

[Cite as *Reason v. Wilson Concrete Prod., Inc.*, 119 Ohio App.3d 94, 2002-Ohio-4236.]

**REASON et al.**

**v.**

**WILSON CONCRETE PRODUCTS, INC. et al.\***

[Cite as *State v. King*, 119 Ohio Misc.2d 94, 2002-Ohio-4236.]

Court of Common Pleas of Ohio,

Montgomery County.

Nos. 00-CV-3431, 00-CV4153, 00-CV-4641, 01-CV1265, 01-CV-3119, 01-CV-4568, 01-CV-4606, 01-CV-4609 and 01-CV-4650..

Decided May 13, 2002.

---

Gary J. Leppla, for Melissa A. Reason and Kurt R. Reason.

James T. Ambrose, for Kenton, Katie, and Karl Reason.

John G. Witherspoon, Jr., for defendants Reason Homes, Inc., Melissa A. Reason, Kurt R. Reason, and Auto-Owners Mutual Insurance Company.

Robert J. Surdyk, James M. Peters, and Don Little, for defendant Wilson Concrete Products, Inc.

R. Jeffrey Baker, for defendants Timothy J. Blashock and Blashock Plumbing, Inc.

James D. Utrecht, for defendant Blashock Plumbing, Inc.

F. Joseph Schiavone, for defendant Timothy J. Blashock.

Gregory P. Dunsky, Montgomery County Assistant Prosecuting Attorney, for defendants

---

\* Reporter's Note: For earlier case, see *Reason v. Wilson Concrete Prod., Inc.*, 119 Ohio Misc.2d 91, [2002-Ohio-4230](#), 774 N.E.2d 781.

Montgomery County, Ohio Division of Building Regulations, Montgomery County Combined Health District, Edwin C. Lemasler, and Mark Allen.

Rasheed A. Simmonds, for defendants Amanda J. Neal Foglyano, administrator of the estate of Darrel Neal, Barbara S. Neal, and Barbara A. Neal.

M. Andrew Sway, for defendant National Mutual Insurance Company.

John McCoy, John Theiler Bode and Robert W. Rettich III, for defendant George F. Kuhn & Co.

Victor A. Hodge, for Sheila Prewitt.

---

JEFFREY E. FROELICH, Judge.

{¶1} George E. Kuhn & Company, Thomas A. Kuhn, and William Hatton (the “Kuhn parties”) have moved the court to disqualify the law firm of Freund, Freeze & Arnold (“FF&A”) and attorney John Witherspoon from representing the Reasons due to the fact that another attorney in FF&A, Patrick Janis, previously represented George E. Kuhn & Company in another lawsuit.

{¶2} In 1999, Ben Balon filled case No. 99—856 against George F. Kuhn & Company, alleging, among other things, that the defendant “negligently installed” a propane heater and proximately caused the plaintiffs physical injuries. The defendant was insured by National Farmers Union and represented by attorney Pat Janis of FF&A. During discovery, the plaintiffs' attorney deposed, among others, Thomas Kuhn and William Hatton of George F. Kuhn & Company. Summaries of all depositions were forwarded by attorney Janis to a liability claim specialist with National Farmers Union. The court has reviewed, in camera, the file compiled by FF&A in its representation of George F. Kuhn & Company in the *Balon* suit. The parties agree that portions of the file were destroyed and are currently unavailable, such as time and billing records. The court also received the testimony, ex parte, of Thomas Kuhn; he explained his

relationship with his attorney, Pat Janis, FF&A, and National Farmers Union during the *Balon* case.

{¶3} In the case sub judice, the Kuhn parties have been named defendants in a case arising out of a gas explosion of a home that caused death and serious injury; included among the plaintiffs, who have (by definition) an adversarial relationship with the Kuhn parties, are the Reasons, whom John Witherspoon of FF&A represents.

{¶4} The applicable law has been very thoroughly set forth in memoranda from both parties and summarized in this court's order of March 18, 2002. As stated in that decision, an attorney may not accept employment against a former client if there is a "substantial relationship" between the existing controversy and the prior representation, and if the attorney has received confidential communications.

{¶5} The issues involved in the *Balon* case and the *Reason* case as they relate to the Kuhn parties are substantially related. Further, attorney Pat Janis in the *Balon* case and attorney John Witherspoon in the *Reason* case have acquired confidential information from the Kuhn defendants. Some of the similarities are set forth in Kuhn Exhibit A to the April 12 hearing.

{¶6} Quite simply, both cases assert negligent installation personal injury claims; to determine their validity requires an understanding of, among other things, the standards used by the company, the training of employees, and the safety procedures utilized. Further, the fact that the identical insurance company was involved in all decisions in the *Balon* case and is now involved in the *Reason* claim, must be considered. This is sometimes referred to as the "playbook problem." "If you know something about the way the client's head works, you know something that's relevant for purposes of applying the substantial relationship test." You might know, for example, "about the client's inclination, the client's willingness to settle, or the client's unwillingness to be deposed." *Mitchell v. Metro. Life Ins. Co.* (Mar. 21, 2002), S.D.N.Y. No. 01

CIV 2112(WHP), 2002 WL 441194, quoting Wolfram, *The Vaporous and the Real in Former-Client Conflicts* (1996), 1 *Institute for Study of Legal Ethics* 133, 138. Herein, the attorneys who previously represented the Kuhn interests and now are adverse to those interests know the “playbook” of National Farmers Union with regard to “negligent installation” personal injury claims as well as the Kuhns’ “inclinations.”

{¶7}           However, in a brief filed on the day of the hearing, FF&A argued correctly that “disqualification is a drastic measure which should not be imposed unless absolutely necessary.” *Stevens v. Grandview Hosp. Med. Ctr.* (Oct. 20, 1993), Montgomery App. No. 14042. Further, FF&A asserts that even if the court finds a substantial relationship, this creates only an “imputed disqualification” and not a “primary disqualification.” FF&A argues that attorney Witherspoon may continue to represent the Reasons because the prior representation of the Kuhn parties was handled by attorney Pat Janis, and because there is a sufficient screening mechanism in place at FF&A.

{¶8}           Most of the reported cases deal with situations where an attorney leaves one firm and *goes* to another, and the issue presented in those cases is whether the second firm could institute a “Chinese wall” that would allow the second firm to continue in a situation that is technically adverse to the firm from which its new attorney arrived. In such a situation, the Supreme Court has held that there is a presumption that the new attorney shared in the confidences and representations of the prior matter, although this presumption may be rebutted. *Kala v. Aluminum Smelting & Refining Co.* (1998), 81 Ohio St. 3d 1, 18. The burden of rebutting this presumption is on FF&A because, as stated in *Kala*, the question is “whether the presumption of shared confidences with the new firm has been rebutted by evidence that a single ‘Chinese wall’ has been erected so as to preserve the confidences of the client.” *Id.* at 22. The Supreme Court has recently affirmed *Kala* while setting forth a different test for cases involving nonattorney employees. *Green v. Toledo Hosp.* (2002), 94 Ohio St. 3d 480.

{¶9} Utilizing the factors set within *Kala* at 23, the court has no evidence of any “structural divisions of the firm,” the “existence of safeguards or procedures which would prevent the quarantined attorney from access to relevant files or other information,” “prohibited access to files and other information on the case,” “locked case files and keys distributed to a select few, \*\*\* instructions given to all members of the firm regarding the ban on exchanging information, and any prohibition regarding billing and fee information.” Who was/is involved in the prior/current representation, including attorneys, paralegals, law clerks, and support staff? Was there a memo sent establishing the screen? Did/do the involved personnel have access to the firm’s network? There is also insufficient information before the court regarding the “timeliness of the screening devices,” which, again, *Kala* requires the court to consider. See, for example, Restatement 3d of the Law Governing Lawyers (2000), Section 124(2), Comment *d* and Reporter’s Note, Section 132.

{¶10} FF&A’ s memorandum contra includes exhibits that demonstrate that it routinely conducted conflict checks as new parties were added or new issues arose in the *Reason* case. The Reason interests had also contacted an expert who examined the scene at the same time he was an expert for the Kuhn interests in the *Balon* case. There apparently was discussion at that time (prior to the decision, by the Reason interests, to add the Kuhn interests as defendants) within FF&A, and it was decided that there was not “even a potential conflict.” (Feb. 28, 2002, Memorandum Contra, at 7.) There is no further evidence of any "screening" once the Reasons and Kuhns became adversaries.

{¶11} The court must also weigh the hardship the client would experience in obtaining new counsel if the motion to disqualify were granted. In that regard, the attorney for Reason (in his role as plaintiff) argues that if attorney Witherspoon is disqualified, this would create a hardship for Reason and deny him his right to be represented by the attorney of his choice. The court takes judicial notice of the fact that Reason did not select FF&A, but rather this

was done by his insurance carrier; this does not diminish in any respect the professional relationship developed between Reason and Witherspoon or the fact that Reason, if left to his own devices, might well have chosen to be represented by FF&A and Witherspoon in particular. However, “any doubts as to the existence of an asserted conflict of interest must be resolved in favor of disqualification in order to dispel any appearance of impropriety.” *Kala*, supra, at 11, citing *LaSalle Natl. Bank v. Lake Cty.* (C.A.7, 1983), 703 F.2d 252, 257.

{¶12} As acknowledged in *Kala*, even the Great Wall of China, from whence the phrase “Chinese wall” is derived, was of limited practical value. Moreover, the court is concerned that a Chinese wall not become a “shoji,” the traditional rice paper wall or screen than is transparent and translucent and which culturally may provide separation and acceptable privacy, but cannot provide true, provable confidentiality, especially to the outsider.

{¶13} Absolutely nothing in this decision should be read to question the ethics or integrity of any of the attorneys or firms involved. The court, as a practitioner and as a judge, knows the individual attorneys and cannot imagine counselors and advocates who more closely adhere to the rules and considerations set forth in the Code of Professional Responsibility and the Statement on Professionalism, A Lawyer’s Creed, and A Lawyer’s Aspirational Ideals issued by the Supreme Court of Ohio. Nonetheless, in questions involving confidential information and perceived potential conflicts of interest, and given the facts before the court, the interests of the profession and the system of justice must prevail over such subjective determinations. The court is in accord with *Roberts & Schaeper Co. v. San—Con, Inc.* (S.D.W.Va. 1995), 898 F. Supp. 356, 359, which quoted *United States v. Clarkson* (C.A.4, 1977), 567 F. 2d 210, 273, fn. 3: “In determining whether to disqualify counsel for conflict of interest, the trial court is not to weigh the circumstances ‘with hair—splitting nicety’ but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing ‘the appearance of impropriety,’ it is to resolve all doubts in favor of disqualification. [Citations omitted.] Neither is

the court to consider whether the motives of counsel in seeking to appear despite his conflict are pure or corrupt; in either case the disqualification is plain.”

{¶14} The general issue before the court is worthy of extended discussion and people of good faith can disagree. See, for example, Hamilton & Coon, *Are We a Profession or Merely a Business: The Erosion of the Conflict Rules Through the Increased Use of Ethical Walls* (1998), 27 Hofstra L. Rev. 57. However, the litigation of this tragic event should continue toward a resolution, and one that is ultimately final and fair, both in reality and appearance, to all parties. The Reasons must obtain new counsel to represent their interests as counter- and cross-plaintiff and defendant. The motion to disqualify is GRANTED; this is a final appealable order and there is no just reason for delay.

Motion to disqualify granted.