IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0308-MR

DATE 9-15-05 Elizabethtown, KY.

MELINDA LANGLEY, GUARDIAN FOR THE ESTATE OF TIMOTHY E. LANGLEY, A DISABLED PERSON — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-0018-OA
WARREN CIRCUIT COURT NO. 2004-CI-0278

HON. JOHN R. GRISE, JUDGE, WARREN CIRCUIT COURT, DIVISION II
AND
DOUGLAS L. KEENE and BRIAN SCHUETTE (REAL PARTIES IN INTEREST) — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from an order of the Court of Appeals denying a petition for writ of prohibition and mandamus. The original action sought to prohibit the circuit judge from enforcing his order that denied a motion to disqualify an attorney from a pending case. It also asked that the Court of Appeals enter an order directing the disqualification of the attorney.

Stuart represented Langley in a personal injury action. Schuette was retained as co-counsel. On June 6, 2003, Schuette enlisted the services of Keene, a jury trial consultant from Texas, at a rate of $500.00 an hour plus expenses. Those services

were terminated seventeen days later by Stuart. Less than two weeks after that, Keene submitted fee and expense invoices totaling $25,212. On September 29, 2003, the underlying tort case was settled for $2,850,000.

Langley filed a petition for a declaration of rights on the single issue of the reasonableness of the fees claimed by Keene. She named both Schuette, whose services had also been previously terminated, and Keene as respondents. After Schuette declined to withdraw from his representation of Keene in that action, Langley filed a motion to disqualify him.

The circuit judge entered an order denying the motion to disqualify Schuette. He rejected Langley's reliance on SCR 3.130(1.9) and Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997). Langley subsequently filed an original action with the Court of Appeals, seeking to prohibit the circuit judge from enforcing the order and to direct the disqualification of Schuette. The Court of Appeals denied the requested relief. This appeal followed.

Langley argues that the Court of Appeals did not properly apply SCR 3.130(1.9) in allowing Schuette to represent Keene. She claims that it gave undue weight to the "confidentiality" issue and too little weight to the "loyalty" issue in its review and analysis of RPC 1.9 and RPC 1.6. Langley asserts that the Court of Appeals erroneously equated the right of Schuette to defend himself against a lawsuit filed by a former client, with his supposed right to also defend a third party. She cites Lovell, supra, in support of her position that Schuette be disqualified from representing Keene. Langley contends that she has no adequate remedy by appeal and great injustice and irreparable injury will result unless Schuette is disqualified.

Schuette and Keene respond that the circuit judge correctly applied SCR 3.130(1.9) to the facts of this case and, therefore, the Court of Appeals denial of the petition for extraordinary relief should be granted. They claim that pursuant to the rules of professional responsibility, Schuette is ethically permitted to take an adverse position to Langley. Schuette and Keene maintain that there is nothing in the rule, the commentary or any case law interpreting the rule that would suggest Schuette cannot represent himself and Keene. They argue that Schuette's adverse position with respect to Langley is mandated by SCR 3.130(1.15). Schuette and Keene contend that when Stuart and Schuette entered into a binding contractual relationship with Keene, each incurred the ethical obligation under SCR 3.130(1.15)(b) to assure that Keene was paid. They assert that Langley failed to demonstrate to the circuit judge that she was entitled to the disqualification of Schuette and the Court of Appeals correctly denied her petition for extraordinary relief. Schuette and Keene argue that Lovell and the other cases cited by Langley do not support her position.

A writ of prohibition or mandamus is an extraordinary remedy. Bender v. Eaton, 343 S.W.2d 799 (Ky. 1961). Such relief may be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted. Bender, supra. See also Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004).

This is nothing more than a fee dispute involving parties that were at one time aligned on the same side in the underlying litigation. We can perceive no great injustice

and irreparable injury that will result if the petition is not granted. Consequently, we find no abuse of discretion by the Court of Appeals in denying the writ.

The decision of the Court of Appeals is affirmed.

All concur.

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