

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

Jack R. Hooks, et al.,	:	
	:	
Plaintiffs-Appellees,	:	Case Nos. 14CA13
	:	14CA14
v.	:	
	:	
Rankin Enterprises, LLC, et al.,	:	
	:	<u>DECISION AND JUDGMENT ENTRY</u>
Defendants-Appellants.	:	
	:	RELEASED 8/20/2014

HOOVER, A.J.

{¶1} After reviewing the notice of appeal filed in this matter, we issued an order directing Appellants to file a memorandum addressing whether the entry appealed from is a final appealable order. Appellants have filed a memorandum arguing that the trial court’s order is a final appealable order under R.C. 2505.02(B)(4) because it denied a provisional remedy, which would not be subject to meaningful review at the close of the underlying case. Appellees filed a memorandum arguing that an entry denying a motion to disqualify counsel is not a final appealable order under the existing Ohio case law. After reviewing the memorandum and the relevant law, we hereby **DISMISS** this appeal because the entry appealed from is not a final, appealable order.

I.

{¶2} Appellants filed a motion in the trial court to have Appellees’ counsel disqualified because counsel had worked for a firm that had represented Appellants on legal matters in the past and Appellants claimed that counsel had been involved with

these earlier matters. The trial court denied Appellants' motion to disqualify counsel, holding that the past matters and the current litigation were not "substantially related matters" as that term is used in Ohio R. Prof. Cond. 1.9 governing disqualification of counsel. The trial court also found that there was no evidence presented that any confidential information counsel may have obtained would have any bearing on the current litigation. Appellants filed this appeal.

II.

{¶3} Appellate courts in Ohio have jurisdiction to review the final orders or judgments of inferior courts within their district. Section 3(B)(2), Article IV of the Ohio Constitution; R.C. 2501.02. In determining whether a judgment is final, an appeals court must determine whether the order is final within the meaning of R.C. 2505.02. If a judgment is not final and appealable, then an appellate court has no jurisdiction to review the matter and must dismiss the appeal. *Production Credit Assn. v. Hedges*, 87 Ohio App.3d 207, 210 at fn. 2 (4th Dist. 1993); *Kouns v. Pemberton*, 84 Ohio App.3d 499, 501 (4th Dist. 1992).

{¶4} Here, Appellants assert that the trial court's ruling was a final order under R.C. 2505.02(B)(4), which defines one type of final order as:

(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.

{¶15} A “provisional remedy” is defined in R.C. 2505.02(A)(3) as “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,”

{¶16} A motion to disqualify counsel is ancillary to the main action. *Bernbaum v. Silverstein*, 62 Ohio St.2d 445, 446, 406 N.E.2d 532 (1980)(finding that a motion to disqualify counsel “was a request for ancillary relief” and holding that a denial of a motion to disqualify counsel is not a final appealable order under the then existing version of R.C. 2505.02). Because a motion to disqualify counsel is ancillary to the main action, it constitutes a provisional remedy as defined by R.C. 2505.02(A)(3). *Estate of L.P.B. v. S.B.*, 10th Dist. Franklin App. Nos. 11AP-81, 11AP-82, 11AP-83, 11AP-84, 11AP-85, 11AP-86, 11AP-87, 11AP-88, 2011-Ohio-4656 (characterizing a motion to disqualify counsel as a request for ancillary relief, but holding that it was not a final appealable order under R.C. 2505.02(B)(4)(b)); *Othman v. Heritage Mutual Ins. Co.*, 158 Ohio App.3d 283, 285, 2004-Ohio-4361, 814 N.E.2d 1261 (1st Dist.)(a motion to disqualify counsel was ancillary to the main action and involved a provisional remedy, but it was not a final appealable order under R.C. 2505.02(B)(4)(b)); *Freer v. Loma Enterprises, Inc.*, 7th Dist. Mahoning App. No. 98CA194, 1999 WL 1279153 (“a motion for disqualification is ancillary to the main action and thus constitutes a provisional remedy,” however, an order denying the motion was not a final, appealable order under R.C. 2505.02(B)(4)(b)).

{¶17} Because an order denying a motion to disqualify counsel denies a

provisional remedy, we must determine if both R.C. 2505.02(B)(4)(a) and (b) are satisfied. We find that R.C. 2505.02(B)(4)(b) is not satisfied because Appellants have a meaningful or effective remedy by an appeal following final judgment. See *Bernbaum v. Silverstein*, 62 Ohio St.2d 445, 446, 406 N.E.2d 532 (1980).

{18} As in this appeal, in *Bernbaum* the appellant moved to disqualify opposing counsel on the grounds that counsel for appellee had previously represented appellant and there were allegations of the possibility of disclosures of client confidences. *Bernbaum* involved an analysis of an earlier version of R.C. 2505.02 and the Court ultimately determined that an order denying a motion to disqualify counsel was not a final appealable order because it was not made in a “special proceeding.” However, we find the discussion concerning the practicality of an appeal following final judgment to be applicable to an analysis of R.C. 2505.02(B)(4)(b), which requires a determination of whether the appealing party would be afforded a meaningful or effective remedy by an appeal following final judgment.

{19} The Court in *Bernbaum* found that, “the claimed prejudice herein is reviewable after final judgment. Appellants’ allegations of disclosures of confidences by members of Porter, Wright, if proven, could constitute reversible error on appeal from judgment in the main action.” *Id.* at 448. The Court rejected the appellants’ contention that a postponed review would not be effective because the disclosures which would have occurred could not be remedied by a second trial, finding instead that the disclosure problem “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.” *Id.* The Court ultimately determined that an effective appeal could be had after final judgment and such a process promotes judicial economy:

In the disqualification context, the costs to the judicial system of appeal by right outweighs its occasional benefit to an unjustly denied movant, who still retains his right to eventual relief upon final judgment. Justice is sometimes neither quick nor sweet. But an attempt to hasten it is doomed to fail when it creates an unrestricted opportunity for litigants to harass an adversary and delay a trial.

Id. at 449.

{¶10} In *Russell v. Mercy Hospital*, 15 Ohio St.3d 37, 472 N.E.2d 695 (1984), the Court held that an order granting a motion to disqualify counsel, in contrast to a denial of such a motion, constitutes a final appealable order. In its analysis, the Court contrasted an order denying a motion to disqualify counsel with an order granting such motion. It reaffirmed its finding in *Bernbaum* that, “the claimed prejudice in denying a motion to disqualify counsel is effectively reviewable after final judgment” *Id.* at 39. The Court also found that a denial of a motion disqualifying counsel is subject to reconsideration from time to time during the progress of trial and thus the interest of judicial economy does not weigh in favor of an immediate appeal as compared to an order granting a disqualification:

In weighing the interests of judicial economy and misallocation of judicial resources, this court, while reaffirming the *Bernbaum* decision that the balance tips in favor of delaying review of orders denying disqualification, nonetheless holds that the balance tips in favor of immediate review when there is a grant of disqualification. The finality of the two orders is as dissimilar as their results. An order granting disqualification seriously disrupts the progress of litigation while new counsel is obtained, but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind. A mere refusal to act

is necessarily less conclusive than the affirmative grant of the requested relief.

* * *

In contrast, delaying review of an order denying a motion to disqualify counsel until after final judgment *is* consistent with the interests of judicial economy. First, a contrary rule would assure pretrial appeals in almost all cases in which motions for disqualification were made. The attractiveness of the delaying tactic might prove irresistible. Moreover, such a rule might well encourage the filing of frivolous motions solely in order to take advantage of the delay inherent in pretrial appellate review. The adverse effects upon the orderly flow of litigation could be substantial.

Id. at 42 (emphasis in original). The Court also noted that its decision in *Russell* was not inconsistent with the United States Supreme Court precedent in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377-379, 101 S.Ct. 669, 675-676, 66 L.Ed.2d 571, in which the Supreme Court held that an order denying a motion to disqualify counsel was not immediately reviewable because it could be effectively reviewed after final judgment. *Russell*, 15 Ohio St.3d at 42.

{¶11} More recently, the Supreme Court of Ohio determined that an order denying a motion to disqualify counsel in a divorce proceeding was not a final appealable order. See *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, 950 N.E.2d 516. Because *Wilhelm-Kissinger* was decided in the context of a divorce proceeding, which is a “special proceeding” under R.C.2505.02(B)(2), the Court’s analysis focused on whether the order denying the motion to disqualify affected a substantial right under R.C. 2505.02(B)(2) and R.C. 2505.02(A)(1). The Court ultimately determined that an unsuccessful movant has no substantial right to disqualify opposing counsel. Thus, although it occurs in a special proceeding, such a denial is not

a final appealable order under R.C. 2505.02(B)(2).

{¶12} In its analysis, the Court once again contrasted the differences between an order denying a motion to disqualify counsel with an order granting one. The Court, citing favorably to its previous analysis in *Russell*, found that a grant of a motion to disqualify counsel must be appealed immediately to afford effective relief, while a denial of a motion does not:

Therefore a grant of a motion to disqualify counsel must be appealed immediately or its effect will be irreversible. An order denying disqualification, however, lacks a similarly permanent effect. That order may be revisited throughout the trial, and the party seeking disqualification may pursue other avenues, such as disciplinary proceedings, to address any improprieties that occur.

With these differences in mind, we cannot conclude that an order denying disqualification in the divorce context requires immediate appeal to ensure the protection of a substantial right. Accordingly, although it occurs in a special proceeding, such a denial is not a final, appealable order under R.C. 2505.02(B)(2).

Wilhelm-Kissinger, 129 Ohio St.3d at 93 (citations omitted).

{¶13} Based upon the Supreme Court of Ohio's analyses in *Bernbaum*, *Russell*, and *Wilhelm-Kissinger*, we conclude that an order denying a motion to disqualify counsel is not a final appealable order. Although the order denies a provisional remedy, the Appellants have a meaningful and effective remedy by an appeal following final judgment in this case. Thus, Appellants have failed to meet the requirement set forth in R.C. 2505.02(B)(4)(b).

III.

{¶14} We conclude that the trial court's order denying the Appellants' motion to disqualify counsel is not a final appealable order under R.C. 2505.02(B)(4). Because the

trial court's order is not a final appealable order, we do not have jurisdiction to consider this appeal from that order. Therefore, we **DISMISS** this appeal.

{¶15} The clerk shall serve a copy of this order on all counsel of record at their last known addresses by ordinary mail.

APPEAL DISMISSED. COSTS TO APPELLANTS. IT IS SO ORDERED.

Abele, P.J. & McFarland, J.: Concur.

FOR THE COURT

Marie Hoover
Administrative Judge