[Cite as *McCormick v. Maiden*, 2014-Ohio-1896.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Joann S. McCormick, Executrix of the Estate of Earl J. McCormick, deceased

Appellant

v.

Anne C. Maiden, et al.

Appellees

Court of Appeals No. E-12-072

Trial Court No. 2010 CV 0729

DECISION AND JUDGMENT

Decided: May 2, 2014

* * * * *

Brent L. English, for appellant.

Mark Landes, Jeffrey A. Stankunas and Mark H. Troutman, for appellees.

* * * * *

JENSEN, J.

{¶ 1} Appellant, Joann S. McCormick, executrix of the estate of Earl J. McCormick, deceased, appeals from a decision of the Erie County Court of Common Pleas which granted an unopposed motion to disqualify Earl J. McCormick's trial counsel during the pendency of a civil lawsuit against appellees, Eileen P. Bulan, Anne C.

Maiden, and Laurence A. Rush. For the reasons that follow we affirm the decision of the trial court, and remand the case for further proceedings consistent with this decision.

{¶ 2} On September 2, 2010, Earl J. McCormick, through his attorney Brent L. English, filed a complaint against appellees for forfeiture and attorney's fees relating to the destruction of public records in violation of R.C. 149.351.

{¶ 3} In May 2012, appellees moved for summary judgment alleging, in part, that (1) Mr. McCormick failed to make a sufficiently narrow public records request before filing the forfeiture complaint; and (2) Mr. McCormick was not "aggrieved" by the destruction of the requested public records. Mr. McCormick opposed the motion opining that attorney English made a sufficient oral records request on his behalf. The affidavit of former mayor of Vermilion, Jean Anderson, was submitted in support of Mr. McCormick's position. The former mayor averred, in relevant part, as follows:

> 4. In early December 2006, an attorney named Brent L. English came to the City Hall in Vermilion inquiring, on behalf of a client named Earl McCormick, about public records which should have been maintained by the City of Vermilion. Specifically, he requested that the City of Vermilion provide him with all electronically stored communications to and from the Mayor of Vermilion to the Safety Service Director for the City and the Finance Director for the City for the year 2005; a data base maintained by the City's Safety Service Director regarding storm water complaints and/or requests for service made to the City; all

communications between the Safety Service Director and the Mayor of Vermillion during 2005; all communications to and from the finance director of the City of Vermilion to the Safety Service Director and/or Mayor of Vermillion for the year 2005; and, all communications between the City's Safety Service Director and the City Engineer and/or the firm serving as the City Engineer and/or any additional engineering firms for the year 2005.

5. I explained to Mr. English that the electronic records pertaining to his request on behalf of his client, Earl McCormick, were not available and had, in fact, been destroyed by the prior members of the City administration. Moreover, only limited copies of documents responsive to his request existed in paper form.

{¶ 4} On August 3, 2012, appellees moved to disqualify Mr. English from acting as Mr. McCormick's counsel. Appellees asserted that the former mayor's affidavit contained inadmissible hearsay and that the memorandum in opposition to the motion for summary judgment "makes clear that Mr. English is likely to be a necessary witness." Appellees argued that disqualification was necessary because attorney English's testimony would violate Prof.Cond.R. 3.7.

{¶ 5} On August 20, 2012, the trial court denied appellees' motion for summary judgment. The court did not issue a finding on the sufficiency of the alleged public records request, but did find that appellees had not sufficiently proven that there were no

genuine issues of material fact regarding whether Mr. McCormick was an aggrieved party.

{¶ 6} On October 3, 2012, the trial court issued a one page entry stating, in relevant part, "[u]pon motion and for good cause shown, the Court being fully advised, the unopposed Motion to Disqualify Brent English as counsel for Plaintiff is granted." Attorney English received a copy of the entry on October 15, 2012. Three days later, he filed a Civ.R. 52 request for findings of fact and conclusions of law. Appellees filed a memorandum in opposition. The trial court denied the request for findings of fact and conclusions of law. Mr. McCormick appealed[1] setting forth three assignments of error for our review.

> I. The trial court abused its discretion in *sub silentio* finding that Appellant's trial counsel, Brent L. English, was a necessary witness and was thus disqualified from representing him further in accordance with Rule 3.7 of the Ohio Rules of Professional Conduct.
>
> II. The trial court abused its discretion by disqualifying Appellant's trial counsel, Brent L. English, from representing him further in the trial court without conducting an evidentiary hearing or having sufficient evidence in the record to demonstrate that disqualification was justified under Rule 3.7 of the Ohio Rules of Professional Conduct.

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[1] After submission of the case for consideration, appellees filed a notice of suggestion of death of Earl J. McCormick. Thereafter, we granted a motion to substitute JoAnn S. McCormick, the duly appointed executrix of the Estate of Earl McCormick, deceased, as the real party in interest.

III. The trial court erred by denying Appellant's timely request for findings of fact and conclusions of law.

First Assignment of Error

{¶ 7} In her first assignment of error, appellant argues that the trial court abused its discretion when disqualifying attorney English because appellees did not meet their burden of proof that the attorney's testimony was necessary to prove appellant's case.

{¶ 8} Preliminarily, it is important to note that an order disqualifying a civil trial counsel is a final order that is immediately appealable pursuant to R.C. 2505.02. *See Kala v. Aluminum Smelting & Refining Co., Inc.*, 81 Ohio St.3d 1, 688 N.E.2d 258 (1998). We review the trial court's decision on a motion to disqualify for an abuse of discretion. *155 North High Ltd. v. Cincinnati Ins. Co.,* 72 Ohio St.3d 423, 650 N.E.2d 869 (1995), syllabus. An abuse of discretion is more than an error of law or judgment, but rather, it is a finding that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 9} Prof.Cond.R. 3.7(a) provides:

> A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:
>
> (1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) the disqualification of the lawyer would work substantial hardship on the client.

{¶ 10} In *Damron v. CSX Transp., Inc.*, 184 Ohio App.3d 183, 2009-Ohio-3638, 920 N.E.2d 169 (2d Dist.), the Second District Court of Appeals held that in the context of a motion to disqualify counsel, Prof.Cond.R. 3.7(a) "functions to allow the court to exercise its inherent power of disqualification to prevent a potential violation of rules governing attorney conduct." *Id.* at ¶ 39, citing *Mentor Lagoons, Inc. v. Rubin*, 31 Ohio St.3d 256, 510 N.E.2d 379 (1987).

{¶ 11} When a trial court reviews a motion for disqualification under Prof.Cond.R. 3.7, the court must: (1) determine whether the attorney's testimony is admissible and, if so, (2) determine if disqualification is necessary and whether any of the exceptions to Prof.Cond.R. 3.7 are applicable. *Baldonado v. Tackett*, 6th Dist. Wood No. WD-08-079, 2009-Ohio-4411, ¶ 20. The burden of proving disqualification is necessary falls upon the moving party. *Id.* The burden of proving one of the exceptions to Prof.Cond.R. 3.7 applies is upon the attorney seeking to claim the exception. *Id.*

{¶ 12} If the evidence that is to be offered by the attorney that is the subject of the motion "'can be elicited through other means, then the attorney is not a necessary witness.'" *State v. Johnson*, 197 Ohio App.3d 631, 2011-Ohio-6809, 968 N.E.2d 541,

¶ 15 (6th Dist.), quoting *Rock v. Sanislo*, 9th Dist. Medina No. 09CA0031M, 2009-Ohio-6913, ¶ 9.

{¶ 13} In the trial court, appellees asserted that attorney English's testimony would be both admissible and necessary. As to admissibility, appellees implied that English would not be precluded under the rules of evidence from testifying as to the nature and extent of the oral public request he made to then-mayor Jean Anderson. As to necessity, appellees argued that Anderson's affidavit contained inadmissible hearsay under Evid.R. 801(C) and 802. Appellees further argued that the only way appellant could prove the details and extent of the oral public records request was to elicit the testimony of the party who made the request, i.e., attorney English.

{¶ 14} Next, appellees argued that none of the exceptions set forth in Prof.Cond.R. 3.7 were applicable. Specifically, appellees argued that (1) attorney English's testimony relates to a contested issue, i.e., the nature and extent of the oral public records request; (2) English's testimony does not relate to the nature and value of the legal services rendered in the case; and (3) English's disqualification will not work a substantial hardship on appellant because English does not have "distinct legal expertise" in actions under R.C. 149.351. Neither Mr. McCormick nor his attorney filed a response to appellees' motion.

{¶ 15} Although the decision granting appellees' motion for disqualification does not specifically indicate whether the trial court found attorney English's testimony admissible and necessary, nor does it specifically find that none of the exceptions in

Prof.Cond.R. 3.7(a) apply, we surmise from the unopposed motion and the trial court's entry that the trial court did apply the proper procedure in determining whether to disqualify attorney English. Our review of the record indicates that sufficient facts were before the trial court upon which it could grant appellees' unopposed motion to disqualify.

{¶ 16} Under the circumstances of this case, we cannot say the trial court's decision was unreasonable, arbitrary, or unconscionable. The trial court did not abuse its discretion when it granted appellees' unopposed motion to disqualify attorney English. Appellant's first assignment of error is not well-taken.

Second Assignment of Error

{¶ 17} In her second assignment of error, appellant argues the trial court abused its discretion by disqualifying attorney English without conducting an evidentiary hearing or having sufficient evidence in the record to demonstrate that disqualification was justified under Prof.Cond.R. 3.7.

{¶ 18} Appellant cites *Brown v. Spectrum Networks, Inc.*, 180 Ohio App.3d 99, 2008-Ohio-6687, 904 N.E.2d 576 (1st Dist.) for the proposition that an evidentiary hearing—either oral or through paper—is necessary in considering whether a lawyer should be disqualified from representing his client. *Id.* at ¶ 18.

{¶ 19} While we have not adopted the First District's holding that an evidentiary hearing is necessary when considering whether a lawyer may be disqualified, we have found that the trial court must apply the test set forth in Prof.Cond.R. 3.7(a). *See*

Johnson, 197 Ohio App.3d 631, 2011-Ohio-6809, 968 N.E.2d 541, at ¶ 16. In other words, the court must consider whether the subject attorney is a necessary witness and, if so, whether any of the exceptions set forth in Prof.Cond.R. 3.7(a) apply. *Id.* at ¶ 15.

{¶ 20} Courts look to Civ.R. 7(B) "for guidance regarding the sufficiency of the mode of presentation of grounds in support of any motion presented to the court." *East Ohio Gas Co. v. Walker*, 59 Ohio App.2d 216, 223, 394 N.E.2d 348 (8th Dist.1978). Civ.R. 7(B) provides, in part:

> (1) An application to the court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing. A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. * * *.
>
> (2) To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

{¶ 21} Loc.R. 4.01 of the Erie County Court of Common Pleas, General Division, sets forth the rules of submission for civil motions as follows:

> A memorandum citing the authorities relied upon must be filed with all civil motions, including motions for summary judgment raising questions of law or fact for determination. If oral argument is requested, such will be noted on the motion at the time of filing. Failure to make such

> request will be considered a waiver of oral argument. The Court, in its discretion, may grant or deny a request for oral argument.
>
> Opposing counsel will file a memorandum contra or request oral argument within fourteen (14) days of the filing of the motion or it will be assumed that the motion is to be submitted on the moving party's memorandum only. A reply memorandum may be filed within seven (7) days of the filing of the memorandum contra. *Id.*

{¶ 22} While in most instances it would be prudent for a trial court to hold an evidentiary hearing on a motion to disqualify counsel, it was not necessary in this case. The motion to disqualify was filed with a memorandum citing the authorities relied upon by the appellees and stating with particularity the grounds upon which the motion was brought. Mr. McCormick failed to file a memorandum contra and further failed to request oral argument. Appellees' written motion coupled with the documents previously filed in the case contained sufficient facts for the trial court to apply the proper test prior to attorney English's disqualification. The trial court did not err by failing to hold a hearing on the motion to disqualify. Appellant's second assignment of error is not well-taken.

Third Assignment of Error

{¶ 23} In her third assignment of error, appellant argues that the trial court erred when it denied Mr. McCormick's timely request for findings of fact and conclusions of law.

{¶ 24} Civ.R. 52 provides,

> When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.
>
> * * *
>
> Findings of fact and conclusions of law required by this rule and by Rule 41(B)(2) are unnecessary upon all other motions including those pursuant to Rule 12, Rule 55 and Rule 56.

{¶ 25} As mentioned earlier, the trial court filed its judgment entry granting appellees' motion to disqualify counsel on October 3, 2012. The entry was journalized October 4, 2012. There is no indication on the docket how or when the entry was served upon the parties.

{¶ 26} This court has previously held that "[t]he provisions of Civ.R. 52 are mandatory in any situation in which questions of fact are tried by the court without intervention of a jury." *Gaillard v. Gill Constr. Co.*, 6th Dist. Ottawa No. OT-11-029, 2012-Ohio-4992, ¶ 15, quoting *Werden v. Crawford*, 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). Because the disqualification of counsel generally involves the determination

of factual issues, we find that Civ.R. 52 is applicable to decisions granting or denying a motion to disqualify trial counsel. Therefore, we must consider whether appellant filed his request for findings of fact and conclusions of law pursuant to the provisions of Civ.R. 52.

{¶ 27} Civ.R. 52 permits the request for findings of fact and conclusions of law to be filed (a) before the entry of judgment pursuant to Civ.R. 58, or (b) within seven days after notice has been given of the trial court's entry of judgment. In turn, Civ.R. 58(B), provides,

> When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A).

Here, the trial court entered the judgment upon the journal, but failed to note service of the entry disqualifying attorney English in the appearance docket. While this failure does not affect the validity of the entry, it does prohibit us from determining whether

appellant's Civ.R. 52 motion was timely. We assume, therefore, that attorney English's motion for findings of fact and conclusions of law was timely.

{¶ 28} We find that the trial court did err when it failed to issue the requested findings of fact and conclusions of law. However, in this instance, the trial court's error was harmless. Mr. McCormick failed to file a memorandum in opposition to or introduce any evidence contra the underlying motion. Thus, there was no argument or evidence in the record conflicting with appellees' argument that attorney English's testimony was necessary to prove Mr. McCormick's case. Appellant's third assignment of error is not well-taken.

{¶ 29} We remand this matter to the trial court for further proceedings consistent with this decision. The costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. ______________________
JUDGE

Thomas J. Osowik, J. ______________________
JUDGE

James D. Jensen, J. ______________________
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.