Court of Appeals, State of Michigan

ORDER

Markell VanSlembrouck v Andrew Jay Halperin MD

Docket No. 309680

LC No. 2006-074585-NH

Elizabeth L. Gleicher
Presiding Judge

Stephen L. Borrello

Deborah A. Servitto
Judges

Defendants have moved for my disqualification pursuant to MCR 2.003(C)(1)(c) and (d). I DENY the motion for disqualification, and GRANT the motion for immediate consideration.

Defendants predicate their disqualification motion on a request for medical records regarding Markell VanSlembrouck made by my former law partner, Barbara Patek, in 2001. According to the information provided in defendants' motion, Ms. Patek requested Markell VanSlembrouck's Beaumont Hospital records "for the admission[s] of August 1999 and August 2000, only." Defendants concede that neither Ms. Patek nor my former law firm ever represented plaintiffs in the lawsuit now pending before this court, which arises from Markell VanSlembrouck's 1995 birth at Beaumont Hospital. Ms. Patek never undertook representation of Kimberly or Markell VanSlembrouck in any litigation. Rather, defendants' motion substantiates that Ms. Patek decided *against* representing plaintiffs.

I had no involvement in Ms. Patek's request for the VanSlembrouck medical records, nor did I review those records. Before receiving defendants' motion, I was completely unaware of Ms. Patek's consultation with the VanSlembroucks.[1] I never discussed the VanSlembrouck medical records or the VanSlembroucks' legal matter with Ms. Patek and never met or spoke with anyone in the VanSlembrouck family or anyone associated with them. The files of my former law firm were routinely destroyed after seven years. Thus, Ms. Patek's file regarding the VanSlembrouck medical record request was destroyed in 2008 or 2009. Ms. Patek and I ended our professional relationship in May 2005, and I was appointed to this Court in August 2007.

MCR 2.003(C)(1)(c) requires disqualification where "[t]he judge has personal knowledge of disputed evidentiary facts concerning the proceeding." Because I had no involvement in Ms. Patek's review of the VanSlembrouck medical records or her consultation with the VanSlembroucks, I have no personal knowledge of any disputed evidentiary facts in this proceeding. This subsection references "personal knowledge" possessed by "the judge." This plain language is inconsistent with defendant's contention that Ms. Patek's knowledge of the medical records may be imputed to me. Furthermore, even if Ms. Patek's review of the VanSlembrouck records could be imputed to me, defendants have pointed to no "disputed evidentiary facts" that would have been revealed by her review of the 1999 and 2000 medical records.

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[1] I note that I previously participated in this case on a motion panel, without objection by any party. *VanSlembrouck v Halperin*, unpublished order of the Court of Appeals, entered September 21, 2011 (Docket No. 306079).

MCR 2.003(C)(1)(d) and (e) address disqualification arising from a judge's professional relationship with a party. Disqualification is warranted when:

(d) The judge has been consulted or employed as an attorney in the matter in controversy.

(e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

Defendants urge my disqualification under MCR 2.003(C)(1)(d). Notably, defendants' disqualification motion makes no mention of MCR 2.003(C)(1)(e). MCR 2.003(C)(1)(d) applies when "the judge" has served as an attorney "in the matter in controversy." MCR 2.003(C)(1)(e) relates to situations such as this one, where a judge was "a member of a law firm representing a party[.]" Because I never served as an attorney "in the matter in controversy," subsection (C)(1)(d) does not apply. And for the reasons discussed, *infra*, subsection (C)(1)(e) does not warrant my disqualification.

Subsection (d) applies to "[t]he judge," rather than to the judge's former law firm or the judge's former law partners. This subsection requires a personal attorney-client relationship between the judge and a party involved "in the matter in controversy." I had no personal relationship with the VanSlembroucks, did not consult with them, and was never employed by them. Accordingly, subsection (d) does not require my disqualification.

Defendants claim that MCR 2.003(C)(1)(d) permits vicarious attribution to a judge of an attorney-client relationship maintained by a former law firm partner. This argument is unsupportable based on both the plain language of subsection (C)(1)(d) and the existence of subsection (C)(1)(e), which specifically addresses law firm relationships.

Even if MCR 2.003(C)(1)(d) could be reasonably interpreted to require disqualification based on a law partner's relationship with a client, defendants have failed to demonstrate any involvement of myself or Ms. Patek "in the matter in controversy." Other courts considering identical language have defined it to mean "the case that is before the Court as defined by the docket number attached to that case and the pleadings contained therein (the answer and any third party pleadings that may be filed in the case, for example)." *Blue Cross & Blue Shield of Rhode Island v Delta Dental of Rhode Island*, 248 F Supp 2d 39, 46 (D RI, 2003). See also *Patterson v Masem*, 774 F2d 251, 254 n 2 (CA 8, 1985). The matter in controversy involves events that occurred in 1995 and was commenced in 2006, when the Beam & Raymond law firm filed a complaint in the Oakland Circuit Court. Neither Ms. Patek nor I were ever consulted or employed as attorneys in the case pending before this Court.

Defendants' related contention that federal law supports my disqualification because MCR 2.003(C)(1)(d) "echoes" 28 USC 455(b)(2) is incorrect. The federal statute requires that a judge disqualify herself or himself "[w]here in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter[.]" 28 USC 455(b)(2). This language sweeps far more broadly than the analogous Michigan Court Rule. Congress elected to require disqualification based on a law firm relationship involving simply "the matter." Rather than "echo[ing]" § 455(b)(2), our Supreme Court plainly rejected automatic disqualification based on law firm affiliation, and instead opted for the two-year rule embodied in MCR 2.003(C)(1)(e).

Subsection (e) addresses situations such as this one, in which a judge was a member of a law firm that formerly represented a party. Under such circumstances, the Rule imposes a two-year period of mandatory disqualification. I was a member of the Gleicher & Patek law firm in 2000 and 2001, when Ms. Patek apparently consulted with the VanSlembroucks and declined to represent them in any matter. Pursuant to subsection (e), my disqualification is not warranted, as Ms. Patek's attorney-client relationship with the VanSlembroucks terminated approximately 13 years ago. Subsection (e) does not require me to recuse myself in this case, and I decline to do so.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

APR 16 2014
Date

Chief Clerk