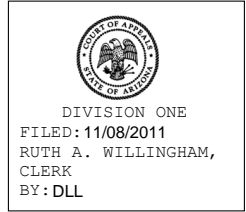


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

JOHN and MARIE FOLTZ, ) No. 1 CA-SA 11-0070  
)  
Petitioners, ) DEPARTMENT D  
)  
v. ) MEMORANDUM DECISION  
)  
THE HONORABLE GEORGE H. FOSTER, ) (Not for Publication -  
JR., Judge of the SUPERIOR COURT ) Rule 28, Arizona Rules  
OF THE STATE OF ARIZONA, in and ) of Civil Appellate  
for the County of MARICOPA, ) Procedure)  
)  
Respondent Judge, )  
)  
REALTY EXECUTIVES, INC. and )  
REALTY EXECUTIVES INTERNATIONAL, )  
INC., )  
)  
Real Parties in Interest. )  
\_\_\_\_\_ )

Petitioner for Special Action  
from the Maricopa County Superior Court

Cause No. CV2010-013791

The Honorable George H. Foster, Judge

**JURISDICTION ACCEPTED; RELIEF GRANTED**

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Stinson Morrison Hecker, LLP Phoenix  
By Lonnie J. Williams, Jr.  
Attorneys for Petitioners/Defendants

Greenberg Traurig, LLP Phoenix  
By Pamela M. Overton  
Attorneys for Real Party in Interest

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G E M M I L L, Judge

¶1 In this special action, petitioners John and Marie Foltz (hereinafter the "Foltzes," or John Foltz individually as "Foltz"), defendants in the underlying civil proceeding, challenge the respondent judge's order disqualifying attorneys Lonnie Williams ("Williams") and Carrie Francis ("Francis") from continued representation of the Foltzes. For the reasons that follow, we accept jurisdiction of this special action and grant relief by vacating the trial court's order disqualifying counsel.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Foltz and Realty Executives, Inc. ("Realty Executives") entered into an Employment Agreement ("Agreement") in 1997. In 1998, Foltz entered into an Independent Contractor Agreement with Realty Executives International, Inc. ("REI"), under which REI hired Foltz to assist in a payment scheme from Realty Executives to REI in the form of franchise fees to be paid to REI. Foltz and Realty Executives entered into an Equity Participation Plan ("Equity Plan") in 1999, which allowed Foltz to earn units representing 20% of Realty Executives' common stock ownership. In 2005, Foltz and Realty Executives agreed to execute an addendum to the Agreement in order to extend Foltz's employment date to December 31, 2015. In 2010, Realty Executives' Board of Directors asked Foltz to accept reduced

compensation. Foltz refused to accept the reduction.

¶13 In May 2010, Realty Executives and REI filed a complaint against the Foltzes for breach of contract, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, conversion, declaratory relief, and equitable accounting. The complaint alleged Foltz, while serving as President and Designated Broker of Realty Executives, engaged in conduct that "irretrievably damage[d] [Realty Executives] through deliberate acts of financial and operational mismanagement, embezzlement, self-dealing and other willful misconduct and dishonest acts." The complaint asserts Foltz "purposefully manipulated Realty Executives' financial and accounting records by engaging in improper practices to increase his own compensation and benefits under the [ ] Agreement, Independent Contractor Agreement and Equity Plan."

¶14 The Foltzes filed an answer and counterclaim in June 2010 for breach of written contract, failure to pay wages due, breaches of the covenant of good faith and fair dealing, wrongful termination, and defamation/libel. Williams and Francis, who at the time were with the law firm of Quarles and Brady LLP, appeared as counsel of record for the Foltzes in the answer and counterclaim.

¶15 In January 2011, Realty Executives and REI filed motions to disqualify Quarles and Brady LLP, and Stinson

Morrison Hecker LLP, as defense counsel under Ethical Rule ("ER") 1.9(a), (b), and (c) of the Arizona Rules of Professional Conduct.<sup>1</sup> Ariz. R. Sup. Ct. 42, ER 1.9. The motions alleged that Francis's and Williams's representation created a conflict because Francis and Williams represented Realty Executives when they worked for the law firm of Snell & Wilmer LLP.

¶16 Following briefing and oral argument, the trial court concluded that the record supported a finding that Francis previously represented Foltz and Realty Executives in "substantially related" matters, creating a conflict requiring disqualification. The trial court further found that the record did not support allegations that Williams previously represented Realty Executives and/or acquired confidential information, so there was no conflict of interest regarding Williams under ER 1.9(a), (b), or (c). The court concluded, however, that Williams was disqualified from representation under ER 1.10 because he worked with Francis at Stinson Morrison Hecker LLP, and Francis was disqualified. The court found that the law firm of Stinson Morrison Hecker LLP was therefore disqualified, although Quarles and Brady LLP was not disqualified because Williams and Francis were no longer employed by that firm.

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<sup>1</sup> By January 2011, Williams and Francis had left Quarles and Brady LLP, and were working for the law firm of Stinson Morrison Hecker LLP.

¶7 Foltz filed this special action in March 2011. Realty Executives subsequently filed a notice of filing bankruptcy in May 2011, noting that "all matters involving Realty Executives are stayed until further order of the bankruptcy court." This court stayed this special action until further notice from the parties. In October 2011, the bankruptcy court ordered the remand of the underlying Maricopa County Superior Court case, from which this special action arises. Therefore, this court will dissolve the stay previously entered and issue our decision in this special action proceeding.

#### **SPECIAL ACTION JURISDICTION**

¶8 The decision to exercise jurisdiction in special action proceedings is highly discretionary. *Ariz. Leg. Council v. Howe*, 192 Ariz. 378, 382, ¶ 10, 965 P.2d 770, 774 (1998). Special action jurisdiction may be available when there is no "equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a). A disqualification order is not appealable because it is not a final order. *Sec. Gen. Life Ins. Co. v. Superior Court*, 149 Ariz. 332, 333, 718 P.2d 985, 986 (1986). Our review is limited to whether the trial judge's determination was arbitrary or capricious or an abuse of discretion. Ariz. R.P. Spec. Act. 3; see also *Villalpando v. Reagan*, 211 Ariz. 305, 307, ¶ 6, 121 P.3d 172, 174 (App. 2005) (reviewing a ruling to disqualify counsel under an abuse of

discretion standard); *Foulke v. Knuck*, 162 Ariz. 517, 519, 784 P.2d 723, 725 (App. 1989) (applying an abuse of discretion standard in a special action seeking relief from a denial of a motion for disqualification).

¶19 In the exercise of our discretion, we accept jurisdiction of this special action because the Foltzes do not have an adequate remedy on appeal and we have concluded that the trial judge erred in disqualifying counsel.

#### DISCUSSION

¶10 Petitioners argue that the trial court misapplied the law in finding the representations by Williams and Francis were "substantially related" under ER 1.9.

¶11 Ethical Rule 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by ERs 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Ariz. R. Sup. Ct. 42, ER 1.9. The comments to the Rule provide guidance on the definition of "matter," stating:

The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Ariz. R. Sup. Ct. 42, ER 1.9 cmt. 2. Matters are "substantially related" "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Ariz. R. Sup. Ct. 42, ER 1.9 cmt. 3; see also Ariz. State Bar Comm. on Rules of Prof'l Conduct, Ethics Op. 94-06 at 3 (1994) ("[S]ome factual nexus must exist between the two matters; i.e., the matters themselves must be substantially interrelated.").

¶12 "Only in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent." *Alexander v. Superior Court*, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984). In addition, "[t]he burden is on the party moving to disqualify opposing counsel to show 'sufficient reason' why the attorney should be disqualified." *Amparano v. Asarco, Inc.*, 208 Ariz. 370, 377, ¶ 24, 93 P.3d 1086, 1093 (App. 2004) (citing *Alexander*, 141 Ariz. at 161, 685 P.2d at 1313).

¶13 Realty Executives and REI argue that Francis represented Foltz in fraud cases, of the same type of fraud alleged in the complaint. Additionally, Realty Executives and REI contend that Francis billed more than 500 hours defending the company under its Errors and Omissions ("E & O") policy with



St. Paul Fire & Marine Insurance Co. and that she handled at least one employment matter.

¶14 Realty Executives and REI maintain in the current action that "Foltz engaged in a pervasive scheme of undisclosed self-dealing to improperly inflate his income." Specifically, they allege that Foltz's scheme included the following methods of self-dealing:

- (1) artificially inflating Realty Executives' net income and other factors used to calculate compensation due under his contracts with Plaintiffs;
- (2) diverting W-2 wages to 1099 income, in his own name or in connection with at least one entity/DBA/alias;
- (3) taking third-party payments for real-estate-related consulting engagements or other services performed without Realty Executives' knowledge or permission; and
- (4) taking third-party kickbacks in connection with procuring products or services for [the Foltzes].

Further, Realty Executives and REI assert that, through the complaint filed in 2010, they were "attempting to recover the significant monetary damages caused by Foltz's nearly decade-long pattern of deception."

¶15 The record does not in our view support a substantial connection between Francis's work for Realty Executives several years ago and the present case. The allegations of a scheme of

self-dealing and deception on the part of Foltz are not substantially related to the cases in which Francis represented Realty Executives.

¶16 Francis was an associate for the law firm of Snell and Wilmer LLP between 2000 and 2004. REI and Realty Executives submitted, in their motion to disqualify, billing statements from Snell and Wilmer as evidence of the representation of Realty Executives by Francis. According to the billing statements, Francis worked on fourteen E & O cases for Realty Executives and one employment contract. The bills reflect that Francis performed various legal duties, including: conducting research; drafting motions, responses, memoranda, letters, disclosure statements, settlement agreements, and subpoenas; conveying a settlement offer; reviewing interrogatories; conducting phone conferences; and preparing for and attending depositions. The Foltzes argued to the trial court that Francis should not be disqualified because, “[u]nlike the present dispute, all of the E & O insurance cases concerned specific real estate transaction disputes and claims of negligence.” The Foltzes provided an affidavit from Francis in their opposition to motion to disqualify. Francis stated in the affidavit:

2. . . . When I was affiliated with Snell & Wilmer LLP [October 2000 to May 2004] the firm represented Realty Executives, Inc. . . . I conducted research and wrote briefs for legal issues identified and requested by

lead counsel on various Realty Executives, Inc. negligence insurance matters. Such work concerned claims asserted by consumers in real estate residential purchase transactions against the Realty Executives, Inc. affiliated real estate agent. The documents produced in discovery in such cases were the purchase transaction documents for the underlying transaction. All settlement discussions involved the real estate agent and the insurance carrier for approval. No confidential information of Plaintiffs' was ever produced or provided in the E & O cases. During my work for Realty Executives, Inc., I never spoke with Rich Rector, Glenn Melton, Karen Dunham or any other Realty Executives Board Member, other than John Foltz on occasion, and the real estate agent involved in the dispute. To my knowledge, Melton and Dunham were not employed at Realty Executives, Inc. when I performed work for the company. Since early 2004, I have not performed any legal services for Realty Executives, Inc.

3. In February 2003, Mr. Foltz asked me to review an employment agreement he had written for a new business development employee, Denis Eckert. The entire content of my communications with Mr. Foltz about this review is contained in Exhibit 1 to Plaintiffs' Motion. To my knowledge, the Eckert agreement was never challenged in a legal proceeding.

4. During my affiliation with Snell & Wilmer LLP, I did not access any files, records, documents or correspondence concerning Realty Executives, Inc.'s agreements with John Foltz, and did not assist in the preparation of any of those legal documents. I did not speak to any other firm attorneys about Realty Executives, Inc.'s agreements with John Foltz, or the negotiations or drafts of those agreements. I did not obtain or learn any confidential information that would help

the Foltz[es] or prejudice Realty Executives, Inc. as to the present lawsuit.

¶17 In *Amparano*, our court upheld a denial of a motion to disqualify, concluding that "vague billing statements supported by very generalized affidavits, stating that [counsel] researched and wrote memoranda and that, at one point, one of these memoranda was incorporated into an opinion letter," without the submission of any actual work product on which the claim was based, was insufficient to support disqualification. 208 Ariz. at 377, ¶ 26, 93 P.3d at 1093. This is also the case here, as Realty Executives and REI provided the court with billing records in the appendices attached to their motion to disqualify counsel. Realty Executives and REI also provided the complaints filed in seven of the fifteen cases Francis worked on in their reply in support of motions to disqualify, but they did not provide specific work product produced by Francis on any of these cases.

¶18 The complaints in these cases, moreover, demonstrate only that negligence, negligent misrepresentation, and/or fraud was alleged against a Realty Executive agent, which supports Francis's affidavit explaining the limited nature of the work she did as an associate. In three of the cases Foltz was a defendant, but his merely being named as a defendant does not automatically create a factual nexus with the present case. We

conclude there is insufficient evidence that a significant factual nexus exists between the prior cases and the present case. See Ariz. State Bar Comm. on Rules of Prof'l Conduct, Ethics Op. 94-06 at 3.

¶19 Realty Executives and REI contend that the cases handled by Francis were cases of "fraud allegedly committed by agents," which they allege is similar to the fraud alleged in the complaint herein. The four categories of alleged deception and self-dealing described by Realty Executives and REI herein are quite different, however, from the alleged wrongdoing in the cases brought in the early 2000s by disappointed buyers, in which Francis was involved as an associate within Snell & Wilmer. See *supra* ¶¶ 14, 16. The focus in the current case, rather, is self-dealing and deception on the part of Foltz vis-à-vis Realty Executives and REI.

¶20 Regarding the one employment matter handled by Francis, that representation was not substantially related to the current case because it did not involve the same employee or the same or similar alleged facts.

#### CONCLUSION

¶21 The current matter is not the same matter as the prior matters that Francis worked on for Realty Executives and REI while she was practicing with Snell & Wilmer, nor is the current matter substantially related to the prior matters. Therefore,

this record does not support the disqualification of Francis or Williams or their current firm.

¶22 For the foregoing reasons, we dissolve the stay entered by our order of May 17, 2011; and we accept jurisdiction over this special action proceeding and grant relief by vacating the trial court's order disqualifying counsel from representation.<sup>2</sup>

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA K. NORRIS, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA A. OROZCO, Judge

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<sup>2</sup> Because we grant relief for the reasons summarized herein, we need not address Foltz's other arguments that the trial court erred in determining whether the conflict had been waived and in balancing the hardships.