to disqualify counsel affects a ‘substantial right’” is “clearly supportable”); *Russell v. Mercy Hosp.* (1984), 15 Ohio St. 3d 37, 39 (“This court, in [*Bernbaum*], while holding that the overruling of a motion to disqualify counsel [in a

non-special proceeding] was not a final appealable order, nonetheless acknowledged that such a motion affects a substantial right.”). *See also Crockett, supra*, at ¶10. Despite these clear statements by this Court that a denial of a motion to disqualify “affects a substantial right,” the Court of Appeals nevertheless held the exact opposite. For this reason alone, the decision of the Court of Appeals should be reversed.

B. R.C. § 2505.02 Does Not Require the Absence of Meaningful or Effective Relief Following Final Judgment as a Condition on Appealability of an Order Made in a Special Proceeding

While the Court’s analysis need not proceed beyond the plain statements in *Russell and Bernbaum* to find that an order denying a motion to disqualify affects a substantial right, there are additional reasons for finding that such an order affects a substantial right. In dismissing Mr. Kissinger’s appeal, the Court of Appeals found that the denial of the motion to disqualify does not affect a substantial right because such an order “may be effectively reviewed after final judgment.” (Appendix at A-8) The Court of Appeals erred in applying such a condition because R.C. § 2505.02 contains no such requirement. In 1998, the 122nd General Assembly enacted Sub.H.B. No. 394 (the “1998 Amendments”), which defined the requirements for a final and appealable order under R.C. § 2505.02. While maintaining existing law that provided that an “order that affects a substantial right made in a special proceeding” is a final order, R.C. 2505.02(B)(2), the 1998 Amendments added definitions for “substantial right” and “special proceeding.” R.C. § 2505.02(A).

It is notable that the 1998 Amendments did not condition appealability on the absence of meaningful relief following final judgment when the basis for appeal was the effect on a substantial right in a special proceeding. In contrast, where the General

Assembly wanted to impose such a requirement, it did so expressly. Specifically, the provisions providing for appeal of an order granting or denying a “provisional remedy” requires as a condition on finality that “[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.” R.C. § 2505.02(B)(4)(B). Furthermore, in defining “substantial right,” the General Assembly did not limit the definition to only those rights that could not be vindicated following an appeal after a final judgment. R.C. § 2505.02(A)(1).

The imposition by the Court of Appeals of this “meaningful or effective remedy” provision to an appeal under Section 2505.02(B)(2) is contrary to a plain reading of the statute. Had the General Assembly intended to impose such a requirement on “special proceeding” appeals, it would have done so. It is evident from the structure of Section 2505.02, that the “meaningful or effective remedy” requirement was not intended to be applied in cases relying on the “special proceeding” provision of Section 2505.02(B)(2).

In reaching its decision, the Court of Appeals relied on this Court’s decision in *Southside Community Develop. Corp. v. Levin*, 116 Ohio St.3d 1209, 2007-Ohio-6665. In *Southside*, the Court determined that an order of the Board of Tax Appeals (“BTA”) denying a county’s motion to intervene was an immediately appealable final order under Section 2505.02(b)(2). The Court stated, “the BTA’s order denying the county’s motion to intervene ‘affects a substantial right’ because it qualifies as an order that ‘if not immediately appealable, would foreclose appropriate relief in the future.’” *Id.* at ¶ 7 (quoting *Bell v. Mt. Sinai. Med. Ctr.* (1993), 67 Ohio St.3d 60, 63).

Neither the Court's opinion in *Southside* nor the parties' memoranda relating to the motion to dismiss addressed the question of whether the quoted statement from *Bell* continued to be valid in light of the 1998 Amendments. As discussed above, the continuing application of the test set forth in *Bell* is inconsistent with the plain wording of the amended R.C. § 2505.02.

In addition to the Court not addressing *Bell's* continuing validity, the conclusion reached in *Southside* suggests Section 2505.02(b)(2) does not require that effective relief after final judgment be completely foreclosed. Specifically, the Court suggested that a retrial of the case following a later appeal could, in fact, protect the county's interest. *Southside, supra*, at ¶ 7 ("a later appeal could protect [the county's] interests only by ordering a complete retrial of the case"). However, despite finding the existence of an effective post-judgment remedy, albeit a complete retrial, the *Southside* court nonetheless held that the order at issue was final and appealable because it affected a substantial right. *Id.* at ¶ 9. Thus, the clear implication in the Court's decision is that the stated requirement of lack of effective remedy following final judgment does not apply to appeals in special proceedings. Therefore, the Court of Appeals erred in dismissing Mr. Kissinger's appeal based on the issue of whether meaningful or effective relief would be available by an appeal following final judgment.

C. An Order Denying a Motion to Disqualify Counsel Cannot be Effectively Remedied Following Trial

The Court of Appeals relied *Russell* and *Bernbaum* for the proposition that an order denying disqualification of counsel can be effectively reviewed following final judgment. The Court of Appeals relied on *Russell* and *Bernbaum* despite the fact that

both acknowledged that denial of a motion to disqualify counsel “affects a substantial right.” *Russell*, 15 Ohio St. 3d at 39; *Bernbaum*, 62 Ohio St. 2d at 446 n.2.

The Court of Appeals focused on *Bernbaum*'s analysis of the effectiveness of the remedy following appeal of a motion to disqualify counsel. It should be noted that, since *Bernbaum* and *Russell* were decided before *Bell*, neither case reflects an actual application of *Bell*'s test of whether an order affects a substantial right. “An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future.” *Bell*, 67 Ohio St. 3d. at 63. The *Bernbaum* court did not find that adequate relief after final judgment is available for a party whose motion to disqualify opposing counsel is denied. In fact, it suggested the exact opposite when it stated “[post-judgment relief] may be less than ideal from the movant's point of view * * * because damage from an attorney's improper disclosure of confidences may perhaps never be fully corrected.” *Bernbaum*, 62 Ohio St. 2d at 448 (alterations in original). Rather, *Bernbaum*'s decision was based on the fact that an immediate appeal of a motion to disqualify may not be fully effective because the challenged attorney may disclose confidential information prior to final determination of the immediate appeal. *Id.*

Neither the language of Section 2505.02(B) nor the Court's decisions in *Bell* or *Southside* suggest that there is a limitation on the right of appeal under Section 2505.02(B)(2) based upon whether the remedy sought by an immediate appeal will only be partially effective. Rather, the question proposed by *Bell* and *Southside* is whether effective relief is available after final judgment. As the Court noted in *Bernbaum*, effective relief is not available after final judgment.

In addition to the lack of an effective remedy after final judgment, there is a real possibility that additional injury may occur to the party seeking disqualification between the time of an immediate appeal of a motion to disqualify and final judgment. A party seeking disqualification is not in a position to know what confidential information has been disclosed by the challenged attorney and what confidential information has not yet been disclosed. The challenged attorney may not disclose to his client all confidential information in his possessions for the simple fact that the importance or relevance of the information may not be apparent until a later event reveals its importance to the case. Therefore, while an immediate appeal may not provide total relief, it does provide some relief to the party seeking disqualification.

The taint that attaches to the proceedings and the loss of confidence in the judiciary that occurs when a motion to disqualify is erroneously denied can never be fully restored. Even if the failure to disqualify is corrected on subsequent appeal, the matter would likely be remanded to the trial court for retrial. But, the judge, who will likely be the same judge who heard the initial proceeding,¹ cannot be expected to forget what he has already heard. Even if on subsequent appeal the attorney is disqualified and the matter remanded, the tactics employed and information used by the challenged attorney will likely have a continuing influence on the judge. Additionally, the actions taken by the attorney and the record of proceedings prior to the appeal will provide a roadmap that successor counsel will be able to exploit even if the original attorney is disqualified. Thus, the attorney's continued participation will inevitably taint the proceedings beyond what can be corrected by an appeal after judgment.

¹ This is especially true in cases such as this one that are heard by the domestic relations divisions of the courts of common pleas, where there is generally a smaller pool of judges available to hear cases than in the courts' general divisions.

Mr. Kissinger will not have an effective remedy following final judgment in this case for the erroneous denial of his motion to disqualify. Mr. Kissinger should be permitted to pursue his appeal immediately to limit the damage that has been caused by Attorney Ferguson's misconduct and that may be caused in future proceedings. The fact that the damage may never be fully corrected should not preclude Mr. Kissinger from obtaining the relief that an immediate disqualification would provide.

CONCLUSION

For the reasons discussed above, Mr. Kissinger requests that the order of the Court of Appeals dismissing his appeal be reversed, and the case be remanded to the Court of Appeals for hearing on the merits of his appeal.

Respectfully submitted,

GOLDMAN & ROSEN, LTD.



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Certificate of Service

I certify that a copy of the foregoing was sent by ordinary U.S. mail on August 27, 2010, to Counsel for Appellee:

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APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0992

BETH A. WILHELM KISSINGER,

Appellee,

v.

JEFFREY R. KISSINGER,

Appellant.

On Appeal from the Summit
County Court of Appeals, Ninth
Appellate District

Court of Appeals Case No. 25105

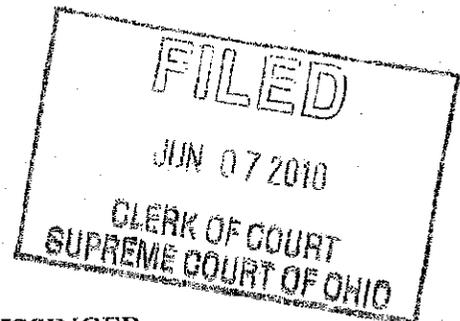
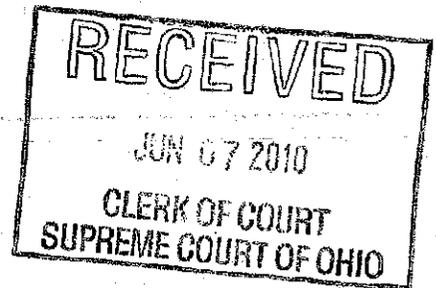
NOTICE OF CERTIFIED CONFLICT OF APPELLANT
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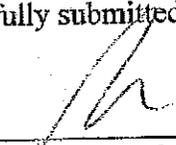
NOTICE OF CERTIFIED CONFLICT

Appellant Jeffrey R. Kissinger gives notice to the Supreme Court of Ohio that he is appealing the ruling from the Summit County Court of Appeals, Ninth Appellate District, entered in *Kissinger v. Wilhelm-Kissinger*, Case No. 25105, on April 15, 2010. On May 21, 2010, the Summit County Court of Appeals, Ninth Appellate District certified a conflict between its April 15, 2010 judgment and the judgment of the Tenth District Court of Appeals in *Crockett v. Crockett*, 10th Dist. No. 02A-482, 2003-Ohio-585, on the following issue: "Whether the denial of a motion to disqualify counsel in a divorce proceeding affects a substantial right and is a final and appealable order."

Appellant requests that the Supreme Court of Ohio consolidate this cause with Supreme Court Case No. 2010-0493, Appellant's discretionary appeal of an earlier judgment in the same proceeding.

WHEREFORE, Appellant respectfully requests that this Court accept jurisdiction over this case and reverse the decision of the Ninth District Court of Appeals.

Respectfully submitted,



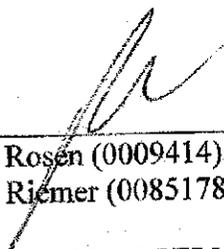
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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail on June 24, 2010, to Counsel for Appellee:

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STATE OF OHIO

COURT OF APPEALS
DANIEL M. HERRIGAN
ss:

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT

MAY 21 AM 11:52

BETH A. WILHELM-KISSINGER

C.A. No. 25105

Appellee

SUMMIT COUNTY
CLERK OF COURTS

v.

JEFFREY R. KISSINGER

Appellant

JOURNAL ENTRY

Appellant, Jeffrey Kissinger, has moved this Court to certify a conflict between its April 15, 2010, judgment and the judgment of the Tenth District Court of Appeals in *Crockett v. Crockett*, 10th Dist. No. 02CA-482, 2003-Ohio-585. Specifically, Mr. Kissinger has proposed that a conflict exists on the following issue:

“Whether the denial of a motion to disqualify counsel in a divorce proceeding affects a substantial right and is a final and appealable order.”

Beth Wilhelm-Kissinger has not responded in opposition.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the “judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]” When certifying a conflict, an appellate court must: 1) determine that its judgment is in conflict with a judgment of another court of appeals on the same question; 2) determine that the conflict is on a rule of law, not on the facts of the cases; and 3) clearly set forth in its opinion or its journal entry the rule of law believed to be in conflict with that of another district. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993).

Upon review, we conclude that this Court's decision conflicts with the judgment of the Tenth District Court of Appeals and that the conflict is on a rule of law, not on the facts of the two cases. Both cases involved an appeal from the denial of a motion to disqualify counsel in a divorce proceeding. The two judgments, however, reached different conclusions as to the finality of the order appealed. The Tenth District held:

"Because the denial of a motion to disqualify counsel in a divorce action affects a substantial right in a special proceeding, the order is final and appealable as defined in R.C. 2505.02(B)(2), and, therefore, we have jurisdiction to hear the appeal."

Crockett at ¶10.

In contrast, this Court held in its April 15, 2010, journal entry:

"[B]ecause an order denying a motion to disqualify counsel may be effectively reviewed after final judgment, it follows that such an order does not affect a substantial right under *Southside Community Develop. Corp. v. Levin* for purposes of R.C. 2505.02(B)(2)." * * * * [W]e conclude that the order appealed is not a final, appealable order * * * .

As Mr. Kissinger has demonstrated that a conflict exists between this District and the Tenth District, the motion to certify a conflict is granted. Accordingly, this Court certifies a conflict between the districts on the following legal issue:

"Whether the denial of a motion to disqualify counsel in a divorce proceeding affects a substantial right and is a final and appealable order."



Judge

Concur:
Belfance, J.
Carr, J.

STATE OF OHIO

COURT OF APPEALS
DANIEL M. HORRIGAN

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT)

2010 APR 15 AM 7:57

BETH A. WILHELM-KISSINGER

C.A. No. 25105

Appellee

SUMMIT COUNTY
CLERK OF COURTS

v.

JEFFREY R. KISSINGER

Appellant

JOURNAL ENTRY

On February 1, 2010, this Court dismissed this appeal for lack of jurisdiction. Specifically, the Court held that the order appealed, which denied appellant's motion to disqualify appellee's counsel, was not final and appealable under R.C. 2505.02(B)(4) and Ohio case law.

Appellant has now moved this Court to certify a conflict between the Court's February 1, 2010, dismissal and the judgment of the Tenth District Court of Appeals in *Crockett v. Crockett*, 10th Dist. No. 02CA-482, 2003-Ohio-585. Alternatively, appellant asks the Court to reconsider the February 1, 2010, order and to review the finality of the order appealed under R.C. 2505.02(B)(2). Because our February 1, 2010, order considered finality only under R.C. 2505.02(B)(4), we grant the motion for reconsideration. We will now review our jurisdiction under subsections (B)(2) and (B)(4) of R.C. 2505.02.

R.C. 2505.02(B)(2) provides that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it *** affects a substantial right made in a special proceeding or upon a summary application in an action after judgment[.]" The order appealed here was issued in the context of a divorce proceeding

and, therefore, was made in a special proceeding. See *State ex rel. Papp v. James*, 69 Ohio St.3d 373, 379 (1994).

The order does not, however, "affect a substantial right." An order "affects a substantial right" only if appropriate relief would be foreclosed in the future absent immediate appeal. *Southside Community Develop. Corp. v. Levin*, 116 Ohio St.3d 1209, 2007-Ohio-6665. The Supreme Court has consistently held that an order denying a motion to disqualify counsel is not immediately appealable because appropriate relief could be obtained at the end of the proceedings. See *Bernbaum v. Silverstein*, 62 Ohio St.2d 445 (1980); *Russell v. Mercy Hosp.*, 15 Ohio St.3d 37, 42-43 (1984) (both decided prior to the 1998 amendments to R.C. 2505.02, but relevant as to availability of appropriate relief.). See also *Othman v. Heritage Mut. Ins. Co.*, 158 Ohio App.3d 283, ¶15 (2004).

In both *Russell* and *Bernbaum*, the Supreme Court concluded that the denial of disqualification of counsel could be effectively reviewed after final judgment and, therefore, appropriate relief would not be foreclosed absent immediate appeal. The court explained:

"[A]ppellants contend that such postponed review would not be effective, because the disclosures which would have occurred could not be remedied by a second trial. This same argument was addressed and disposed of in Comments, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 Univ. of Chicago L.Rev. 450. In advocating that review of such orders by federal courts of appeals await final judgment, the commentator observes, at page 457, that " * * * (t)his remedy may be less than ideal from the movant's point of view, * * * because damage from an attorney's improper disclosure of confidences perhaps might never be fully corrected * * *. The disclosure problem, however, is no more curable by an immediate appeal; the challenged attorney will generally have had ample opportunity to disclose all that he knows before he is disqualified upon appeal."

Bernbaum, at 448. Accordingly, because an order denying a motion to disqualify counsel may be effectively reviewed after final judgment, such an order does not affect a substantial right and is not final and appealable under R.C. 2505.02(B)(2).

For the same reason, the order fails to meet the finality requirements for a provisional remedy under R.C. 2505.02(B)(4). An order that grants or denies a provisional remedy is immediately appealable only if "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4)(b). See, also, *Giusti v. Akron Gen. Med. Ctr.*, 178 Ohio App.3d 53, 2008-Ohio-4333, at ¶9-10. As stated above, an order that denies a motion to disqualify counsel does not foreclose an appropriate remedy in an appeal from final judgment. Accordingly, the order appealed lacks finality under R.C. 2505.02(B)(4), as well. *Russell v. Mercy Hosp.* (1984), 15 Ohio St.3d 37, 41, citing *Bernbaum* at 448. See, also, *Mattison v. Khalil*, 6th Dist. No. L-07-1393, 2008-Ohio-716, at ¶20-24; *Lava Landscaping, Inc. v. Rayco Mfg. Inc.* (Jan. 20, 2000), 9th Dist. No. 2930-M.

Upon reconsideration of the February 1, 2010, order, therefore, we conclude that the order appealed is not a final, appealable order under either R.C. 2505.02(B)(2) or R.C. 2505.02(B)(4). Furthermore, because we have reconsidered the February 1, 2010, order and issued a new determination of this matter, appellant's motion to certify a conflict between that order and *Crockett v. Crockett* is denied as moot.



Judge

Concur:
Belfance, J.
Carr, J.

Appendix
8

[Cite as *Crockett v. Crockett*, 2003-Ohio-585.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Dorcas A. Crockett,

Plaintiff-Appellee,

v.

Paul B. Crockett,

Defendant-Appellant.

No. 02AP-482

(REGULAR CALENDAR)

O P I N I O N

Rendered on February 6, 2003

Baker & Hostetler, and Barry H. Wolinetz, for appellee.

Jerrold W. Schwarz, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

KLATT, J.

{¶1} Defendant-appellant, Paul B. Crockett, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, overruling appellant's motion to disqualify counsel and imposing sanctions. For the reasons that follow, we affirm that judgment.

{¶2} By complaint filed May 16, 2001, appellant's wife, plaintiff-appellee Dorcas A. Crockett, filed for a divorce from appellant. In the divorce proceedings, appellant argued that, before the filing of the complaint, his mother, Kaoruko Crockett ("Kaoruko"), quit-claimed to him her entire interest in real property located at 2001 Merryhill Drive. Following that transfer, appellant and appellee sold the Merryhill property and used a portion of the proceeds to buy the current marital residence. Therefore, appellant contended that a portion of the current marital residence was his separate property. However, appellee submitted an affidavit signed by Kaoruko, which stated that the transfer of the Merryhill property was intended as a gift to the entire family, including appellee, thereby supporting appellee's assertion that the entire value of the marital residence should be considered marital property.

{¶3} After submission of the affidavit, appellant filed a motion to disqualify appellee's counsel, Barry H. Wolinetz. Appellant claimed that Wolinetz's testimony was necessary to determine the validity of the affidavit and whether Kaoruko signed it under duress. After a hearing, the trial court overruled appellant's motion, finding that appellant failed to show that there was any conflict of interest, that Wolinetz was a necessary witness, or that Kaoruko was under any pressure, duress or undue influence when she signed the affidavit. The trial court further determined that the motion was frivolous and awarded appellee \$1,000 in reasonable and necessary attorney fees incurred in defending appellant's motion pursuant to Civ.R. 11.

{¶4} Appellant appeals, assigning the following errors:

{¶5} "1. The Court erred in ordering a Civil Rule 11 sanction because Appellant/Defendant failed to establish a basis for his Motion to Disqualify; yet, pursuant to DR5-102, the Court refused to allow Appellee/Plaintiff's counsel to fully testify.

{¶6} "2. The Court erred as a matter of law imposing sanctions pursuant to Civil Rule 11 with no finding in the record or Entry that the Appellant/Defendant acted willfully or in bad faith.

{¶7} "3. The Court erred in ordering Appellant/Defendant to pay Civil Rule 11 sanctions."

{¶8} As an initial matter, we must determine whether the order appealed from is a final appealable order. Appellee contends it is not. Article IV, Section 3(B)(2) of the Ohio Constitution limits this court's appellate jurisdiction to the review of final orders. Absent a final order, this court is without jurisdiction to affirm, reverse, or modify an order from which an appeal is taken. *General Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20; R.C. 2501.02.

{¶9} Pursuant to R.C. 2505.02(B)(2), an order that affects a substantial right made in a special proceeding is a final appealable order. It is well-established that the denial of a motion to disqualify counsel affects a substantial right. *Russell v. Mercy Hospital* (1984), 15 Ohio St.3d 37, 39; *Bernbaum v. Silverstein* (1980), 62 Ohio St.2d 445, 446 [footnote 2]. Therefore, the key question presented here is whether the order denying appellant's motion to disqualify counsel was made in a special proceeding.

{¶10} To determine whether the order at issue was made in a special proceeding, we must examine the nature of the underlying action. *Walters v. The Enrichment Ctr. of Wishing Well, Inc.* (1997), 78 Ohio St.3d 118, 123. Orders that are entered in actions that were recognized at common law or in equity and were not created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02. *State ex rel. Papp v. James* (1994), 69 Ohio St.3d 373, 379. The underlying action in this case is an action for divorce. There was no common-law right of divorce. Divorce is purely a matter of statute. *Id.* at 379; *Briggs v. Briggs* (Jan. 23, 1997), Franklin App. No. 96APF11-1523; *Hollis v. Hollis* (1997), 124 Ohio App.3d 481, 484. Divorce, therefore, has been described as a "special statutory proceeding." *State ex rel. Papp*, *supra*, at 379; *Dansby v. Dansby* (1956), 165 Ohio St. 112, 113. Because the denial of a motion to disqualify counsel in a divorce action affects a substantial right in a special proceeding, the order is final and appealable as defined in R.C. 2505.02(B)(2), and, therefore, we have jurisdiction to hear the appeal.

{¶11} Appellee cites *Bernbaum*, *supra*, for the proposition that the denial of a motion to disqualify counsel is not a final appealable order. Although that was the holding in *Bernbaum*, it should be noted that the order at issue in *Bernbaum* was not entered in a special proceeding. Therefore, *Bernbaum* is clearly distinguishable from the case at bar.

{¶12} Having determined that we have jurisdiction to hear the appeal, we turn to appellant's first assignment of error, wherein he contends that the trial court erred by refusing to allow him to fully examine appellee's counsel at the hearing on appellant's motion to disqualify. At the outset, we note that the trial court has the inherent authority to supervise members of the bar appearing before it, and this necessarily includes the power to disqualify counsel in specific cases. *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 33-34; *Mentor Lagoons*, supra, at 259. Disqualification "is a drastic measure which should not be imposed unless absolutely necessary." *Spivey v. Bender* (1991), 77 Ohio App.3d 17, 22, quoting *Gould, Inc. v. Mitsui Mining & Smelting Co.* (N.D. Ohio 1990), 738 F.Supp. 1121, 1126. The trial court has wide discretion in the consideration of motions to disqualify counsel. *Royal Indemnity*, supra. The determination of the trial court will not be reversed upon appeal in the absence of an abuse of discretion. *Centimark Corp. v. Brown Sprinkler Serv., Inc.* (1993), 85 Ohio App.3d 485; *Musa v. Gillette Communications of Ohio, Inc.* (1994), 94 Ohio App.3d 529. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶13} Appellant argues that Wolinetz's testimony was necessary to determine the circumstances surrounding the execution of Kaoruko's affidavit. Only after examining Wolinetz would appellant know whether Wolinetz's testimony would be prejudicial to his [Wolinetz's] client's interest. Appellant misunderstands the essence of a motion to disqualify opposing counsel. A motion to disqualify counsel is to be used when "a lawyer learns or it is obvious" that counsel may be called as a witness, not to determine whether he should be called; that is the purpose of discovery. *Morgan v. N. Coast Cable Co.* (Nov. 15, 1990), Cuyahoga App. No. 57209, affirmed (1992), 63 Ohio St.3d 146 (reversing disqualification of counsel at early stage of proceedings when discovery had not been completed because it was impossible to say whether attorney would be a witness).

{¶14} It is also apparent that Wolinetz's testimony was not necessary to establish the facts surrounding the execution of Kaoruko's affidavit. There is no reason why these

facts could not be established through the testimony of other witnesses, including Kaoruko and the notary. Moreover, the questioning of Wolinetz that was permitted by the trial court during the hearing established that Wolinetz's testimony would not be prejudicial to his client's interest. Therefore, Wolinetz's continued representation of appellee was consistent with DR-5-102(B), which permits an attorney to represent a client even though he learns he may be called as a witness by the opposition "until it is apparent that his testimony is or may be prejudicial to his client." DR-5-102(B); *Jackson v. Bellomy* (1995), 105 Ohio App.3d 341, 348-349.

{¶15} It is the burden of the party moving for disqualification of an attorney to demonstrate that the proposed testimony may be prejudicial to that attorney's client and that disqualification is necessary. *Pilot Corp. v. Abel*, Franklin App. No. 01AP-1204, 2002-Ohio-2812, at ¶13; *Mentor Lagoons, Inc. v. Teague* (1991), 71 Ohio App.3d 719, 724. Appellant did not show that Wolinetz's testimony would be prejudicial to appellee and it was obvious that any testimony Wolinetz might supply could be obtained from other witnesses. See *Wasserman, Wasserman, Bryan & Landry v. The Midwestern Indemnity Co.* (Nov. 21, 1986), Lucas App. No. L-86-135 (reversing disqualification of counsel when testimony that would have been presented by attorney could be provided by other witnesses); cf. *Sneary v. Bafy* (Aug. 14, 1996), Allen App. No. 1-96-13 (reversing disqualification of attorney when attorney's testimony would not have been necessary). Appellant failed to meet his burden and, under these circumstances, the trial court did not abuse its discretion in limiting the scope of inquiry during the hearing on appellant's motion to disqualify or in denying the motion to disqualify. Therefore, appellant's first assignment of error is overruled.

{¶16} Appellant's second assignment of error alleges that the trial court erred in imposing sanctions pursuant to Civ.R.11, because it failed to make a finding that appellant acted willfully or in bad faith. We agree that sanctions are not supportable under Rule 11 in the absence of a finding that the filing was willful. *Bruggeman v. Bruggeman* (Nov. 22, 2000), Montgomery App. No. 18084, citing *Ceol v. Zion Industries, Inc.* (1992), 81 Ohio App.3d 286, 290. However, based upon the trial court's finding that appellant's motion was frivolous, we affirm the sanction based upon R.C. 2323.51.

{¶17} We note that appellee's request for sanctions was premised on both Civ.R.11 and R.C. 2323.51. The trial court specifically found that appellant's motion to disqualify counsel was frivolous. Although the trial court's judgment entry granted sanctions premised on a violation of Civ.R.11, this court may affirm a judgment on a legal basis other than those used by the lower court when the evidentiary basis on which the appellate court relies was fully adduced before the trial court. *State v. Peagler*, 76 Ohio St.3d 496, 1996-Ohio-73; *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614-615. Here, the evidentiary basis for finding a violation of R.C. 2323.51 was fully adduced before the trial court.

{¶18} A court may award reasonable attorney fees to any party in a civil action who is adversely affected by another party's frivolous conduct. R.C. 2323.51(B)(1). Frivolous conduct is the conduct of a party which satisfies either of the following: (1) It obviously serves merely to harass or maliciously injure another party to the civil action, or (2) it is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. R.C. 2323.51(A)(2)(a). As opposed to an award of sanctions pursuant to Civ.R.11, an award granted under R.C. 2323.51 does not require a finding that appellant acted willfully. *Ceol*, supra, at 291.

{¶19} A trial court is required to engage in a two-part inquiry when presented with a R.C. 2323.51 motion for sanctions. Initially, it must determine whether an action taken by the party against whom sanctions are sought constituted frivolous conduct. Second, if the conduct is found to be frivolous, the trial court must determine what amount, if any, of reasonable attorney fees necessitated by the frivolous conduct is to be awarded to the aggrieved party. *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 232-233. Whether or not to impose sanctions once frivolous conduct is found rests within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *Id.*; *Riley v. Langer* (1994), 95 Ohio App.3d 151.

{¶20} In the present case, the trial court made the following findings in support of its award of attorney fees: (1) there was nothing obvious that [Wolinetz] needed to be called or should be called as a witness; (2) there was no showing of any possible

prejudice to the defendant if Wolinetz would be called as a witness; (3) there was no showing of a conflict; (4) there was nothing presented pursuant to DR-5-102(B) that counsel may be called as a witness; (5) no evidence was presented supporting defendant's motion; (6) no evidence was presented that in any way indicated that Wolinetz's representation would be prejudicial to plaintiff; (7) there were alternate methods available to defendant for obtaining information about the preparation and execution of the affidavit; (8) defendant failed to make a case whatsoever, to support his motion; (9) defendant did not meet his burden of proof and his motion was frivolous.

{¶21} Given these express findings, the trial court did not abuse its discretion in finding appellant's motion to disqualify frivolous and awarding appellee its reasonable and necessary attorney fees in defending the motion. Appellant's second assignment of error is overruled.

{¶22} Finally, appellant contends in his third assignment of error that the trial court erred in ordering appellant, rather than appellant's attorney, to pay Civ.R. 11 sanctions. As we discussed above, we have affirmed the trial court's imposition of sanctions based upon R.C. 2323.51. An award of sanctions under R.C. 2323.51(B)(4) may be made against a party, the party's counsel of record, or both. *Ron Scheiderer & Assoc. v. London* (1998), 81 Ohio St.3d 94, 95. Therefore, the trial court did not err in making an award of sanctions against appellant rather than his attorney. Appellant's third assignment of error is also overruled.

{¶23} In conclusion, having overruled appellant's three assignments of error, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

TYACK and BOWMAN, JJ., concur.

DANIEL W. HOFFMAN
2009 SEP 17 PM 9:05
SUMMIT COUNTY
CLEAN UP COURTS

IN THE COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
SUMMIT COUNTY, OHIO

BETH A. WILHELM KISSINGER)

Plaintiff)

vs.)

JEFFREY R. KISSINGER)

Defendant)

CASE NO. 2008-11-3309

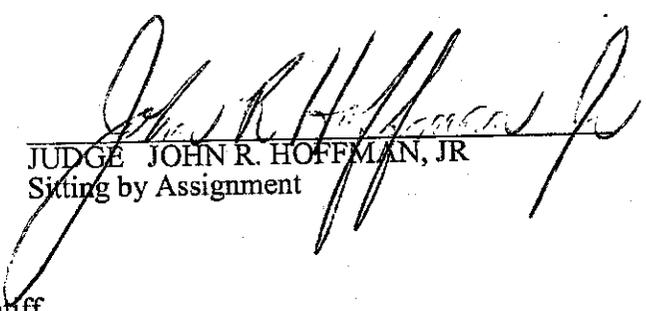
JUDGE JOHN R. HOFFMAN, JR.
Sitting by Assignment

JUDGMENT ORDER
Motion for Disqualification

This motion came on for hearing September 29, 2009, before Honorable Judge John R. Hoffman, Jr., sitting by assignment, on a motion for disqualification filed by Defendant against Plaintiff's counsel Attorney David Ferguson. The Court heard arguments, took testimony, reviewed exhibits and briefs of respective counsels.

The Court denies the motion for disqualification. Counsel for Plaintiff, Attorney David Ferguson, is not removed.

The Court orders the matter to be set for final hearing on all issues.


JUDGE JOHN R. HOFFMAN, JR.
Sitting by Assignment

cc: David Ferguson, Attorney for Plaintiff
Gary Rosen, Attorney for Defendant

JRH/cr


 Baldwin's Ohio Revised Code Annotated Currentness
 Title XXV. Courts--Appellate
 Chapter 2505. Procedure on Appeal (Refs & Annos)
 Final Order
 → 2505.02 Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

CREDIT(S)

(2007 S 7, eff. 10-10-07; 2004 H 516, eff. 12-30-04; 2004 S 80, eff. 4-7-05; 2004 S 187, eff. 9-13-04; 2004 H 292, eff. 9-2-04; 2004 H 342, eff. 9-1-04; 1998 H 394, eff. 7-22-98; 1986 H 412, eff. 3-17-87; 1953 H 1; GC 12223-2)

Current through 2010 File 54 of the 128th GA (2009-2010), apv. by 8/25/10 and filed with the Secretary of State by 8/25/10.

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