[Cite as *Roc v. Sanislo*, 2009-Ohio-6913.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

JUNE ROCK	C. A. No. 09CA0031-M
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
KEVIN R. SANISLO, ESQ., et al.	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellees	CASE No. 09CIV0128

DECISION AND JOURNAL ENTRY

Dated: December 30, 2009

MOORE, Presiding Judge.

{¶1} Appellant, June Rock, appeals from the decision of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} Attorney Kevin Sanislo began representing Appellant, June Rock, in 2003 regarding a workers' compensation case. Rock sustained an injury arising out of her employment with The Inn at Medina ("the employer"). The Industrial Commission allowed the claim, and on April 6, 2004, the employer filed a notice of appeal in the Medina County Court of Common Pleas. On April 29, 2004, Rock filed her responsive complaint, alleging a right to participate in the workers' compensation system. On March 7, 2005, in his representative capacity, Sanislo voluntarily dismissed Rock's complaint pursuant to Civ.R. 41(A). On May 9, 2006, over a year after Rock's complaint was voluntarily dismissed, the employer filed a motion for default judgment based upon her failure to timely refile her complaint. On May 10, 2006,

Sanislo filed his motion to withdraw. On July 6, 2006, the trial court granted the employer's motion for default judgment. Rock, through Attorney Natalie Grubb, filed a Civ.R. 60(B) motion for relief from judgment, which the trial court denied. She appealed to this Court and we affirmed. *Rock v. The Inn at Medina Mgt. Co.*, 9th Dist. No. 07CA0072-M, 2008-Ohio-1992.

{¶3} On January 21, 2009, on behalf of Rock, Grubb filed the instant legal malpractice action against Sanislo. On March 3, 2009, Sanislo filed a motion to disqualify Grubb pursuant to Ohio Rule of Professional Conduct 3.7. The trial court held a hearing on March 27, 2009 and on April 21, 2009, granted the motion. Rock appealed, and has raised two assignments of error for our review. We have combined them for ease of analysis.

II.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED TO THE PREJUDICE OF [ROCK] IN CONCLUDING THAT [ROCK'S] COUNSEL IS A NECESSARY WITNESS."

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED TO THE PREJUDICE OF [ROCK] IN CONCLUDING THAT THE DISQUALIFICATION OF [ROCK'S] COUNSEL DOES NOT CREATE A SUBSTANTIAL HARDSHIP ON [ROCK]."

{¶4} In her assignments of error, Rock contends that the trial court erred when it concluded that Grubb was a necessary witness and that Grubb's disqualification would not create a substantial hardship on Rock. We do not agree.

{¶5} We review the trial court's decision to disqualify Grubb under an abuse of discretion standard of review. *Popa Land Co., Ltd. v. Fragnoli*, 9th Dist. No. 08CA0062-M, 2009-Ohio-1299, at ¶9. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶6} In the instant case, the trial court determined that, pursuant to Prof.Cond.R. 3.7, Grubb was likely to be a witness in Rock's malpractice suit against Sanislo and that no exception to the general rule applied. Therefore, the trial court disqualified Grubb.

{¶7} Prof.Cond.R. 3.7 provides that:

> "(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:
>
> "(1) the testimony relates to an uncontested issue;
>
> "(2) the testimony relates to the nature and value of legal services rendered in the case;
>
> "(3) the disqualification of the lawyer would work substantial hardship on the client." (Emphasis in original.)

{¶8} "The rule is stated as an imperative; that is, counsel is not permitted by the rule to be both an advocate and a witness unless one of the exceptions applies." *Popa*, supra, at ¶14.

{¶9} As the movant, Sanislo bore the burden of proving that Grubb was a necessary witness. *Popa*, supra, at ¶16. We have explained that, pursuant to Prof.Cond.R. 3.7, a "necessary witness" is someone whose proposed testimony is "relevant and material" and "unobtainable elsewhere." *Puritas Metal Products, Inc., v. Cole*, 9th Dist Nos. 07CA009255, 07CA009257, & 07CA009259, 2008-Ohio-4653, at ¶31-38. "Stated differently, counsel's testimony must be admissible and unobtainable through other trial witnesses." *Popa*, supra, at ¶15. However, "[p]ursuant to the rule, the moving party does not need to establish that the attorney *will be* called as a witness. He only needs to establish that it is *likely* that the attorney would need to testify." (Emphasis added.) *Baldonado v. Tackett*, 6th Dist. No. WD-08-079, 2009-Ohio-4411, at ¶21.

{¶10} Sanislo argued that because he was no longer Rock's counsel or responsible for refiling the complaint, Grubb was the only witness who could testify to any information

regarding the underlying workers' compensation case, i.e., her personal understanding of the matter and the underlying reasons for her action or inaction with regard to refiling the complaint. Rock asserted that any evidence Grubb may have would be rendered inadmissible due to the attorney-client privilege, and that Rock herself could testify to any evidence Grubb would testify to, thus her testimony was not unobtainable through other witnesses.

{¶11} According to the testimony at the disqualification hearing, Grubb began representing Rock on July 7, 2005. She explained that she was retained to represent Rock at the administrative level before the Industrial Commission. She explained that she understood that Sanislo represented Rock in connection with the workers' compensation claim at the judicial level. She was aware that Sanislo had withdrawn as counsel of record at the administrative level. Grubb testified that on May 8, 2006 she received the employer's default judgment motion filed in the Common Pleas court and that it was addressed to her. Grubb stated that she never signed any agreement to represent Rock at the judicial level and that the default judgment motion was sent to her as a courtesy. She noted that the certificate of service indicated that the motion was also sent to Sanislo.

{¶12} Sanislo testified that he represented Rock from December of 2003 to March of 2005. He explained that on April 29, 2004 he filed a complaint in the Common Pleas Court on Rock's behalf in response to the notice of appeal filed in the workers' compensation complaint. This, according to Sanislo, is when he began representing Rock at the judicial level.

{¶13} Sanislo testified that on March 7, 2005, he filed a voluntary dismissal of Rock's complaint pursuant to Civ.R. 41(A). On March 10, 2005, he sent Rock a letter along with the time stamped copy of the Civ.R. 41(A) dismissal. The letter informed Rock that he was terminating the employment relationship and that she should obtain new counsel to refile her

complaint within the year allotted. Sanislo stated that he withdrew as Rock's attorney because she failed to attend mediations and previously scheduled meetings and because he found it difficult to adequately represent her. He stated that he also spoke to Rock on the phone and informed her that he was terminating their attorney/client relationship. Sanislo further testified to a letter he sent to the Bureau of Workers' Compensation withdrawing as attorney of record. He explained that this letter became a part of the workers' compensation file. According to Sanislo, after he terminated the attorney/client relationship via letter, Rock did not contact him about her claim until November of 2006 when she requested her file. Sanislo testified that he did receive a copy of the employer's motion for default judgment, and upon receipt he informed the employer that he no longer represented Rock. Sanislo confirmed that on July 6, 2006, the trial court granted the default judgment.

{¶14} After the close of the testimony, Sanislo informed the trial court that he intended to call Grubb as a witness to testify to her knowledge as to when Sanislo was no longer representing Rock. Sanislo stated that because he filed a notice of withdrawal in the administrative case, Grubb would have seen the notice when she examined the file. Consequently, Grubb would have had knowledge of Sanislo's previous representation and would have discussed the matter with her client. Sanislo stated that this testimony would show that Rock, through Grubb, would have had knowledge of a potential malpractice claim as early as May of 2006 and therefore this testimony would support his statute of limitations defense. He further argued that only Grubb could testify to the knowledge she had of the pending judicial case between the beginning of her representation on June 2, 2005 and the March 7, 2006 refiling deadline. According to Sanislo, because Grubb was Rock's only representation at that time,

Grubb would have particular knowledge that would be necessary to his defense to the malpractice claim.

{¶15} In its judgment entry disqualifying Grubb, the trial court stated that it was clear that Sanislo intended to base his defense on Grubb's actions (or inactions) in relation to the underlying workers' compensation claim that gave rise to the malpractice case. "Stating it another way, [Sanislo] alleges that he was no longer counsel for [Rock] or responsible for pursuing any re-filing [sic] of the workers' compensation case, and that any information regarding the underlying workers' compensation case was in the sole possession of either Attorney Grubb or her law firm." The trial court found that this testimony would be admissible at trial as it is relevant and material and that because only she could testify to her personal knowledge regarding her understanding of the matter, the evidence would be unobtainable elsewhere. Upon review, we conclude that the trial court did not abuse its discretion when it made this determination.

{¶16} Grubb would be a necessary witness in Sanislo's defense to the malpractice suit. Grubb contends that any information she had would be covered by the attorney-client privilege, and therefore would not be admissible at trial. R.C. 2317.02(A)(1) provides that the testimony of an attorney is privileged "concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client[.]" The Supreme Court of Ohio has held that "'the burden of showing that testimony [or documents] sought to be excluded under the doctrine of privileged attorney-client communications rests upon the party seeking to exclude [them] ***.'" *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 166, quoting *Waldmann v. Waldmann* (1976), 48 Ohio St.2d 176, 178. We conclude that the testimony regarding Grubb's understanding of her representation of

Rock or her testimony regarding her actions between June 2, 2005 and the March 7, 2006 refiling deadline would not be covered by the attorney-client privilege as it does not relate to any communications from Rock to Grubb or to any advice from Grubb to Rock. Accordingly, to the extent that the proposed testimony would come from Grubb's personal knowledge and not from anything her client told her, the attorney-client privilege does not apply. Therefore, the trial court did not abuse its discretion when it determined that Grubb's testimony was necessary to Sanislo's defense in the malpractice suit. We stress, however, that our conclusion as to Rock's assignments of error are limited to the question before us, that of Grubb's disqualification, and do not address the merits of the underlying case, as that issue is not before us.

{¶17} Next, Grubb contends that the trial court erred when it determined that one of the exceptions to Prof.Cond.R. 3.7 did not apply to her case. While Sanislo bore the burden to determine that Grubb was a necessary witness, Grubb bore the burden to provide evidence to support a finding that one of the exceptions to Prof.Cond.R 3.7 applied. *Baldonado*, supra, at ¶20.

{¶18} Grubb contends that Prof.Cond.R. 3.7(A)(3) applies in this case. She argues that her disqualification would work a substantial hardship on Rock. A substantial hardship "requires more than a showing of mere financial hardship." *155 N. High, Ltd. v. Cincinnati Ins. Co.* (1995), 72 Ohio St.3d 423, 429. Further, it requires more than a showing of long time familiarity. Id. However, in her argument to this Court, Grubb erroneously contends that "it is clearly a substantial hardship on Sanislo and his law firm to represent Rock even beyond the economics. However, Rock's current counsel has stated on the record that 'it's not a substantial hardship on our firm.'" Despite accurately articulating the exception pursuant to Prof.Cond.R. 3.7(A)(3), that *Rock* must suffer a substantial hardship, she argues instead that *Sanislo* would

suffer a substantial hardship and that *Grubb* would not suffer a substantial hardship. This argument has no merit as the trial court was required to look solely to the client to determine a substantial hardship. Prof.Cond.R. 3.7(A)(3).

{¶19} Further, Rock states that because "there is evidence that Rock is unable to obtain counsel elsewhere and there is specific evidence relating to Rock's 'substantial hardship' outside of economics," disqualification was an abuse of discretion. She does not, however, provide any support for this conclusory statement. A review of the record reveals that Grubb contended below that her law firm was the only firm that would represent Rock because Rock was disabled, could not drive, and did not own a phone. Because of this, Grubb was required to drive out to Rock's home to discuss her case. While there was evidence before the trial court that Grubb willingly undertook this task, there is nothing in the record to establish that because of her disabilities, Rock was unable to obtain representation elsewhere. Therefore, we conclude that the trial court did not abuse its discretion when it determined that Rock failed to establish that she would suffer a substantial hardship if Grubb was disqualified.

{¶20} Accordingly, Rock's assignments of error are overruled.

III.

{¶21} Rock's assignments of error are overruled. The judgment of the Medina County Court of Common pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

NATALIE F. GRUBB, and JOHN S. LOBUR, Attorneys at Law, for Appellant.

WILLIAM G. PORTER, GINA R. RUSSO, and GRANT M. WATSON, Attorneys at Law, for Appelleees.