



**TABLE OF CONTENTS**

I. EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND ISSUES OF PUBLIC AND GREAT GENERAL INTEREST.....1

II. STATEMENT OF FACTS AND CASE.....2

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....3

    Proposition of Law:

    An order denying a motion to disqualify attorney who switched sides in the same litigation and/or that attorney’s new firm is a final appealable order pursuant to R.C. § 2505.02.....3

IV. CONCLUSION .....8

V. APPENDIX – Entry of Cuyahoga County Court of Common Pleas (January 25, 2012) ..... A-1

**I. EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION AND ISSUES OF PUBLIC AND GREAT  
GENERAL INTEREST.**

This case addresses the very foundation of the public's confidence in the legal profession. Specifically, attorney Adriann Garland participated in several strategy and planning meetings for the plaintiff and that she had access to his privileged information. Garland admittedly shared information with at least one attorney at her new firm, and jointly moved for sanctions against her former client.

After the trial court held that Garland and her new firm were *not* disqualified, thus allowing Garland to represent defendant *in the same case*, the Eighth District Court of Appeals held that this order was not a final appealable order subject to an immediate appeal under R.C. § 2505.02.

Plaintiff/Appellant Jeffrey Boring respectfully submits that allowing an attorney to switch sides is not an error that can be fixed after the case has been concluded on the merits, and after that attorney's knowledge of privileged matters has already been used, including, for example, at the deposition of the former client. Boring respectfully submits that the Eighth District Court of Appeals' decision finding no final appealable order misinterprets Ohio law, and improperly deprives the constitutional, statutory, and common law rights given to litigants, including but not limited to litigants rights of procedural and substantive due process.

As the Supreme Court held in *Akron Bar Assn. v. Holder*,<sup>1</sup> this "professional duty exists to safeguard client confidences and secrets to ensure the client's complete trust in the attorney and the client's freedom to divulge anything and everything needed for the client's proper and effective representation."<sup>2</sup> Foreclosing the right to immediately appeal an order allowing a litigant's attorney to switch sides during the same litigation is the complete antithesis of ensuring the public's complete trust in attorney-client relationships and the legal system as a whole.

---

<sup>1</sup> 2004-Ohio-2835, 102 Ohio St.3d 307, 810 N.E.2d 426.

<sup>2</sup> *Id.* @ ¶ 37.

## II. STATEMENT OF FACTS AND CASE

While employed at The Spitz Law Firm, as is typical for a small firm with two to three attorneys, Garland regularly participated in biweekly interactive strategy and planning meetings regarding this case, which Garland admitted at the hearing on this matter.

In or about March of 2010,<sup>3</sup> Garland started secretly interviewing with Reminger Co., LPA, the firm defending this case. After four months of concurrently participating in the strategy and planning meetings while seeking employment with the opposition, on July 6, 2011, Garland quit The Spitz Law Firm, and started with Reminger the following day.

On August 23, 2011, Brian Spitz emailed Garland and a Reminger partner regarding reports that Garland had breached the attorney-client privileges. While Reminger denied the reports, after being receiving further reports of Garland's breaches from a staff attorney in a separate case, on August 25, 2011, Spitz again emailed Reminger to address this situation.

According to Reminger, it was only at this point, on August 25, 2011 – **over seven weeks after Garland started working at Reminger** – that Reminger's IS Department first established a firewall on its computer system that blocked Garland's computer from accessing matters where she participated and/or was privy to confidential information while employed at The Spitz Law Firm. This was the first effort to screen Garland. Additionally, Reminger admitted that it **never** sent a firm-wide email or other notice quarantining Garland from this, or any other file (including litigation where she was counsel of record and had signed pleadings). Reminger further admitted that it took no actions to lock this file up to ensure that Garland would not have access to it.

At an August 29, 2011 meeting at Reminger's office to discuss this issue, Reminger's managing partner, Stephen Walters, admitted to having a discussion with Garland about her

---

<sup>3</sup> Neither Garland nor Reminger could or would identify the particular date that Garland applied or started interviewing despite repeated requests for that information.

involvement in cases that she worked on while at The Spitz Law Firm. Thereafter, another Reminger attorney, Clifford Masch, entered an appearance in this matter on behalf of both Reminger and Garland. Within his attorney-client relationship with Garland, Masch discussed with her what Garland knew and what work she did on this matter. Masch then used this information to craft an affidavit to support the Defendant and oppose Boring. Masch then talked with the Reminger counsel of record on this case. Indeed, despite having expressly shared confidences with Garland, **Masch then entered an appearance to also represent Defendant against Boring** – including as counsel for Defendant, Reminger and Garland on the appeal. Significantly, Garland, Reminger and Defendant **jointly** moved for sanctions against Boring.

To avoid disqualification, Garland, Reminger and Defendant primarily argued that Garland “would not be personally subject to the disqualification set forth in Rule 1.9.” But, Garland should be disqualified under either: (1) Prof.Cond.R. 1.9(a) because she participated in the representation in the exact same matter; or (2) Prof.Cond.R. 1.9(b) because Garland was employed while The Spitz Law Firm represented Boring in the same matter, Defendant is materially adverse to Boring, and Garland acquired privileged information material to this litigation. Moreover, Garland continued to gain this privileged information while not informing Boring that she continued to seek a job at Reminger.

Initially, Reminger should be presumptively disqualified under Prof.Cond.R. 1.10(a), which according to the Official Comments clearly “imputes all conflicts.” Moreover, the presumption of disqualification should be non-rebuttable under Prof.Cond.R. 1.10(c) as Garland’s concurrent participation in Boring’s strategy meetings and ongoing arranging of employment at Reminger falls squarely within the Ohio Supreme Court’s holding in *Kala v. Aluminum Smelting & Refining Co., Inc.*<sup>4</sup> (“The appearance of impropriety is so strong that nothing that the Duvin firm could have done

---

<sup>4</sup> 81 Ohio St.3d 1, 688 N.E.2d 258, 261-62 (1998).

would have had any effect on Kala's perception that his personal attorney had abandoned him with all of his shared confidences and joined the firm representing his adversary while the case was still pending.") However, even if there is a debate over whether Garland did have "substantial responsibility," as required under Prof.Cond.R. 1.10(c), Reminger still should not be able to rebut the presumption of disqualification under Prof.Cond.R. 1.10(d) because Reminger waited over seven weeks to spend less than an hour erecting a firewall, which clearly does not satisfy Prof.Cond.R. 1.10(d)'s requirement that the "new firm **timely** screens the personally disqualified lawyer."<sup>5</sup> Indeed, courts that have considered the "timely" requirement have held that the "screening devices must be employed as soon as the disqualifying event occurred."<sup>6</sup> Additionally, Reminger's refusal to send a firm-wide email or memo pursuant or lock the file as required by *Kala* further prevents it from rebutting the presumption of its disqualification under Prof.Cond.R. 1.10(d).

On November 15, 2011, the trial court denied Boring's Motion to Disqualify, and certified it for appeal with no just cause for delay. But, on January 25, 2012, the Eighth District Court of Appeals granted the Motion to Dismiss filed by Defendant/Reminger/Garland. The Eighth District Court of Appeals' decision denying Boring from an immediate appeal is the subject of this appeal.

### **III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

#### **Proposition of Law:**

**An order denying a motion to disqualify attorney who switched sides in the same litigation and/or that attorney's new firm is a final appealable order pursuant to R.C. § 2505.02.**

Garland/Reminger/Defendant argued that only an order disqualifying an attorney is not a final appealable order subject to an immediate right of appeal. The Eighth District Court of Appeals agreed and held that an order denying a motion to disqualify an attorney can never be a final

<sup>5</sup> Prof.Cond.R. 1.10(d) (**Emphasis** added).

<sup>6</sup> *United States v. Goot*, 894 F.2d 231, 233-37 (7<sup>th</sup> Cir.1990); *See also LaSalle Nat'l Bank v. County of Lake and the Village of Grayslake*, 703 F.2d 252, 259 (7<sup>th</sup> Cir.1983).

appealable order. Boring respectfully submits that this decision misapplies this Court's prior decisions in *Kala v. Aluminum Smelting & Refining Co., Inc.*,<sup>7</sup> and *Wilhelm-Kissinger v. Kissinger*.<sup>8</sup>

In *Kala*, the Ohio Supreme Court held that a motion to disqualify an attorney that has switched sides necessarily implicates the substantial rights<sup>9</sup> associated with the disclosure of privilege: "When an attorney leaves his or her former employment and becomes employed by a firm representing an opposing party, a presumption arises that the attorney takes with him or her **any** confidences gained in the former relationship and shares those confidences with the new firm. This is known as the presumption of shared confidences."<sup>10</sup> The Supreme Court further held that an order addressing the disqualification of an attorney who has switched sides is a final appealable issue:

**The issue before the court is whether a law firm should be automatically disqualified from representing a party when an attorney leaves his or her former employment with a firm representing a party and joins the law firm representing the opposing party, or whether that law firm may overcome any presumption of shared confidences by instituting effective screening mechanisms**

...

#### I. FINAL APPEALABLE ORDER

As a preliminary matter, although not raised by counsel, **we must decide whether this matter is a final appealable order. We conclude that it is...**<sup>11</sup>

Defendant/Reminger/Garland successfully persuaded the Eighth District Court of Appeals that *Kala* was distinguishable on its facts because it addressed an order *granting* disqualification.

In *Wilhelm-Kissinger*, while the Ohio Supreme Court held that there was no final appealable order based on the facts, this Court did not hold that no order denying disqualification could ever be the basis for a final appealable order, as Defendant/Reminger/Garland have asserted. Quite the

<sup>7</sup> 81 Ohio St.3d 1, 688 N.E.2d 258 (1998).

<sup>8</sup> 129 Ohio St.3d 90, 92, 950 N.E.2d 516, 518, 2011-Ohio-2317.

<sup>9</sup> Under R.C. § 2505.02(B)(2), an order is a final order that may be immediately reviewed if it is an order in a "special proceeding" and it "affects a substantial right." Defendant/Reminger/Garland do not dispute that the hearing on the Motion to Disqualify was a "special proceeding."

<sup>10</sup> *Id.* @ 3, 688 N.E.2d @ 261 (1998) (**Emphasis added**).

<sup>11</sup> *Id.* (**Emphasis added**).

contrary, the Ohio Supreme Court held that “an order denying disqualification, **standing alone**, affects no right held by the unsuccessful movant because there is no substantial right to disqualify opposing counsel.”<sup>12</sup> In reality, the Supreme Court held that an analysis must undertaken to determine if the order would affect a substantial right:

An order affects a substantial right for the purposes of R.C. 2505.02(B)(2) only if an immediate appeal is necessary to protect the right effectively. *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (To prevail in contending that an order affects a substantial right, “appellants must demonstrate that in the absence of immediate review of the order they will be denied effective relief in the future”).<sup>13</sup>

In *Wilhelm-Kissinger*, there was no issue of side-switching attorneys or substantial rights. The only allegation was that one divorce litigant, Wilhelm-Kissinger, allegedly stole privileged emails off the computer of her opposing spouse, who in turn sought to remove his opposing counsel as a sanction for possibly seeing those documents. But, as Wilhelm never shared an attorney client relationship with the attorney representing his spouse, there was no substantial right at issue.

A substantial right is affected when an attorney switches sides because that attorney takes confidences gained as part of the attorney-client relationship that forms the very foundation of our legal system. These privileges have their roots in common law and is also statutorily protected pursuant to R.C. § 2307.02 and Civ.R. 26(B)(3). “It is beyond dispute that confidences gleaned during an attorney-client relationship are, with little exception, **sacrosanct**.”<sup>14</sup> The rationale for allowing an immediate appeal of any order potentially invading attorney-client privilege is clear: “an appeal following final judgment as to all proceedings, issues, claims, and parties would not afford a meaningful or effective remedy because the disclosure of the possibly privileged material would

<sup>12</sup> *Id.* @ ¶ 9 (**Emphasis added**).

<sup>13</sup> *Id.* @ ¶ 7.

<sup>14</sup> *In re Grand Jury Subpoenas Issued to Lynd*, 2005-Ohio-4607 @ ¶ 13 *cert. denied* 106 Ohio St.3d 1549, 835 N.E.2d 1270, 2005-Ohio-5429 (**Emphasis added**).

already have occurred.”<sup>15</sup> In *Kala*, the Ohio Supreme Court recognized that: “No steps of any kind could possibly replace the trust and confidence that Kala had in his attorney or in the legal system if such representation is permitted.”

To that end, could the harm be undone if the abandoned client was not allowed to appeal until after his former attorney deposed him? Or even assisted in the preparation for his deposition? Would an appeal after final disposition fix the use of the abandoned client’s privileged information to prepare the opposing party for depositions? Certainly, conveying the former client’s litigation strategy and litigation plans to her co-workers at her new firm cannot be put back in the box following the use of that information during litigation or at trial. Allowing Defendant access to Garland’s knowledge of privileged information cannot be effectively remedied at the conclusion of this case any more than an order allowing Defendant to depose a current member of The Spitz Law Firm about the strategy and planning meetings in which Garland admittedly participated.

Defendant/Reminger/Garland may argue that Garland “only” participated in biweekly strategy and planning meetings and that such participation does not amount to “substantial responsibility” for this matter. But, on top of the fact that Prof.Cond.R. 1.9 and 1.10(a) and (d) do not contain such a requirement to effect disqualification, the only issue before this Court is whether the denial of a motion to disqualify a side-switching and her new firm is a final appealable order. Alternatively, Defendant/Reminger/Garland may point to cases where the denial of a motion to disqualify an attorney was for reasons other than when an attorney switched sides in the same litigation. But, unlike the right to protect privileged information, there is obviously no substantial right to disqualify opposing counsel by putting an attorney on a witness list.

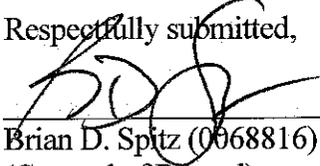
---

<sup>15</sup> *Abuhl v. Orange Village*, 2003-Ohio-4662 @ ¶ 31 cert. denied 100 Ohio St.3d 1547, 800 N.E.2d 752, 2003-Ohio-6879; see also *Akron v. Carter*, 190 Ohio App.3d 420, 2010-Ohio-5462 @ ¶ 12; *Smalley v. Friedman, Damiano & Smith Co., L.P.A.*, 172 Ohio App.3d 108, 2007-Ohio-2646 @ ¶ 19 cert. denied 115 Ohio St.3d 1444, 2007-Ohio-5567.

#### IV. CONCLUSION

For the forgoing reasons, Boring respectfully submits that this case involves substantial constitutional questions, and issues of public and great general interest; and therefore, respectfully requests this Court grant jurisdiction to decide whether the denial of a motion to disqualify a side-switching attorney and her new firm is a final appealable order that can be immediately appealed.

Respectfully submitted,



\_\_\_\_\_  
Brian D. Spitz (0068816)

(Counsel of Record)

Fred M. Bean (0086756)

**THE SPITZ LAW FIRM, LLC**

4568 Mayfield Road, Suite #102

South Euclid, Ohio 44121

Telephone: (216) 291-4744

Facsimile: (216) 291-5744

Email: [Brian.Spitz@SpitzLawFirm.com](mailto:Brian.Spitz@SpitzLawFirm.com)

[Fred.Bean@SpitzLawFirm.com](mailto:Fred.Bean@SpitzLawFirm.com)

*Counsel for Appellant Jeffrey A. Boring*

#### CERTIFICATE OF SERVICE

A copy of the foregoing was served via regular US mail on February 20, 2012 to:

Clifford C. Masch  
REMINGER CO. L.P.A.  
1400 Midland Building  
101 Prospect Avenue, West  
Cleveland, OH 44115

COUNSEL FOR APPELLEE FOWLER ELECTRIC CO.,  
REMINGER CO. L.P.A. AND ADRIAN GARLAND



\_\_\_\_\_  
Brian D. Spitz (0068816)

Brian D. Spitz (0068816)

*Counsel for Appellant Jeffrey A. Boring*

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

JEFFREY A. BORING

Appellant

COA NO.  
97598

LOWER COURT NO.  
CP CV-751301

COMMON PLEAS COURT

-vs-

FOWLER ELECTRIC CO., ET AL.

Appellee

MOTION NO. 450418

RECEIVED FOR FILING

JAN 25 2012

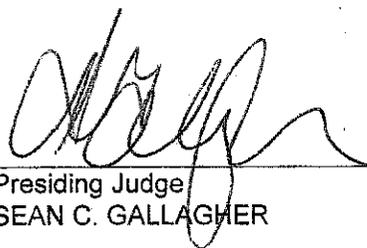
GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY  DEP.

Date 01/25/12

Journal Entry

Motion by Appellee to dismiss appeal is granted. The denial of a motion to disqualify opposing counsel is not appealable as the denial of a provisional remedy pursuant to R.C. 2505.02(B)(4). "[A]n order denying a motion to disqualify counsel is not a final appealable order because its effect is not permanent, in that the order may be revisited, and the party seeking disqualification may pursue other avenues, such as disciplinary proceedings, to address any improprieties that occur. See, e.g., Wilhelm-Kissinger v. Kissinger, 129 Ohio St.3d 90, 950 N.E.2d 516, 2011-Ohio-2317, ¶ 8-10 (in the context of a divorce proceeding, the denial of a motion to disqualify counsel is not a final appealable order)." Estate of L.P.B. v. S.B., 10th Dist. Nos. 11AP-81, 11AP-83, 11AP-84, 11AP-85, 11AP-82, 11AP-86, 11AP-87, 11AP-88, 2011-Ohio-4656, 2011 WL 4090433, ¶ 12. The order also is not appealable under any of the other provisions of R.C. 2505.02.

Judge MARY EILEEN KILBANE, Concur

  
Presiding Judge  
SEAN C. GALLAGHER

COPIES MAILED TO COUNSEL FOR  
ALL PARTIES--COSTS TAKEN