Case No. 2012-0303

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFFREY A. BORING	:	
Appellant,	:	Court of Appeals
v.	:	Case No. CA-11-097598
FOWLER ELECTRIC CO., et al.	:	
Appellees.	:	

APPELLANT JEFFREY A. BORING'S MEMORANDUM IN OPPOSITION TO REQUEST OR SANCTIONS FILED BY APPELLEE FOWLER ELECTRIC CO., REMINGER CO. L.P.A. AND ADRIAN GARLAND

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I. IT IS IMPROPER TO SANCTION AN ABANDONED CLIENT FOR TRYING TO PREVENT HIS PRIVILEGED INFORMATION FROM BEING USED BY HIS FORMER ATTORNEY AND HER NEW FIRM IN THEIR REPRESENTATION OF HIS OPPONENT IN THE SAME LITIGATION.

Appellant Jeffery Boring respectfully submits that not only is the Request for Sanctions without merit, but it further emphasizes the need for the Ohio Supreme Court to accept jurisdiction in this case.

First and foremost, the Court should note, as indicated on the cover page, that the Memorandum in Opposition to Jurisdiction and Request For Sanctions was filed **jointly** by Appellee, Reminger Co. L.P.A., **and his former attorney, Adrianne Garland.** As such, attorney Cliff Masch of Reminger does not dispute that he has an attorney client relationship with both Boring's opposing party and Boring's former counsel – *at the same time while litigation remained ongoing*. Masch does not dispute that he discussed Garland's involvement and knowledge of Boring's representation and strategies. Masch does not dispute that he discussed the facts and issues with other Reminger attorneys representing Appellee. There should be no dispute that he has an ethical obligation to represent Appellee to the fullest extent possible with all information at his disposal – including that gained from Garland. Yet, Appellee, Reminger and Garland jointly argue that this situation is not grounds for disqualification of Reminger, Masch or even Garland – and that attempts to seek disqualification of his former attorney and her new firm, and appealing the denial of such motions are sanctionable conduct.

Next, Appellee, Reminger and Garland jointly argue that Boring engaged in sanctionable conduct by ignoring this Court's decision in *Wilhelm-Kissinger v. Kissinger*.[1] Boring respectfully submits that he has not. While Appellee, Reminger and Garland argue that *Wilhelm-Kissinger* stands for the proposition that the denial of a motion to disqualify an attorney can never be a final appealable order, Boring did not act in a sanctionable fashion by relying on the express language that "an order

[1] 129 Ohio St.3d 90, 92, 950 N.E.2d 516, 518, 2011-Ohio-2317.

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denying disqualification, **standing alone**, affects no right held by the unsuccessful movant because there is no substantial right to disqualify opposing counsel."[2] Boring respectfully submits that the "standing alone" language should not be ignored as superfluous and that when taken in context of the entire decision is reasonably interpreted to require an analysis to determine if the order would affect a substantial right. That Appellee, Reminger and Garland argue that *Wilhelm-Kissinger* precludes all immediate appeals while Boring reasonably reads *Wilhelm-Kissinger* to require an analysis on the affects of substantial rights further supports the need for jurisdiction to resolve this dispute.

Moreover, Boring respectfully submits that allowing an attorney to switch sides during the same litigation implicitly implicates a substantial right. This should be particularly true where the side-switching attorney has taken an active role against her former client – including repeated efforts to seek sanctions and admittedly sharing confidences with joint counsel. While Appellee, Reminger and Garland jointly point to several cases holding that disqualification does not create an immediate right of appeal – not one involves an attorney that switched sides in the same litigation. Indeed, the only case raised by either party that involves an attorney that switched sides is *Kala v. Aluminum Smelting & Refining Co., Inc.*,[3] which held: "**we must decide whether this matter is a final appealable order. We conclude that it is**...[4] Despite the assertion by Appellee, Reminger and Garland that *Kala* has been superseded by the subsequently enacted Rules of Professional Conduct, the Rules do not address the issue of when a final appealable order exists in this situation, and thus, would not supersede *Kala* on this point. Certainly, because Kala is the only authority to address "whether this matter is a final appealable order," it was not frivolously sanctionable for Boring to rely on such authority.

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[2] *Id.* @ ¶ 9 (**Emphasis** added).
[3] 81 Ohio St.3d 1, 688 N.E.2d 258 (1998).
[4] *Id.* (**Emphasis** added).

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Appellee, Reminger and Garland also hide that their joint Motion for Sanctions was denied by the Eighth District Court of Appeals. (Exhibit 1). Appellee, Reminger and Garland chose not to appeal the denial of sanctions to this Court, nor did they file a cross appeal. Instead, Appellee, Reminger and Garland point to other cases, including a yet to be appealed decision from a trial court, which it attached to their joint request for sanctions. But, in citing to other trial court decisions, Appellee, Reminger and Garland failed to inform the Court that their Motion for Sanctions was also denied by the Eighth District Court of Appeals in *Whelan v. Fowler Electric Co.* (Exhibit 2). Thus, Appellee, Reminger and Garland twice opted not to further appeal the Eighth District Court of Appeals' denial of sanctions. Moreover, while raising *Symonette v. Burlington Coat Factory*, Franklin County Court of Common Pleas Case No. 11 CVC 01-589, Appellee, Reminger and Garland neglected to inform the Court that despite the fact that Garland was *counsel of record and drafted and signed the complaint* for the plaintiff in that case, Reminger and Garland still argued that she was not disqualified from opposing her former client. How can fighting this pattern of conduct be worthy of sanctions?

Lastly, Boring should not be sanctioned because the protection of his privileged information cannot be accomplished by waiting until after the final merits of the case. Indeed, Appellee, Reminger and Garland failed to even attempt to answer these simple questions: 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? Can Garland's conveying Boring's litigation strategy and litigation plans to Masch and other co-workers at Reminger be put back in the box following the use of that information during litigation or at trial? Certainly not. It is not sanctionable for Boring to file an appeal to vigorously attempt to protect his privileged information from being used by his former attorney to oppose him in the same action.

II. CONCLUSION

As the Supreme Court held in *Akron Bar Assn. v. Holder*,[5] 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."[6] 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. Yet, Appellee, Reminger and Garland want the Court to sanction Boring for vigorously attempting to protect his privileged information. How could the public have any confidence in our legal system if we let an attorney switch sides during the same case, foreclose an appeal, and then grant the former attorney and her new firm sanctions from the abandoned client? To do so would make a mockery of any assertion that we want the public to trust in the legal system and freely confide in their attorneys.

Respectfully submitted,

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[5] 2004-Ohio-2835, 102 Ohio St.3d 307, 810 N.E.2d 426.
[6] *Id.* @ ¶ 37.

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CERTIFICATE OF SERVICE

A copy of the foregoing was served via regular US mail on March 12, 2012 to:

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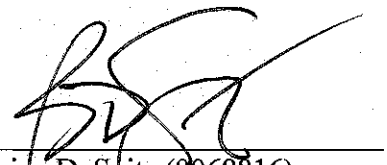

Brian D. Spitz (0068816)
Counsel for Appellant Jeffrey A. Boring

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. 450419

Date 01/25/12

Journal Entry

Motion by Appellee for sanctions is denied.

COPIES MAILED TO COUNSEL FOR ALL PARTIES.-COSTS TAXED

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JAN 25 2012

GERALDINE. FUERST
CLERK OF THE COURT OF APPEALS
BY_____ DEP.

Judge MARY EILEEN KILBANE, Concurs

Presiding Judge
SEAN C. GALLAGHER

Exhibit 1

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

DIRK WHELAN

Appellant

COA NO. 97599 | LOWER COURT NO. CP CV-751302

COMMON PLEAS COURT

-vs-

FOWLER ELECTRIC CO.

Appellee

MOTION NO. 450421

Date 01/25/12

Journal Entry

Motion by Appellee for sanctions is denied.

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JAN 25 2012
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____ DEP.

Judge MARY EILEEN KILBANE, Concurs

Presiding Judge
SEAN C. GALLAGHER

Exhibit 2