[Cite as *Cty. Risk Sharing Auth. v. Robson*, 2016-Ohio-1460.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COUNTY RISK SHARING AUTHORITY Plaintiff-Appellee -vs- CINDY ROBSON Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. John W. Wise, J. Hon. Craig R. Baldwin, J. Case No. 15-CA-62 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 2014CV1101
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 23, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
TODD M. RASKIN FRANK H. SCIALDONE Mazanec, Raskin & Ryder Co., LPA 100 Franklin's Row 34305 Solon Road Cleveland, Ohio 44139	CHRISTINA L. CORL Crabbe, Brown & James, LLP 500 South Front Street, Suite 1200 Columbus, Ohio 43215
AND	AND
STACY V. POLLOCK Mazanec, Raskin & Ryder Co., LPA 175 South Third Street, Suite 1000 Columbus, Ohio 43215	SCOTT ELLIOT SMITH Scott Elliot Smith, LPA 5003 Horizons Drive, Suite 200 Columbus, Ohio 43220

Hoffman, P.J.

{¶1} Defendant-appellant Cindy Robson appeals the August 18, 2015 Judgment Entry entered by the Licking County Court of Common Pleas, which granted plaintiff-appellee County Risk Sharing Authority's ("CORSA") motion to disqualify counsel.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 25, 2012, Appellant, who was an employee of Licking County Job and Family Services ("LCJFS"), upon direction of LCJFS Director, John Fisher, visited the home of Evelyn and James Shaw in order to conduct a home inspection to assess whether two children should be placed in the Shaws' care. The Shaws took Appellant to the backyard where they kept a mountain lion in a cage. The Shaws told Appellant the mountain lion had no teeth or claws, but as Appellant walked next to the cage, the mountain lion bit off a portion of her pinky finger.

{¶3} Attorney Scott Elliot Smith, filed suit against the Shaws on Appellant's behalf on August 2, 2012. The Shaws filed a counterclaim against Robson, which was electronically served on Attorney Smith. Attorney Smith provided a copy of the counterclaim to Appellant on August 28, 2012, for delivery to Licking County for review and possible handling. Appellant delivered the copy of the counterclaim to LCJFS Director Fisher. The next day, Attorney Smith spoke with Assistant Licking County Prosecutor Mark Zanghi. During the conversation, Zanghi and Attorney Smith discussed who would be responsible for Appellant's defense. Zanghi advised Attorney Smith he had not received a copy of the counterclaim and asked Attorney Smith to send him a copy. Via email dated August 29, 2012, Zanghi informed Attorney Smith he would forward the counterclaim to Melinda Allen, Licking County's Risk Management Coordinator, for

handling. Zanghi did not advise Attorney Smith the counterclaim was being sent to CORSA for review. CORSA is a self-insured risk pool in which Licking County is a member.

{¶4} On September 4, 2012, Attorney Smith emailed Zanghi, notifying him the answer to the counterclaim was due on September 10, 2012, although the actual due date was September 24, 2012. Zanghi subsequently emailed Allen, inquiring whether she had heard from CORSA and whether CORSA was providing Appellant with a defense. After receiving a copy of the counterclaim, Allen contacted Elizabeth Miller, CORSA's claim and litigation manager, to discuss the counterclaim. Allen advised Miller Licking County was not a named defendant and the counterclaim alleged Appellant was outside the scope of her employment at the time of the incident. Miller informed Allen, based upon the language of the counterclaim, as described by Allen, there would be no coverage or defense. Miller requested a copy of the counterclaim be sent to her for review. Allen sent Miller a copy of the counterclaim that day. No decision as to a defense was made at that time.

{¶5} Via email dated September 5, 2012, Allen advised Zanghi she had forwarded a copy of the counterclaim to CORSA. Allen also outlined, in part, the contents of her conversation with Miller. Allen did not mention Miller's statement she would analyze the counterclaim to determine coverage and defense once it was received. On September 6, 2012, after unsuccessfully attempting to reach Allen by telephone, Zanghi emailed Attorney Smith, stating:

> The office of the Licking Prosecutor has reviewed the Answer and Counterclaim filed by the Shaw's [sic] in the above captioned matter with

> Elizabeth Miller, the claim & litigation manager for CORSA. It is the opinion of CORSA and of this office that because Licking County has not been named as a party to this lawsuit, neither CORSA, nor our office will be entering an appearance or filing an answer to the counterclaim.

{¶6} Zanghi added, "Please be advised that Licking County did not submit a claim to CORSA regarding this matter." Zanghi copied Miller on the email. Attorney Smith did not confirm with CORSA the information contained in Zanghi's September 6, 2012 email as he assumed the information was true. Attorney Smith did, however, email Zanghi, requesting the name, address, and telephone number of CORSA's representative so he could communicate directly with the appropriate party at CORSA. Attorney Smith testified he requested the contact information as he wanted to ensure CORSA was aware of the counterclaim and to confirm CORSA was the entity which should be providing coverage and a defense. Zanghi emailed the requested contacted information to Attorney Smith on September 7, 2012. Attorney Smith did not contact Miller or anyone else at CORSA about the counterclaim at that time.

{¶7} On September 7, 2012, Attorney Smith contacted CORSA's legal counsel, Attorney Mark Landes at the law firm of Isaac, Brant, Ledman & Teetor, LLP (now Isaac, Wiles, Burkholder and Teetor, LLC), regarding contact information for CORSA and Miller. Attorney Smith spoke with Landes regarding CORSA's duty to defend the counterclaim. Although Landes gave Attorney Smith CORSA's contact information, Attorney Smith did not contact CORSA at that time.

{¶8} Miller reviewed the counterclaim on September 7, 2012, and forwarded the information to Landes for a coverage opinion. Via email dated September 7, 2012, Miller advised Zanghi she had been in meetings all day on September 6, 2012, and had not received his voicemail until the next day. Miller told Zanghi CORSA had not made a decision yet on whether there was coverage for Appellant or whether CORSA would provide her with a defense. Zanghi did not relay this information to Attorney Smith because he believed Attorney Smith had spoken to Miller, and knew CORSA was reviewing the counterclaim and had not yet made a decision.

{¶9} On September 11, 2012, Landes telephoned Miller and advised her CORSA had a duty to defend Appellant against the counterclaim. Immediately after speaking with Landes, Miller referred Appellant's defense to Steve Teetor at Isaac, Brant, Ledman & Teetor, LLP. In a correspondence dated September 13, 2012, Teetor notified Appellant and Attorney Smith CORSA retained his office to defend Appellant.

{¶10} On August 29, 2013, Attorney Smith on behalf of Appellant filed an action against CORSA in Licking County Court of Common Pleas Case No. 13CV 0875 (*Robson I*), alleging she submitted a claim to CORSA for defense of a counterclaim and CORSA refused to provide a defense in violation of the Agreement CORSA had with Licking County. Appellant asserted claims of breach of contract, bad faith and unjust enrichment. In its Answer, CORSA denied Appellant's allegations.

{¶11} The trial court incorporated the "entire record for case number 13CV0875" into the record of this declaratory judgment action. The record includes the deposition transcripts of Attorney Smith, Cindy Robson, Mark Zanghi, and Elizabeth Miller as well as

all the related exhibits. The *Robson I* record also contains the extensive summary judgment briefing by both parties which delineates the legal theories of the case.

{¶12} In *Robson I*, the trial court denied Appellant's motion for summary judgment, and granted, in part, CORSA's motion for summary judgment. The trial court found, on Appellant's claim for "declaratory judgment to declare her rights as to coverage by CORSA [, there] is no dispute concerning coverage or CORSA's duty to defend Robson. CORSA has provided a defense for Robson against the counterclaim." *(Robson I,* Judgment Entry of June 11, 2014.) The court set the rest of the claims for a jury trial, including the contract, unjust enrichment and bad faith claims.

{¶13} During the course of the proceedings in *Robson I,* CORSA filed a motion to disqualify Attorney Smith. The trial court conducted a hearing on the motion. On January 13, 2014, Attorney Christina Corl filed a Notice of Substitution of Counsel, substituting herself for Attorney Smith. Appellant voluntarily dismissed *Robson I* on October 21, 2014.

{¶14} CORSA filed the instant declaratory judgment action on December 18, 2014, seeking a determination CORSA had met its obligations and there was no breach of contract; CORSA acted in good faith; and CORSA was not "unjustly enriched". Appellant filed an answer and counterclaim. The trial court scheduled the declaratory judgment action for a jury trial for January 19, 2016.

{¶15} Attorney Corl represented Appellant throughout the proceedings. However, approximately seven months after the filing of the complaint, Attorney Smith filed a notice of appearance as "additional counsel" on behalf of Appellant. As it did in *Robson I*, CORSA sought disqualification of Attorney Smith. The trial court conducted a hearing on the issue of disqualification on August 17, 2015.

{¶16} Via Judgment Entry filed August 18, 2015, the trial court granted CORSA's motion and disqualified Attorney Smith. The trial court found Attorney Smith's testimony was necessary; therefore, he could not serve as both an advocate and a witness.

{¶17} It is from this judgment entry Appellant appeals, raising as her sole assignment of error:

{¶18} "I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF APPELLEES [']MOTION TO DISQUALIFY DEFENDANT ROBSON'S COUNSEL."

{¶19} An order disqualifying a civil trial counsel is a final order that is immediately appealable pursuant to R.C. 2505.02. *See Kale v. Aluminum Smelting & Refining Co., Inc.,* 81 Ohio St.3d 1, 688 N.E.2d 258 (1998). We review the trial court's decision on a motion to disqualify for an abuse of discretion. *155 North High Ltd. v. Cincinnati Ins. Co.,* 72 Ohio St.3d 423, 650 N.E.2d 869 (1995), syllabus. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶20} Trial courts have the "inherent power to disqualify an attorney from acting as counsel in a case when the attorney cannot or will not comply with the Code of Professional Responsibility and when such action is necessary to protect the dignity and authority of the court." *Horen v. City of Toledo Public School Dist.,* 174 Ohio App.3d 317, 2007–Ohio–6883, 882 N.E.2d 14, ¶ 21 (6th Dist.). "However, because of the potential use of the advocate-witness rule for abuse, disqualification 'is a drastic measure which should not be imposed unless absolutely necessary.' " *Waliszewski v. Caravona Builders, Inc.,* 127 Ohio App.3d 429, 433, 713 N.E.2d 65 (9th Dist.1998), quoting *Spivey v. Bender,* 77

Ohio App.3d 17, 22, 601 N.E.2d 56 (6th Dist.1991). *See, also, A.B.B. Sanitec West, Inc. v. Weinsten,* 8th Dist. Cuyahoga No. 88258, 2007–Ohio–2116, ¶ 12 (applying the current Rules of Professional Conduct). It is therefore important for the trial court to follow the proper procedures in determining whether disqualification is necessary. *Brown v. Spectrum Networks, Inc.,* 180 Ohio App.3d 99, 2008–Ohio–6687, 904 N.E.2d 576, ¶ 11 (1st Dist.) citing *Kala v. Aluminum Smelting & Refining Co., Inc.,* 81 Ohio St.3d 1, 6, 688 N.E.2d 258 (1998).

{¶21} Prof. Cond. R. 3.7 provides, "[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness * * *." The rule provides three exceptions to disqualification:

> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of the legal services rendered in the case;
>
> (3) the disqualification of the lawyer would work substantial hardship on the client.

{¶22} Under Prof. Cond. R. 3.7, a lawyer may be disqualified from representing his or her client only when it is likely the lawyer will be a "necessary" witness. A necessary witness under Prof. Cond. R. 3.7 is one whose testimony must be admissible and unobtainable through other trial witnesses. *King v. Pattison,* 5th Dist. Muskingum No. CT2013–0010, 2013-Ohio-4665, citing *Popa Land Co., Ltd v. Fragnoli,* 9th Dist. Medina No. 08CA0062–M, 2009–Ohio–1299, ¶ 15. "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and availability of other

evidence. * * * A party's mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony." *Akron v. Carter,* 190 Ohio App.3d 420, 2010–Ohio–5462, 942 N.E.2d 409, ¶ 19 (9th Dist.) quoting *Puritas Metal Prods. Inc. v. Cole,* 9th Dist. Lorain Nos. 07CA009255, 07CA009257, and 07CA009259, 2008–Ohio–4653, at ¶ 34 quoting *Mettler v. Mettler* (2007), 50 Conn. Supp. 357, 928 A.2d 631, 633.

{¶23} In *Brown v. Spectrum Networks, Inc., supra,* the First District determined the procedure for a trial court to follow in determining whether to disqualify an attorney who has been called to testify by the opposing party:

> (1) determine whether the attorney's testimony is admissible and (2) determine whether the attorney's testimony is necessary. Under the second part of this analysis, the court must decide whether the attorney's testimony is relevant and material to the issues being litigated and whether the testimony is unobtainable elsewhere. If the court determines that the lawyer's testimony is admissible and necessary, the court must then determine whether any of the exceptions set forth under Rule 3.7 apply.
>
> *Brown,* at ¶ 15.

{¶24} In its August 18, 2015 Judgment Entry disqualifying Attorney Smith, the trial court specifically found "Mr. Smith's testimony is necessary and in fact he has been deposed as a witness in the case." The trial court further found Attorney Smith's "testimony as a necessary witness does not relate to an uncontested issue and in fact, as has been prevalent by the animosity between counsel for the parties, including Mr. Smith, every issue will be contested, especially his understanding of the Civil Rules, his

application of them to the case and the terms of his legal contract with [Appellant]. The Court finds the testimony relates to more than the nature and value of the legal services." August 18, 2015 Judgment Entry at 2, unpaginated.

{¶25} We agree with the trial court and find Attorney Smith's testimony is necessary. We further find none of the exceptions enumerated in Prof. Cond. R. 37 apply. It is undisputed Attorney Smith's testimony relates to a contested issue – what CORSA advised him regarding whether it would provide Appellant with coverage and a defense. In addition, although Attorney Smith's testimony would, in part, relate to the nature and value of the legal services rendered in the case, his testimony could potentially go beyond merely the nature and value of his legal services. Appellant's complaint included a bad faith claim. It is likely Attorney Smith's testimony would be relevant, if not crucial, to that claim. Finally, we do not find the disqualification of Attorney Smith would work a substantial hardship on Appellant. Attorney Corl had begun her representation of Appellant in January, 2014.

{¶26} Based upon the foregoing, we find the trial court did not abuse its discretion in disqualifying Attorney Smith.

{¶27} Appellant's sole assignment of error is overruled.

{¶28} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Wise, J. and

Baldwin, J. concur