

RENDERED: SEPTEMBER 3, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002565-MR

HARRY L. MATHISON, EXECUTOR OF THE
ESTATE OF EILEEN N. DEEP, DECEASED

APPELLANT

APPEAL FROM HENDERSON CIRCUIT COURT
v. HONORABLE CHARLES W. BOTELER, JR., SPECIAL JUDGE
ACTION NO. 00-CI-00560

NAN D. TERNES

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON AND VANMETER JUDGES.

VANMETER, JUDGE: This appeal is from a decision of the Henderson Circuit Court disqualifying counsel for plaintiff, as counsel would be a necessary witness concerning certain missing records. For the reasons hereafter stated, we reverse and remand.

In 2000, Eileen N. Deep (Deep) filed this action to collect approximately \$55,000 advanced to Nan D. Ternes between March 1997 and July 1999. During the course of this litigation

Deep was represented by the Honorable Harry L. Mathison.¹ Ternes was a co-owner of a women's clothing store, Bohn's, Inc. The other co-owner was Deep's daughter, Michelle Deep (Michelle). Ternes raised a number of defenses to the action: that part of the funds were a gift, that the funds were not personal loans from Deep to Ternes, that the funds were either a loan to or an investment in Bohn's, and/or that Deep purchased clothing against her Bohn's account in an amount equal to or in excess of the funds advanced. The funds apparently were tracked on a ledger that Ternes kept at the business. The record indicates that Michelle had access to the ledger.

The case was initially set for a two-day trial beginning October 18, 2001. However, Ternes's counsel moved for a continuance for reasons of his health. This motion was granted and the trial was rescheduled for March 13, 2002. However, on March 12 the trial court entered an order continuing the trial due to Deep's ill health. The trial was reset for September 25, 2002, but on that date apparently neither Ternes nor her counsel appeared, and the trial was again continued over Deep's objection. A new trial date was set for February 27, 2003.

On January 17, 2003, counsel for Ternes filed a motion to withdraw. During the February 3 hearing of the motion,

¹ Eileen N. Deep died on March 31, 2003, and Mathison, as Executor of her will, was substituted as party plaintiff.

Honorable Joe Evans entered his appearance on Ternes's behalf. On February 14, Ternes filed a motion requesting production of the store's business records and accounts for the years involved in the controversy. At a pretrial hearing, the court continued the trial date in order to give Deep an opportunity to produce the business records requested.

In a subsequent deposition Michelle admitted that she had possessed the store's ledger and other business records, but asserted that the records were no longer available. In a 2001 pretrial brief, Deep's counsel indicated he had possession of at least some of the store's business records. During an October 2003 pretrial hearing, counsel described the store records in his possession as being certain bank records. Counsel for Ternes stated these records were not included in the records made available for him to inspect. The circuit court granted Ternes's motion to disqualify Mathison as Deep's counsel, noting in its order that Ternes's apparent theory justifying disqualification was that the store's records were apparently lost, that both Michelle and Mathison had acknowledged possession of at least some of the records, and that Ternes "should be entitled to question Mr. Mathison concerning the alleged missing records and to ask various questions of Mr. Mathison in his capacity as executor of the estate which counsel was precluded from asking Mrs. Deep as a result of her untimely

death." The court's order cited SCR 3.130, Rule 3.7(a), implicitly finding that Mathison would be a necessary witness. At Mathison's request, the order disqualifying him as counsel was made final and appealable. This appeal followed.

SCR 3.130, Rule 3.7(a) provides that a lawyer "shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness." In *Zurich Insurance Co. v. Knotts*, Ky., 52 S.W.3d 555 (2001), the court discussed this rule in great detail, as well as the need to balance a party's right to be represented by counsel of his or her own choosing versus prejudice to the opposing party's case. The court in *Zurich* held that "disqualification is a drastic measure which courts should be hesitant to impose except when absolutely necessary." *Id.* at 560. The opposing party must prove that (a) counsel's testimony is important to its proof at trial; (b) it is probable that counsel's testimony will conflict with that of other witnesses; and (c) the information obtained from counsel is unattainable from other sources. *Id.*

In the instant case, the circuit court record is devoid of any description of the testimony which Ternes hoped to elicit from Deep's counsel, how that testimony would be important to her proof, how that testimony would conflict with the testimony of any other witness, and whether that information

could be obtained from any other source.² While it is possible that Ternes ultimately might be entitled to a spoliation instruction or some other sanction relating to a failure to comply with discovery, we express no opinion as to that issue. Instead, we simply conclude that the showing required under *Zurich* for the disqualification of counsel was not made.

The order of the Henderson Circuit Court is reversed and remanded for further proceedings consistent herewith.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harry L. Mathison
Henderson, Kentucky

BRIEF FOR APPELLEE:

Joe A. Evans III
Madisonville, Kentucky

² In fact, the main contention against Deep's counsel is that he prepared his pretrial brief using bank statements of the store, and that counsel for Ternes was unable to find those bank statements in the produced records. The record does not indicate that duplicate copies of any bank statements cannot be obtained.