STATE OF MICHIGAN

COURT OF APPEALS

KENNETH MITAN and TECORP ENTERTAINMENT,

Plaintiffs-Appellants,

v

NEW WORLD TELEVISION, INC., NEW WORLD DETROIT, INC. d/b/a WJBK-TV CHANNEL 2, RICH FISHER, BILL BONDS, HUEL PERKINS, MIKE REDFORD, MICHAEL VORIS and MORT MEISNER,

Defendants-Appellees.

UNPUBLISHED
November 12, 2002

No. 225530
Wayne Circuit Court
LC No. 97-710748-NZ

Before: White, P.J., and Neff and Jansen, JJ.

WHITE, P.J. (*concurring in part and dissenting in part*).

I agree with the majority regarding the special master issue. On the disqualification issue, I conclude that given plaintiffs' showing of a potential conflict of interest, the circuit court erred in failing to conduct an evidentiary hearing and an in camera review of documents offered by plaintiffs, and in failing to make factual findings on the issue. The record is thus inadequate to support meaningful review.

A

Knowlton, the Honigman Miller Schwartz & Cohen lawyer that represented Kenneth Mitan in the *Frandorson* matters, billed Kenneth Mitan in the former matter for phone calls he made to Fox 2 and Mike Voris, both of whom are defendants in the instant matter.[1] Knowlton's

[1] Mitan submitted below a copy of HMS&C's billings to Mitan in *Frandorson,* reflecting that on April 11, 1996 Knowlton spent nine hours doing six tasks—three apparently related to Frandorson and the remaining three were "telephone calls with Ken Mitan regarding case and Fox TV-2 news reporting; telephone call to Mike Vooris of Fox TV-2." Plaintiff sought to disqualify defense counsel in this court. The motion was denied. I reject defendant's argument that that denial constitutes a decision on the merits of the

(continued…)

calls to Fox 2 and Mike Voris in the former matter were regarding Fox 2's Hall of Shame broadcasts of Mitan in 1996, which are the subject matter of the instant defamation suit.

In support of his motion to disqualify defense counsel, Mitan stated in an affidavit that "HMS & C actually represented Deponent with regards to TV2, specifically, Deponent sought and received advice from Timothy Knowlton of HMS& C on TV2's request for a live interview with Deponent," that "HMS&C asked for and received verbal and written briefings from Deponent as to the TV2 broadcasts, which are available to the Court in camera, and that Deponent can verify that these written briefings were submitted to Mr. Knowlton" and that "Deponent believed that all communications with HMS&C were fully privileged." Mitan's affidavit further stated:

> 3. The Frandorson matters are principally related to the TV2 action:
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> > A. TV2 made reference to the Frandorson litigation in one of their broadcasts.
> >
> > B. HMS&C argued in front of the Michigan Court of Appeals that the TV2 broadcasts about Deponent "were inaccurate."
> >
> > C. Defendant Michael Voris indicated to Deponent that one of his sources was the attorney for Frandorson.
> >
> > D. That the broadcasts by TV2 were about much more than the operation of the pool hall, calling Deponent "Un-American" and "not a straight shooter."
> >
> > E. The affidavit filed in Ingham County about the TV2 broadcasts was done at the request of HMS&C, and was co-authored between Deponent and HMS&C, i.e. [,] HMS&C suggested numerous changes to Deponent's affidavit.
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> 4. In defense of the frivolous RICO action by Frandorson, summarily dismissed by the Honorable Robert Bell, HMS&C asked for and received virtually all pleadings involving Deponent or any of his entities, and billed Deponent for review of this material.
>
> 5. In defense of the Frandorson cases in general, Mr. Knowlton of HMS&C was allowed to participate in confidential telephone conversations with other attorneys representing Deponent and his entities in other matters.

(…continued)

question whether the trial court erred in denying plaintiff's motion to disqualify counsel below.

6. Contrary to TV2's position, HMS & C is in possession of confidential financial information on Deponent, including some information which was sealed by various Courts.

Knowlton submitted an affidavit below, stating:

3. HMS & C does not currently represent any of the Mitans or their entities. As of December 31, 1996, Mitan is a former client of HMS&C and HMS&C does not plan to render any legal services to Mitan at any time in the future.

4. Between 1994 and December 30, 1996, HMS & C handled three related litigation matters for Mitan. HMS&C has not represented Mitan in any other matter.

5. The first matter . . . was litigation in the Ingham County Circuit Court . . . ("Frandorson I"). That case was subsequently appealed to the Michigan Court of Appeals. HMS&C ceased its representation of Mitan in Frandorson I and last performed legal services for Mitan in that case on December 30, 1996. Because of the dormant appeal, however, no substitution of counsel was entered in the circuit court until April 10, 1997.

* * *

10. HMS&C did not represent Mitan in any of the matters that are the subject of the "Hall of Shame" broadcasts. None of these broadcasts concern the issues presented in the Frandorson matters. The issues in the Frandorson matters are unrelated to any of the issues presented in this litigation.

11. No HMS&C attorney ever received from Mitan any confidential letter outlining facts and circumstances of the Fox 2 "Hall of Shame" broadcasts.

12. HMS&C has never received from Mitan any confidential information concerning issues related to the Fox 2 "Hall of Shame" broadcasts.

13. In Frandorson II, in response to something filed by Mitans' opponents stating that Mitan had been the subject of a Hall of Shame broadcast, Mitan drafted for filing in the Ingham County Circuit Court the Affidavit of Kenneth Mitan . . . which is attached to this affidavit as Exhibit 1. HMS&C did not prepare this Affidavit with Mitan. Mitan prepared the Affidavit and delivered it to HMS&C with instructions to file it with the court.

14. The only information HMS&C has received from Mitan related in any way to this matter are the contents in the Affidavit which Mitan revealed to HMS&C solely by way of this same Affidavit which was filed in court. Because this Affidavit is part of the public court record, it is not a client confidence or any other type of confidential information.

> 15. There are no HMS&C attorneys who possess information obtained from Mitan which is directly relevant to this lawsuit. The only information related to this lawsuit that any HMS&C attorney is in possession of would have been obtained from Fox 2. That information is, of course, subject to the attorney-client privilege.

Kenneth Mitan's responsive brief to defendant's opposition to disqualify defendant's counsel asserted that the Channel 2 broadcasts were specifically brought up during the course of the Frandorson litigation, that there was substantially more confidential information requested by Knowlton regarding the truth or falsity of the broadcasts than is contained in the affidavit filed in the earlier litigation, that as part of the defense of the RICO claim in the Frandorson litigation, plaintiff was required to provide HMS&C documentation in regards to past business dealings including confidential financial information, and that:

> . . . . In the Franderson [sic] litigation counsel for Franderson [sic] used the Channel 2 broadcasts concerning Plaintiff to enhance their position in their case. In Mr. Knowlton's argument before the Court of Appeals, he emphatically argued before the court the allegations referenced to Mr. Mitan in the Channel 2 broadcasts were inaccurate. Now, Herschel Fink of the same law firm has argued to this court that those allegations were absolutely true as part of their defense. To argue that Hogniman [sic] Miller's representation of Plaintiff did not include representation of a substantially similar matter is ludicrous.

Attached to Mitan's responsive brief was an affidavit of Keith J. Mitan, stating:

> 1. That in March, 1996, he participated in a telephone conference with Kenneth Mitan and Timothy Knowlton of [HMS & C].
>
> 2. That during said telephone conference, Timothy Knowlton provided specific legal advice to Kenneth Mitan regarding responding to TV2's request for a live interview.

In a supplemental affidavit filed on appeal and not contained in the lower court record, Knowlton states:

> 3. In connection with one of the [three] Frandorson matters, I requested pleadings from Mitan for some of the other cases they have been involved in. The pleadings requested were from specific cases which involved allegations similar to the allegations made in the Frandorson lawsuits: that Mitan purchases retail properties, bleeds them dry, then defaults on his purchase obligations. While I received pleadings from some of these cases, I never received all of the pleadings. I never requested nor received pleadings from all the litigation in which Mitan has been involved.
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> 4. HMS&C has never received from Mitan any confidential information concerning issues related to the FOX 2 "Hall of Shame" broadcasts. As set forth on the bill submitted by Mitan in support of his motion in the Court of Appeals, on April 11, 1996, I had a telephone call with Kenneth Mitan regarding the FOX

2 news report. Mr. Mitan called me and told me that he had been the subject of a FOX 2 news report and wanted to sue the station and the producer, Mike Voris. I advised Mr. Mitan that, while I did not know for sure whether my law firm represented FOX 2, I knew that we represented several news organizations and that we did not handle these types of cases for plaintiffs. I told Mr. Mitan that we would not represent him in any such case. This was the extent of my discussion with Kenneth Mitan concerning the FOX 2 report. I attempted to call Mike Voris at FOX 2 to obtain a copy of the tape so that I could determine whether the broadcast had anything to do with the Frandorson matters. I never reached Mr. Voris and never obtained a copy of the tape.

5. Contrary to the unsworn allegations in plaintiffs' current moving papers, neither I nor anyone else at HMS&C at the time of our representation of the Mitan [sic] ever researched or addressed the facts in connection with the FOX 2 news reports.

B

At the hearing on plaintiff's motion, the circuit court refused Mitan's request that it review documents in camera:

MR. THOMAS [*plaintiffs' counsel*]: Your Honor, this is Plaintiff's motion to disqualify Defense Counsel and the law firm of Honigman Miller from representing the Defendants in this matter. Your Honor, we have filed -- and I'm not sure if the Court received yesterday a second responsive brief including affidavits of Kenneth Mitan and Keith Mitan which further go into detail as to the former representation of Honigman Miller of these – of my clients in other matters.

THE COURT: I did. I received that yesterday and read it yesterday.

MR. THOMAS: And I have also asked the Court to look in camera at some other documents which I have for the Court right now which are in Exhibit "A" –

THE COURT: Do you have any objection?

MR. FINK [*defendants' counsel*]: Yes. I think that's grossly inappropriate. I think if he's going to present something I have to know what it is so I can tell the Court why –

THE COURT: You haven't seen this?

MR. THOMAS: (Interposing) He hasn't seen it, Your Honor. If I show it to him and he continues representing them, then I'm divulging information directly relating to this lawsuit.

MR. FINK: He's got the burden of showing under the rules of professional conduct –

> THE COURT: Well, we're not going to argue that. There's no motion for an in cameron [sic] inspection and I'm not going to – you know, if you put that in your motion perhaps I could do that, but that's without notice. So the Court will deny your oral motion for the in cameron [sic]. So you may proceed with the motion.
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> * * *

Despite having objected to plaintiff's request that the court review documents in camera, defense counsel argued that plaintiff had not provided specific evidence to support his affidavit:

> MR. FINK: What do we have in this affidavit that we got at four o'clock yesterday? What we got was no specifics, a lot of conclusions, no evidence, irrelevancies but no specifics. Counsel – and Mr. Mitan in his affidavit, talk about, 'Well, I gave him all these documents and they billed me for his and that'. Where is it? Where is it? I haven't seen anything. There are no specifics and, if you got to any specifics I submit, Your Honor, that you would see that the information wasn't confidential . . . .
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> * * *
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> THE COURT: Rebuttal?
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> MR. THOMAS: Yes, Your Honor. Counsel is wrong. He's absolutely wrong. There was more than just this affidavit. He knows that. There were confidential conversations that were witnessed by their parties. We have to have an evidentiary hearing in this matter, I think we should; . . . I have documentation that was sent directly to Timothy Knowlton which was not an affidavit, which was not to be considered public record, which has never been filed in any court and which is certainly confidential information.
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> . . . . He [Kenneth Mitan] asked for advice from Timothy Knowlton, 'What should I do about Chanel [sic] 2?' Timothy Knowlton says, 'Well, tell me what they did and tell me if it's true or not.' He did that in writing and in several conversations, Your Honor, which were witnessed by third parties.
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> . . . . [defense counsel's] law firm has access to not only – not only information relating to this lawsuit and as to the truth and veracity of the allegations that were broadcast by Channel 2, they have access to his financial information which is certainly going to become an issue in this lawsuit—they're going to be asking for him to present because those are also parts of the broadcast by Channel 2 –they have that in their possession . . . .

C

The circuit court made no factual findings, stating simply:

> This Court has had some experience in these motions to disqualify counsel. . . . So the Court is satisfied—the Court has read the motion and heard the argument,

> that the motion to disqualify defense counsel and for protective order should be denied.

Mitan appealed the circuit court's order denying his motion to disqualify defense counsel to this Court, where it was peremptorily dismissed for lack of jurisdiction.

D

"A decision to disqualify counsel must be based on a factual inquiry conducted in a manner which will afford appellate review. Factual findings regarding disqualification are reviewed under a clearly erroneous standard." *Kalamazoo v Michigan Disposal Service Corp,* 125 F Supp 2d 219 (WD MI, 2000), aff'd 151 F Supp 2d 913 (WD MI, 2001), citing *Dana Corp v Blue Cross & Blue Shield Mut of Northern Ohio,* 900 F 2d 882, 889 (CA 6, 1990).

In *Kalamazoo, supra,* 125 F Supp 2d at 238-240, the court discussed whether two matters are "substantially related:"

> B. Substantial Relationship
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> . . . . The commentary to Rule 1.9 indicates that the scope of a "matter" requires an examination of the facts of a particular situation or transaction and the nature and degree of the lawyers' involvement. "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can justly be regarded as changing of sides in the matter in question." MICHIGAN RULES OF PROF'L CONDUCT R.1.9 CMT. State ethics opinions in this area are instructive. They state, "**In case of doubt about whether a matter is substantially related, or whether confidential information relating to the former representation could be used to the disadvantage of the former client, a lawyer should decline the representation."** RI-46 (citing *General Elec. Co. v. Valeron Corp.,* 608 F.2d 265 (6th Cir. 1979); see also Michigan Prof'l & Judicial Ethics Comm., Informal Op. RI-95 (1991).
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> In *General Electric v. Valeron,* 608 F.2d 265 (6th Cir. 1979), General Electric moved for an order disqualifying defendant's counsel Bernard Cantor. Cantor had been retained as a patent attorney by General Electric during the period from 1965-67 and had prepared several draft patent applications for General Electric. General Electric filed suit in 1977 alleging that Valeron infringed General Electric's patent No. 3,341,920. Valeron denied infringement and sought a declaration of invalidity because of specified prior art and prior invention. The district court held a hearing and concluded that Cantor and his firm should be disqualified. General Electric successfully argued that Cantor's work in preparing drafts of several patent applications was substantially related to the subject matter of General Electric's lawsuit, the subject matter being Valeron's defense, denial of infringement and an assertion of invalidity based on prior art or prior invention. 608 F.2d at 267. The court rejected Valeron's assertion that General Electric was required to show a substantial relation between Cantor's work for it and the actual issues in the infringement lawsuit. The Sixth Circuit observed that the "narrower formulation" asserted by Valeron was "not supported by case law generally" and

was contrary to settled authority. *Id.* (citing *Melamed v. ITT Cont'l Baking Co.*, 592 F.2d 290, 292 (6th Cir. 1979), and *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.,* 559 F.2d 250 (5th Cir. 1977) (former client "need only show that matters embraced within the pending suit are substantially related to matters or cause of action wherein the attorney previously represented him."). The Sixth Circuit also observed that "**the narrower formulation might well be difficult to apply in practice since the actual issues in lawsuits are frequently not determined until long after the litigation has begun."** *Id.* at 267.

In *Anchor Packing Co. v. Pro-Seal, Inc.*, 688 F.Supp. 1215, 1220-21 (E.D. Mich. 1988), the United States District Court for the Eastern District of Michigan, applying Michigan ethics rules, observed that, "[T]here is a substantial relationship between the two representations if facts pertinent to problems for which the original legal services were sought are relevant to the subsequent litigation." . . . .

The substantial relationship test was first fashioned by courts, and then codified into ABA Model Rule 1.9(a), from which MRPC 1.9 was adopted. **In deciding whether a "substantial relationship" exists, the scope and subject matter of the former and present representations must be examined.** Some cases use a "transactional analysis," which holds that a conflict exists if the prior representation and the subsequent representation involved even interconnected (but not the same) events which could reveal a pattern of client conduct; that is done on the theory that relevant confidences could have been acquired by the lawyer in question. . . . . Other cases use a narrower "issues analysis," finding a "substantial relationship" only when the issues involved in the two cases or transactions are identical or virtually so. . . .

Michigan Prof'l & Judicial Ethics Comm., Informal Op. RI-248 (1995). Michigan has not expressly decided whether a "transactional analysis" or "issues analysis" should be applied.

The court need not definitively resolve what is apparently an unresolved state-law issue. . . . . **"Indeed, the case law reveals that disqualification is proper when the 'similarity in the two representations is enough to raise a common-sense inference that what the lawyer learned from his former client will prove useful in his representation of another client whose interests are adverse to those of his former client.'"** *Cardona* [*v General Motors Corp,* 942 F Supp 968, 973 (DNJ, 1996)] (quoting ABA/BNA Lawyer's Manual on Professional Conduct at 51:215 (1996).

* * *

C. Shared Confidences

In *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977), the Fifth Circuit noted that there are significant distinctions between presumptions regarding exchange of confidential information depending on

whether there was a direct or indirect (implied) attorney-client relationship. **In the case of a previous direct representation,** the moving party seeking disqualification need only show that the matters embraced within the pending lawsuit are substantially related to the matter or cause of action where the attorney previously represented him. "**This rule rests on a presumption that confidences potentially damaging to the client have been disclosed to the attorney during the former period of representation. The court may not even inquire as to whether such disclosures were in fact made or whether the attorney is likely to use the damaging disclosures to the detriment of his former client. The inquiry is limited solely to whether the matters of the present suit are substantially related to matters of the prior representation. . .**" [*Kalamazoo,* 125 F Supp 2d at 238-240. Emphasis added.]

E

The affidavits and arguments of the parties demonstrate that there were disputed questions of fact regarding the prior representation and the scope and nature of the information provided. I conclude that given plaintiff's affidavit and the HMS&C billing to Mitan in the *Frandorson* matter, the circuit court improperly denied plaintiff's request for an evidentiary hearing and plaintiff's request for in camera review of documents that plaintiff alleged would further have supported his position, which documents plaintiff's counsel had ready to present at the hearing. Further, the circuit court failed to articulate factual findings, thus precluding meaningful appellate review.

I would reverse and remand for further findings on the disqualification issue.

/s/ Helene N. White