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Lane Swainston, Lori Swainston, Lane Swainston, Zachary Swainston v. Intermountain Health Care Inc. : Reply Brief

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs-Respondents, :

vs. :

INTERMOUNTAIN HEALTH CARE, :
INC., et al., :

Defendant-Appellant. :

Case No. 870312
Consolidated with
Case No. 870319
(Category 10 or 14b)

REPLY BRIEF

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's ruling denying IHC's motion to disqualify the Howard firm is based solely on the doctrines of collateral estoppel and full faith and credit; the court did not reach the merits of the motion under the Utah Code of Professional Responsibility. (See Addendum to Appellant's Brief at 4, hereinafter "Add.") Respondents' Brief contains no response to IHC's argument in Point III of Appellant's Brief that the district court's order is insupportable under the doctrine of full faith and credit; therefore, that point is conceded and will not be discussed further. The district court's collateral estoppel ruling must be reversed for lack of identity of issues and the absence of a final judgment. Finally, if this Court addresses IHC's motion on the merits, disqualification is required under Utah law.

Point I: COLLATERAL ESTOPPEL CANNOT BE APPLIED BECAUSE UTAH DISQUALIFICATION LAW IS DISTINCT FROM FEDERAL LAW AND THE FEDERAL COURT ORDER LACKED THE NECESSARY FINALITY.

A. Lack of Identity of Issues

Utah law is clear that for collateral estoppel to apply, the issues in the two actions must be "identical." Wilde v. Mid-Century Ins. Co., 635 P.2d 417, 419 (Utah 1981).

Respondents attempt to soften that standard by arguing that collateral estoppel may apply if the issues are "substantially the same." Respondents concede that the disqualification motion in Bodily v. Intermountain Health Care, Inc., 649 F. Supp. 468 (D. Utah 1986), "was decided under federal law," but argue that

the issue raised here is the same because Utah law and federal law on disqualification are "substantially identical." (Resp. Br. 7-9.) The simplicity of the argument carries a certain appeal, but its premise is false. Careful comparison of Utah law as stated in Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985), to federal law as stated in Bodily demonstrates that the two are distinct.

Respondents argue that Margulies relied heavily on federal case law and note that Margulies cites two federal cases for the point that Canon 5 cannot be avoided by simply dropping one of the two conflicting representations. (Resp. Br. 9.) That analysis of Margulies is superficial and misleading. This Court in Margulies relied on federal law only in formulating the appropriate standard of review and in focusing its analysis on Canon 5 rather than Canon 4. 696 P.2d at 1199-1200, 1202-03. The two federal cases referred to by respondents were cited in Margulies only to support the Court's focus on the simultaneous representation principles of Canon 5 despite counsel's prior voluntary withdrawal from one of the two actions. Neither federal case supports the ultimate holding in Margulies, as respondents later recognize (Resp. Br. 17), because in both the disqualification motion was denied.

The Margulies holding, that the challenged law firm was required to withdraw from both actions, was not based on federal law, but on an original, independent analysis drawn from the language of Canons 5 and 9, prior Utah cases, and this

Court's view of the importance of undivided loyalty and the integrity of the judicial system. 696 P.2d at 1203-05. This Court's conclusion that a violation of Canon 5 "may not be cured or rectified by an optional withdrawal in the case of [counsel's] choice" cites no federal precedent. Id. at 1204. Likewise, the conclusion that "a serious appearance of impropriety" coupled with a violation of Canon 5 "requires" withdrawal from both actions is based on no federal precedent. Id. at 1205. Thus, Utah law as declared in Margulies is neither based on, nor the same as, federal law.

As for federal disqualification law, respondents concede that the Bodily court "cites predominantly federal cases in Section III of his opinion" dealing with the appropriate sanction, but argue that those cases "are not contrary to Utah law." (Resp. Br. 10.) That is not accurate. The federal cases chiefly relied upon by the Bodily court stand for a "restrained approach" that requires disqualification only where the ethical violations are demonstrated to have prejudiced the opposing party or to have tainted the underlying litigation. (Add. 26-27 and n.20.) No such demonstration is required under this Court's statement of Utah disqualification law in Margulies. Moreover, the citation of Margulies in footnote 21 of the Bodily opinion is not offered in support of the Bodily holding, but only to illustrate a possible mitigating factor if Johnson did in fact disclose the conflict to Rosenbloom.

Thus, federal disqualification law is distinct from Utah law regarding the appropriate sanction for violations of Canons 5 and 9. The state district court could find that under Utah law disqualification is required even though the federal district court concluded that under federal law it was not required. Accordingly, the issue of the appropriate sanction for violation of Canons 5 and 9 in this case is not "identical" to the issue decided in Bodily, and collateral estoppel cannot apply.

B. Absence of Final Judgment on the Merits

Respondents concede that a ruling must be final for purposes of res judicata, but argue that finality is not necessary for application of collateral estoppel. (Resp. Br. 11-12.) Utah law does not support such an artificial distinction, and respondents cite none. In fact, Utah law is clear that the same degree of finality is required for collateral estoppel as for res judicata. See Penrod v. Nu Creation Creme, Inc., 669 P.2d 873, 874-75 (Utah 1983); Baxter v. Utah Dept. of Transportation, 705 P.2d 1167, 1168 (Utah 1985); see also Gresham Park Community Organization v. Howell, 652 F.2d 1227, 1242 (5th Cir. 1981) (finality requirement not relaxed for collateral estoppel).

The purpose of the finality requirement is the same for collateral estoppel as for res judicata, which is to prevent conclusive reliance on a tentative ruling that is subject to change. See 1B Moore's Federal Practice ¶¶ 0.409[1] and

O.441[4]; U.R.Civ.P. 54(b). As respondents admit (Resp. Br. 12), the disqualification ruling in Bodily "remains technically subject to revision" if further discovery reveals that the conflicting representation actually prejudiced IHC or would taint future proceedings. Accordingly, the ruling on the motion in this case should not be allowed to rest on the potentially shifting order in Bodily.

In sum, the Bodily ruling may not be accorded collateral estoppel effect in this case. Respondents have made no attempt to refute or distinguish the Utah cases cited at Appellant's Brief pp. 9-10 specifically holding that litigation of a matter in federal court under federal law does not bar subsequent adjudication of the matter in a different case in state court under state law. Therefore, the district court's ruling must be reversed.

Point II: IF THIS COURT REACHES THE MERITS OF THE UNDERLYING MOTION, DISQUALIFICATION OF PLAINTIFFS' COUNSEL IS REQUIRED UNDER UTAH LAW AND THE FACTS OF THIS CASE.

Respondents argue that if this Court reverses the collateral estoppel ruling, it should proceed to address the disqualification motion on the merits. (Resp. Br. 13.) While IHC questions the authority for such a course, it has no objection to a ruling on the merits of the motion should the Court deem it appropriate.

Respondents argue that the Howard firm's violations of Canons 5 and 9 do not require disqualification because Johnson's involvement in Wilson v. Intermountain Health Care, Inc.,

Civil No. 69908 (Fourth Dist., filed June 14, 1985), was limited, and the Howard firm did not acquire or have access to confidential information concerning IHC. (Resp. Br. 14-16.) However, those arguments assume facts contrary to the evidence and miss the essence of Canons 5 and 9 as construed in Margulies.

A. Canon 5

Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client; it does not pertain to preservation of client confidences. To comply with Canon 5, a lawyer is required to

. . . decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C). [DR 5-105(A).]

Conflicting representation is presumed to have an "adverse effect" on a lawyer's professional judgment in behalf of a client. See In re Hansen, 586 P.2d 413 (Utah 1978); Margulies, supra, at 1203 n.4. DR 5-105(C) permits concurrent representation of two adverse clients only if (1) it is obvious that the lawyer is able to represent both clients adequately; and (2) the lawyer obtains consent from both clients "after full disclosure of the possible effect of such representations on the exercise of his independent professional judgment on behalf of each." The burden is on the attorney undertaking the adverse employment to prove compliance with both

requirements. Margulies, supra, at 1203; In re Hansen, supra, at 415.

1. Obviousness

In this case it was not "obvious" that the Howard firm could adequately represent the interests of both clients. Johnson testified that he had a thorough understanding of the prohibition against conflicts of interest. (I Tr. 50-51; see also I Tr. 69-70.) In fact, Johnson had personal experience disqualifying opposing counsel for ethical violations. See Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985); see also II Tr. 42-45. Johnson testified that he immediately recognized an obvious conflict of interest in undertaking to represent IHC in Wilson while suing IHC in this case and other malpractice actions. (I Tr. 49-52.) The Bodily court concluded that it was obvious the Howard firm could not adequately represent the conflicting interests:

The point is that the conflict should have been obvious to anyone in the Howard firm, and in fact the conflict was obvious to Mr. Johnson [Add. 20.]

That conclusion is also justified in this case.

2. Informed Client Consent

Concurrent conflicting representation may be undertaken only after full disclosure to, and consent of, both clients. DR 5-105(C); Margulies, supra, at 1203-04. In this case there is no dispute that Johnson at no time personally contacted the plaintiffs in this case or IHC about a possible conflict. It is also undisputed that Johnson received no consent from either of

the clients. (See I Tr. 77-80 and citations in Appellant's Br. pp. 2-3, Bodily, Add. 21-22.) Johnson testified that he disclosed the conflict to Rosenbloom, IHC's California counsel. However, even if true, that did not relieve the Howard firm of the duty to obtain the requisite consent of both clients after full disclosure, as mandated by Canon 5. Margulies, supra, at 1198-99, 1203-04. A lawyer may not discharge his duty under Canon 5 by disclosing the conflict to the client's other counsel and then claim "constructive disclosure" to the client. I.B.M. v. Levin, 579 F.2d 271, 281-82 (3rd Cir. 1978). Absent disclosure of the conflicting representation to the clients, there could obviously be no informed consent by the clients.

Thus, the conclusion is inescapable that the Howard firm violated Canon 5. (R. 307; Bodily, Add. 23; Margulies, supra, at 1203-04. Whether the Howard firm in fact acquired confidential information during the Wilson representation is immaterial to Canon 5. Even if it were relevant, the Howard firm's access to such information (See Appellant's Br. p.3; Bodily, Add.11) is regarded as equally repugnant under the standards of professional conduct. Margulies viewed no material distinction between actual acquisition and mere access to confidential information. 696 P.2d at 1202. Under Canon 5 analysis, the result is the same because the focus is on the exercise of independent professional judgment, not on disclosure of client confidences. Here, the conflicting representations

clearly divided the Howard firm's loyalty and diminished its independent professional judgment on behalf of IHC.

B. Canon 9

Canon 9 requires a lawyer to avoid even the appearance of professional impropriety. As defined in Margulies:

The basis of this tenet is that society's perception of the integrity of our legal system may be as important as the reality, since it is the perception that engenders public confidence that justice will be dispensed. Litigants are highly unlikely to be able to maintain this confidence if their attorney in one matter is allowed simultaneously to sue them in another. [696 P.2d at 1204, emphasis added.]

Canon 9 requires a lawyer to be "unreservedly identified with his client's interests." In re Hansen, supra, 586 P.2d at 416. The Howard firm's concurrent conflicting representation certainly creates an appearance of professional impropriety, as respondents concede. (Resp. Br. 16 n.4.) See Margulies, supra, at 1204-05; see also Gillette v. Newhouse Realty Co., 75 Utah 13, 282 P. 776, 779-80 (1929) (discussion of public policy in prohibiting conflicts of interest and appearances of impropriety); In re Roberts, 46 B.R. 815, 833-36, 849 (Bankr. D. Utah 1985) (discussing Canons under Utah law).

In view of the Howard firm's violations of Canons 5 and 9, it is evident under Margulies that disqualification is required. See Margulies, supra, at 1204-05, and discussion in Appellant's Br. pp. 5-6.

CONCLUSION

Based on the foregoing, the district court's ruling should be reversed and the case should be remanded for a ruling on the merits of the disqualification motion, or this Court should order disqualification prior to remand.

Dated this 28th day of April, 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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