

1987

Lane Swainston, Lori Swainston and Zachary Swainston v. Intermountain Health Care Inc. : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Swainston v. Intermountain Health Care Inc.*, No. 870312.00 (Utah Supreme Court, 1987).
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IN THE SUPREME COURT OF THE STATE OF UTAH

870312, 870319

LANE SWAINSTON, LORI :
SWAINSTON, and LANE :
SWAINSTON as guardian ad :
litem for ZACHARY SWAINSTON, :
a minor, :

Plaintiffs- : Case Nos. 870312 & 870319
Respondents, : (Consolidated)

vs.

INTERMOUNTAIN HEALTH CARE,
INC., et al.,

Defendant-
Appellant.

Category 10
(See Note 1 of Text)

RESPONDENTS' BRIEF

APPEAL FROM A RULING OF THE FOURTH DISTRICT COURT
OF UTAH COUNTY, JUDGE CULLEN Y. CHRISTENSEN

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Salt Lake City, UT 84111

ATTORNEYS FOR Defendant-Appellant

FILE

870312
Clerk, Supreme Court Utah

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PARTIES TO THE PROCEEDING BELOW

Plaintiffs: Lane Swainston, Lori Swainston and Lane Swainston as guardian ad litem for Zachary Swainston, a minor. Plaintiffs are represented below by Jackson Howard, for Howard, Lewis & Petersen. Plaintiffs were formerly represented by Charles F. Abbott and Brent Jensen, for Abbott and Jensen.

Defendants: Intermountain Health Care, Inc., dba Utah Valley Hospital (represented below by Dan S. Bushnell and Charles W. Dahlquist, II, for Kirton, McConkie & Bushnell), Steven S. MacArthur, M.D., Steven S. MacArthur, M.D., a professional corporation (represented below by David W. Slagle, for Snow, Christensen & Martineau), and DOES I through X, inclusive. Of the defendants, only Intermountain Health Care, Inc. is a party to this appeal.

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RESPONDENTS' BRIEF

JURISDICTION AND NATURE OF PROCEEDING

This is an appeal from the Order of the District Court denying a motion to disqualify plaintiffs' counsel. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(i) (1987).

¹Appellant has designated this case being in category 14b for priority of oral argument, which category applies to "[a]ppeals from final orders in civil cases not included within other categories." (Amendment to Order Re: Priority of Cases Scheduled for Oral Argument, Utah Supreme Court, April 23, 1987.) Respondents submit, however, that this case should be assigned the priority of category 10, which includes "[a]ppeals from interlocutory orders."

Case No. 870312 is an appeal from an interlocutory order. (R. 606.) Although Case No. 870319 purports to be an appeal from a Rule 54(b) final order, IHC acknowledges that it is questionable whether an order denying a motion to disqualify can be declared final under Rule 54(b). (R. 364-65; Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981).) This case should, therefore, be accorded priority for oral argument in accordance with category 10.

ISSUES PRESENTED

1. Is a party who has had a full and fair opportunity to litigate a disqualification motion in one court thereafter entitled to relitigate an identical motion in another court?

2. Where an attorney has simultaneously represented the interests of adverse parties in separate matters, is his former law firm per se required to withdraw from both cases, notwithstanding the attorney's lack of access to any confidential information and notwithstanding other facts which indicate that disqualification may not be warranted?

STATEMENT OF THE CASE

A. Nature of the Case. At issue in this appeal is a motion to disqualify plaintiffs' counsel for alleged violations of the Utah Code of Professional Responsibility. The issue arises in a medical malpractice action.

B. Course of Proceedings and Disposition Below. Plaintiffs filed their action for medical malpractice against Intermountain Health Care, Inc. ("IHC"), and the defendant treating physician on March 9, 1984. (R. 1-6.) IHC filed a motion to disqualify plaintiffs' attorneys, Howard, Lewis & Petersen ("the Howard firm"), on February 27, 1986. (R. 170.) Supporting and opposing memoranda were filed (R. 94-169, 184-216, 222-37) and an evidentiary hearing scheduled (R. 219), but the parties agreed that a hearing on the motion could be continued without date. (R. 220, 221.) An evidentiary hearing

was subsequently held in connection with an identical motion which had been filed by IHC against the Howard firm in a case then pending before the United States District Court for the District of Utah. After a full hearing on the merits, the court in that case denied IHC's motion. Bodily v. Intermountain Health Care, Inc., 649 F. Supp. 468 (D. Utah 1986). IHC then determined to reactivate its motion in the instant case, and the parties stipulated that the motion could be decided based upon the evidence which had been taken before the federal court. (R. 250-52.) New supporting and opposing memoranda were submitted (R. 255-301, 302-15, 320-31), and oral arguments were entertained (R. 335). The district court, the Honorable Cullen Y. Christensen, thereafter entered its Ruling holding that IHC was collaterally estopped by reason of the prior federal adjudication from relitigating its disqualification motion before the state court. (R. 336-41.)

The district court certified its order as final pursuant to Utah R. Civ. P. 54(b). (R. 341.) IHC perfected both a direct appeal from the final order (R. 364-65) and also petitioned this Court for leave to file an interlocutory appeal. (R. 608-13.) The petition was granted (R. 606), and the appeals are now consolidated.

C. Statement of Facts. Plaintiffs filed their complaint for medical malpractice against IHC and the treating physician on March 9, 1984. Plaintiffs were represented in the filing of that complaint by the Provo law firm of Abbott & Jensen. (R. 1-

6.) Approximately three months after filing the Complaint, however, Abbott & Jensen filed their Notice of Withdrawal (R. 34), and the firm of Howard, Lewis & Petersen entered its appearance on June 25, 1984. (R. 39.)

The parties engaged in substantial discovery, including the taking of 10 depositions. (R. 367-76.) The last discovery activity reflected in the file prior to the motion to disqualify was a deposition which was scheduled to occur on May 10, 1985. (R. 91.)

Approximately one month later, the case of Wilson v. Intermountain Health Care, Inc., Civil No. 69,908 (filed June 14, 1985), was commenced in the Fourth Judicial District Court of Utah County. IHC was represented in Wilson by the Beverly Hills, California, office of Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey ("Finley Kumble"). (R. 111.) On July 11, 1985, Peter C. Rosenbloom, an associate with Finley Kumble, telephoned Richard B. Johnson, who was then a member of the Howard firm, with the purpose of engaging local counsel to assist Finley Kumble in conforming documents with the local rules of the court, making contact with other local counsel to arrange extensions of time to file documents or discovery responses, if necessary, and to perform other functions typical of local counsel. The substantive work in the case was to be performed by Finley Kumble. (R. 385.)

Mr. Johnson testified that he advised Mr. Rosenbloom that the Howard firm engaged in a substantial amount of malpractice

litigation against IHC, and asked whether that would be a problem. Mr. Rosenbloom responded that he did not think the concurrent prosecution of malpractice actions against IHC would be a problem because the Wilson case was for wrongful discharge, but stated that he would clear it with his client and his senior partner and send materials to Mr. Johnson only if the representation had been approved. (R. 172-73, 428-29, 456-57.) Mr. Rosenbloom further represented that he thought that the case would be resolved quickly by a motion to dismiss. (R. 429.) (Mr. Rosenbloom disputed having been advised that the Howard firm represented plaintiffs in malpractice actions against IHC. (R. 385.)) Mr. Rosenbloom further instructed Mr. Johnson to open a file for the case under the name of Peter Rosenbloom, and to send billings directly to him. (R. 429-30.)

Mr. Rosenbloom subsequently sent a packet of materials to Mr. Johnson, from which Mr. Johnson assumed that Mr. Rosenbloom's client, IHC, had agreed to the representation. (R. 173, 205-06, 456-57.) During the next several months, Mr. Johnson prepared appropriate papers to secure the admittance pro hac vice of three members of the Finley Kumble firm (R. 207-13), and reviewed a motion to dismiss and supporting memoranda for compliance with Utah law and local procedure and had the papers retyped in proper form. (R. 186-88.) Mr. Johnson also prepared a notice of deposition, after the date and time for the deposition had been arranged by Finley Kumble and Wilson's attorneys.

(R. 187.) For these services Mr. Rosenbloom was billed \$127.50 in fees plus \$68.32 for costs. (R. 176.)

Mr. Johnson's only communications from Finley Kumble consisted of the initial telephone call, the complaint, a motion to dismiss and supporting memorandum, a reply memorandum, telephone calls regarding scheduling a deposition, various cover letters, and copies of letters from Mr. Rosenbloom to Wilson's attorneys. (R. 173-75.) Mr. Johnson specifically did not receive any literature, pamphlets, books or other information relative to IHC or its practices, policies, or conduct. (R. 176.) No other member of the Howard firm had any involvement with or knowledge of the existence of the case. (R. 182.) Neither Mr. Johnson nor any member of the Howard firm had any direct contact with anyone from IHC regarding that case. Mr. Johnson did not even discuss the merits of the case with Mr. Rosenbloom, but discussed only the mechanics of scheduling depositions and conforming pleadings to local format. (R. 176.)

About mid-November, 1985, Mr. Johnson first became aware that IHC had not consented to the representation. (R. 438.) Mr. Johnson immediately ceased all work on the case, and filed a Notice of Withdrawal on behalf of the Howard firm on January 16, 1986. (R. 439.)²

IHC filed its Motion to Disqualify Plaintiffs' Counsel on February 27, 1986. (R. 170.) No other activity reflected in the

²Mr. Johnson is no longer a member of the Howard firm. He left the firm on April 1, 1986. (R. 426.)

file had occurred in the instant case during the period that Mr. Johnson had appeared as counsel in Wilson. IHC's motion was ultimately denied by the trial court and IHC thereafter perfected this appeal.

SUMMARY OF ARGUMENT

The trial court properly held that IHC was collaterally estopped from relitigating the issues raised by its motion to disqualify plaintiffs' counsel. The same issues were fully and fairly litigated in Bodily v. Intermountain Health Care Corp., 649 F. Supp. 468 (D. Utah 1986), and a decision adverse to IHC had been rendered. Bodily was decided under federal law, but federal law and state law on this issue are substantially identical. Although the decision in Bodily was not final for purposes of appeal, the decision did have that decree of finality necessary to warrant application of collateral estoppel.

If this Court determines that the standards applied in Bodily were not in accord with Utah disqualification law, then respondents acknowledge that the trial court erred in applying collateral estoppel. The result reached, however, was still correct and should be affirmed. This Court's decision in Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985), did not establish a per se requirement of disqualification any time an attorney has simultaneously represented the interests of adverse parties in separate matters. The instant case is distinguishable from Margulies in several respects, including particularly

the very limited nature of the representation, the undisputed lack of any actual access to confidential information or of any attempt to obtain confidential information, and the absence of any prejudice to IHC. Under the unique facts of this case, the extreme sanction of disqualification is not warranted.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY HELD THAT
IHC WAS COLLATERALLY ESTOPPED FROM
RELITIGATING IN THIS CASE THE SAME ISSUE
WHICH WAS DECIDED IN BODILY.

The trial court held that IHC was collaterally estopped from relitigating its motion to disqualify in the instant case, because a motion to disqualify based on the same factual circumstances had been previously litigated and denied in Bodily v. Intermountain Health Care Corp., 649 F. Supp. 468 (D. Utah 1986). IHC challenges that ruling on two primary grounds, (1) that the issues in the two cases were not the same, and (2) that the Bodily decision was not a final judgment. These arguments will be addressed in order.

A. The Issue in the Instant Case is Substantially Identical to the Issue in Bodily.

IHC argues that the issue presented in Bodily was whether disqualification was required under federal law, whereas the issue in the instant case is whether disqualification was required under state law. Although this statement is technically correct, it does not follow that there was a lack of

identity of issues, because state and federal law in Utah are substantially the same with respect to disqualification. Where state and federal law are the same, collateral estoppel may be applied even though the technical labels on the issues are different. See Calhoun v. Franchise Tax Board, 20 Cal. 3d 881, 143 Cal. Rptr. 692, 574 P.2d 763, cert. denied, 439 U.S. 872 (1978).

A careful study of state and federal law as they relate to the instant case reveal that the law applied by Judge Greene in Bodily was substantially the same as that which would have been applied by Judge Christensen in the instant case. Judge Greene stated that this Court's "construction of Utah's version of the Code [of Professional Responsibility] is relevant and persuasive," 649 F. Supp. at 473 n.6, and relied heavily on Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985), in formulating his decision. Margulies in turn relied heavily on federal precedent. Margulies particularly relied upon federal precedent in articulating the standard which IHC claims is controlling in this case. In support for its statement that an attorney should not be able to avoid a violation of Canon 5 "by simply dropping one of the clients at his option when a disqualification motion is filed," this Court cited two federal cases, Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1345 n.4 (9th Cir. 1981), and Fund of Funds, Ltd. v. Arthur Andersen & Co., 435 F. Supp. 84, 95 (S.D. N.Y.), aff'd in part, rev'd in part on other grounds, 567 F.2d 225 (2d Cir. 1977). 696 P.2d at 1203.

IHC claims that with respect to the issue of what sanction to impose, Judge Greene relied wholly on federal cases. (Appellant's Brief at p. 9.) Although it is true that Judge Greene cites predominately federal cases in Section III of his opinion, the cases there cited are not contrary to Utah law. For example, both Bodily and Margulies cite the same case, Redd v. Shell Oil Co., 518 F.2d 311, 314 (10th Cir. 1975), to support the proposition that disqualification is committed to the sound discretion of the trial court. 649 F. Supp. at 477; 696 P.2d at 1199. The remaining federal cases cited in section III of Bodily are cited for the proposition that courts should be hesitant to separate a client from his chosen attorney, and should not do so unless the misconduct threatens to taint the litigation. This proposition is in accord with the statements in Margulies that disqualification motions are frequently used as a litigation tactic, 696 P.2d at 1201, and that disqualification motions present the need to balance the client's right to chose his own attorney against the public's perception of integrity. 696 P.2d at 1204.

More importantly, Judge Greene cites only Margulies in that portion of his opinion which actually analyzes the facts in Bodily to determine whether disqualification was appropriate in that case. 649 F. Supp. at 478 n.21. The trial court properly held that the standards applied in Bodily were the same as those articulated in Margulies, and that Bodily decided the same issue as that presented in the instant case.

B. The Ruling in Bodily Was Sufficiently Final and Firm to Be Accorded Conclusive Effect.

The purpose of the doctrine of collateral estoppel is to "prevent the relitigation of issues which a party has once actually litigated." Wilde v. Mid-Century Insurance Co., 635 P.2d 417, 419 (Utah 1981). IHC asserts, however, that collateral estoppel does not apply, even if a party has fully litigated an issue, unless the litigation has resulted in a final judgment, and further asserts that finality is determined by the same standard as for appealability. In support of this proposition, IHC cites Gresham Park Community Organization v. Howell, 652 F.2d 1227, 1242 (5th Cir. 1981), and 1B Moore's Federal Practice, pp. 744-47 (2nd ed. 1984). Contrary to the assertion by IHC, the court in Gresham only held that the appeal standards of finality apply in a res judicata case. 652 F.2d at 1242.

A growing number of courts hold that the test of finality for collateral estoppel or issue preclusion is different from that used for res judicata or claim preclusion. This rule is expressed in the Restatement (Second) of Judgments § 13 (1980):

The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

Comment g to that section states that the factors which should be considered are whether the prior decision was adequately deliberated and firm, whether the parties were fully heard, and whether the court supported its decision with a reasoned opinion. The Restatement is based on the seminal case of Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962), and its progeny. The court in Lummus stated as follows:

Whether a judgment, not "final" in the sense of 28 U.S.C. § 1291, ought nevertheless be considered "final" in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. "Finality" in the context here relevant may mean little more than the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

297 F.2d at 89.

Judge Greene's decision in Bodily clearly meets these standards. The parties had a full and fair opportunity to be heard, and presented extensive evidence and arguments. The judgment was not tentative, and in fact, Judge Greene stated that it was a "final" decision. Although the decision was not immediately appealable and remains technically subject to revision under Fed. R. Civ. P. 54(b), it is clear that it is sufficiently firm so as to warrant giving that decision preclusive effect.

Judge Christensen properly held that IHC had already had a full and fair opportunity to issue the question of whether the Howard firm should be disqualified, and that they should not be given another opportunity to relitigate that same issue. That decision should be affirmed.

POINT II

DISQUALIFICATION IS NOT APPROPRIATE UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

Point I of this brief establishes that the trial court properly held that IHC was precluded from relitigating in this case the same issues which had been previously litigated in Bodily v. Intermountain Health Care, Inc., 649 F. Supp. 468 (D. Utah 1986). Even if this Court were to determine that collateral estoppel or issue preclusion does not apply in this case, however, this Court should still affirm the decision of the trial court because it is apparent that the court reached a correct result. Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982). Because this case was submitted on stipulated facts, this Court may examine the facts de novo. Sacramento Baseball Club, Inc. v. Great Northern Baseball Co., 748 P.2d 1058, 73 Utah Adv. Rep. 10, 11 (1987) (citing Prince v. W. Empire Life Insurance Co., 19 Utah 2d 174, 177, 428 P.2d 163, 165 (1967)).

Howard, Lewis & Petersen acknowledges that Richard Johnson, who at the time was a member of the Howard firm, entered an appearance in the case of Wilson v. Intermountain Heath Care,

Inc. as local counsel for IHC, and the Howard firm was at the same time counsel of record for plaintiffs in the instant action. IHC asserts that this conduct violated Canon 5 of the Utah Code of Professional Responsibility, and particularly DR 5-105, which provides in part as follows:

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

This rule proscribes multiple representation only in those instances where the lawyer's independent professional judgment will be affected thereby. The decision of whether disqualification is warranted by reason of a technical violation of Canon 5 should, therefore, involve a consideration of the degree to which the lawyer was called upon to exercise independent professional judgment on behalf of the client. Mr. Johnson's involvement in the Wilson case was limited solely to the clerical acts of conforming the documents to the format required by the local rules, and making contact with local attorneys to arrange for needed extensions of time and to schedule discovery.

A similar situation was addressed by the court in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975). The court there stated as follows:

Schreibers' involvement was, at most, limited to brief, informal discussions on a procedural matter or research on a specific point of law. . . . In this respect we do not believe that there is any basis for distinguishing between partners and associates on the basis of title alone--both are members of the bar and are bound by the same Code of Professional Responsibility. [Citation.] But there is reason to differentiate for disqualification purposes between lawyers who became heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions. . . . Under the latter circumstances, the attorney's role cannot be considered "representation" . . . so as to require disqualification. Those cases and the canons on which they are based are intended to protect the confidences of former clients when an attorney has been in a position to learn them. To apply the remedy when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions.

518 F.2d at 756-57 (emphasis added).

It is undisputed that Mr. Johnson and the Howard firm did not gain access to any confidential information³ by reason of

³The issue of receipt of or access to confidential information is generally raised in subsequent representation cases where a violation of Canon 4 is alleged. See cases cited in Margulies, 696 P.2d at 1202. Although the instant case involves concurrent representation and an alleged violation of Canon 5's duty of loyalty, however, the Howard firm's lack of any access to confidential information is still relevant. In Margulies, this Court found the law firm violated its duty of loyalty by affirmatively and vigorously seeking in one case to obtain confidential information from clients which it represented in another case. The determinative issue in a concurrent represen-

their involvement in Wilson. IHC has repeatedly asserted that there was a technical access to confidential information, but the evidence undisputedly demonstrated that Mr. Johnson's only contact was with Peter Rosenbloom, and that he did not relate any substantial information to Mr. Johnson other than that contained in pleadings which ultimately became part of the public record. Neither Mr. Johnson or anyone at the Howard firm had any contact whatsoever with IHC or any of its employees relating to Wilson, and so there was no occasion on which any confidential information could have been conveyed.

IHC claims, however, that Margulies established a per se rule mandating disqualification any time there is a violation of Cannons 5 and 9.⁴ (Appellants' Brief at pp. 8-9.) Margulies should not be read as establishing such a per se rule, and any inadvertent language to that effect in the opinion was not necessary to the holding and must be considered dictum.

Margulies presented a situation to this Court in which a law firm appeared as lead counsel on behalf of the plaintiffs in a medical malpractice action against certain doctors, and also appeared as lead counsel for a limited partnership composed of the same doctors in another action brought to foreclose personal

tation case, therefore, is not whether there was some technical access to confidential information, but rather whether the law firm violated its Canon 5 duties by affirmatively seeking to compel disclosure of such confidential information.

⁴ The discussion herein has centered on Canon 5 rather than on Canon 9. It seems clear that any time there has been an impropriety (e.g., a violation of Canon 5), there will also be an "appearance" of impropriety.

letters of credit signed by the individual doctors. The malpractice action included a claim for punitive damages against the individual doctors, and the law firm had sought in the malpractice action to discover detailed information concerning the personal finances of the individual doctors. The doctors objected, and the court entered an order denying discovery of that information. That very financial information, however, was inherently already available to the law firm by reason of its representation of the limited partnership. 696 P.2d at 1199.

This Court held that disqualification in Margulies was mandated because of the serious appearance of impropriety resulting from the law firm's vigorous efforts to obtain confidential information from the firm's own clients over their objection.

Respondents acknowledge that there is language in Margulies, which language is quoted on pages 8 and 9 of Appellants' Brief, which, taken out of context and without reference to the facts of Margulies, might be read as establishing a per se rule of disqualification. The cases cited in Margulies in support of those statements do not, however, support such a per se rule. In Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1981) and in Fund of Funds, Ltd. v. Arthur Anderson & Co., 435 F. Supp. 84 (S.D. N.Y.), aff'd in part, rev'd in part on other grounds, 567 F.2d 225 (2nd Cir. 1977), the courts denied the disqualification motions based on the unique circumstances presented in each of those cases. Even

the language in Margulies, properly read in context, only establishes that disqualification was mandated under the circumstances of that case.

The instant case is readily distinguishable from Margulies on several important points. First, no one in the Howard firm had any actual contact or communication with IHC. Although the Howard firm acknowledges that it technically represented IHC, it would be more factually correct to state that the Howard firm represented Peter Rosenbloom, who in turn represented IHC. This is reflected both in the manner in which the billing was set up at Mr. Rosenbloom's request, and in the work which was performed.

Second, the Howard firm relied on an attorney to obtain the required consent from IHC. An important factor in this Court's decision in Margulies was that the law firm had relied on a layman to obtain the necessary consents to the dual representations. The Court stated:

Reliance upon a lay person is simply not sufficient to meet the standard of professional conduct. Sundstrom could not be supposed to understand the nuances of the ethical requirements of the situation and the alternatives available to the appellant. It does not even appear that he understood Jones, Waldo's dual representation to be possibly unethical.

969 P.2d at 1204.

In the instant case, in contrast, Mr. Johnson fully disclosed to Mr. Rosenbloom that the Howard firm had represented plaintiffs against IHC in the past and was representing them at

the time, and that the consent of IHC would be necessary for the Howard firm to represent IHC in the Wilson case. Rosenbloom replied that he did not see any problem with that, but that he would obtain the necessary consents. In contrast to a lay person, Rosenbloom as an attorney may be presumed to have understood the potential problems of the dual representation, and Rosenbloom in fact has testified that he was very familiar with those requirements. Under the circumstances, there was nothing inappropriate in Mr. Johnson's reliance on Mr. Rosenbloom to obtain the necessary consent from IHC. Although it appears in retrospect that it would have be preferable for Mr. Johnson to have confirmed that understanding by letter, the failure to do so does not change the fact that reliance on Mr. Rosenbloom to obtain the required consent was reasonable and proper under the circumstances. See Unified Sewerage, 646 F.2d at 1346 n.6.

Third, the work performed by the Howard firm for IHC was more clerical than substantive. As set forth on page 15 above in the quote from the Silver Chrysler case, there is reason to distinguish for purposes of disqualification between an attorney who becomes heavily involved in the facts of the matter and those who perform more clerical tasks. Mr. Johnson did nothing more in the Wilson case than extend a professional courtesy to an out-of-state attorney to arrange for the admission of those out-of-state attorneys and to conform pleadings to local format. Although the Howard firm does not suggest that the practice

should be condoned, neither does it warrant the extreme sanction of disqualification.

Finally, and most importantly, the Howard firm did not seek in any of the cases against IHC to obtain access to any documents which were inherently available to it as counsel in the Wilson case. The factor which appears to have been most important in compelling disqualification in Margulies was that the law firm had sought in the malpractice action to obtain confidential information to which it had access in the foreclosure action. It was this attempt to obtain financial information which led to the filing of the motion to disqualify in the first instance. 596 P.2d at 1199. No such circumstance exists in this case.

Margulies did not establish a per se rule of disqualification. Each case must be judged on its own unique facts and circumstances. The serious improprieties and active attempt to obtain confidential information which were present in Margulies are not present in the instant case. Mr. Johnson was not involved in the substantive aspects of the representation, and his only contact was with an attorney who in turn represented IHC. Subjecting the plaintiffs to the delay and expense inherent in disqualification is not justified by the minor nature of any violation which may have occurred.

CONCLUSION

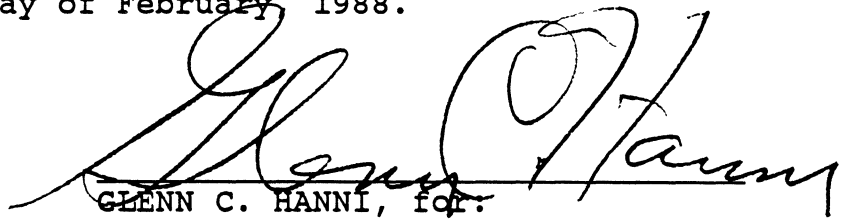
The trial court properly applied collateral estoppel to deny IHC's Motion to Disqualify Plaintiffs' Attorneys, because

state and federal law on the relevant issues were the same, and the decision in Bodily was sufficiently firm to be accorded conclusive effect.

Margulies does not establish a per se rule of disqualification. A review of the facts and circumstances of this case establish that any violation which may have occurred was relatively minor, and does not warrant subjecting the plaintiffs to the extreme sanction of denying them the right to use the counsel of their choice and imposing on them the delay and expense associated with obtaining new counsel.

The ruling of the trial court, denying IHC's Motion to Disqualify Plaintiffs' Attorneys, should be affirmed.

DATED this 25 day of February, 1988.

A large, stylized handwritten signature in black ink, appearing to read "Glenn C. Hanni".

GLENN C. HANNI, for:
STRONG & HANNI
Attorneys for Howard, Lewis &
Petersen (Respondent)

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 25th day of February, 1988.

Dan S. Bushnell, Esq.
Charles W. Dahlquist, Esq.
Merrill F. Nelson, Esq.
KIRTON, McCONKIE & BUSHNELL
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A handwritten signature in dark ink, appearing to read "Dan S. Bushnell", is written over a horizontal line.