

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-0268

POLK COUNTY NO. EQCE085101

LIQUOR BIKE, LLC,

Plaintiff-Appellant,

vs.

IOWA DISTRICT COURT IN AND FOR POLK COUNTY,

Defendant,

VIVONE, LLC,

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY, IOWA
HONORABLE JEANIE VAUDT, DISTRICT COURT JUDGE

PLAINTIFF-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED IN ORDERING THE DISQUALIFICATION OF COUNSEL FOR DEFENDANT.

Bottoms v. Stapleton, 706 N.W.2d 411 (Iowa 2005)

Iowa R. Prof'l. Conduct 32:1.7

Iowa R. Prof'l Conduct 32:1.13

II. THE DISTRICT COURT ERRED IN ORDERING THAT BILLY MALLORY AND BRICK GENTRY, P.C. BE PROHIBITED FROM DISCUSSING THIS DISPUTE WITH THEIR CLIENT OR REPLACEMENT COUNSEL.

16 Iowa Prac. Series, *Lawyer & Judicial Ethics* § 5:7(f)

ROUTING STATEMENT

The Supreme Court should retain this case as it presents a substantial issue of first impression, a fundamental and urgent issue of broad public importance requiring prompt or ultimate determination by the supreme court, and a substantial question of enunciating legal principles. *See* Iowa R. App. P. 6.1101(2)(c), (d), (f) (2020). Specifically, this case gives the court an opportunity to set forth and analyze the standard to govern conflicts of interest for closely-held organizational clients. This issue is a matter of first impression and should have a significant impact on lawyers and law firms representing corporate clients and their ownership.

STATEMENT OF THE CASE

A. Nature of the Case

This case arises from a District Court Order granting a motion to disqualify counsel due to an alleged concurrent conflict of interest.

B. Course of Proceedings and Disposition

The underlying case is a boundary dispute between two neighboring property owners. Vivone, LLC (hereinafter “Vivone”) filed a Petition for Injunction on September 30, 2019, claiming Liquor Bike, LLC (hereinafter “Liquor Bike”) erected a concrete retaining wall, a trash enclosure, and a wood fence that encroaches upon its property and that the Court should order the encroachments removed and the

property restored to its original condition at Liquor Bike's cost and expense. APP006-APP007.

Liquor Bike accepted service, and filed an Answer, Affirmative Defenses, and Counterclaims on October 22, 2019. APP009-APP010. Liquor Bike denied Vivone's claims and asserted counterclaims for quiet title based on boundary by acquiescence, estoppel, trespass, and adverse possession. APP010-APP017.

On November 15, 2019, Vivone filed a Motion to Disqualify Counsel for Liquor Bike. APP019-APP021. The basis of the motion to disqualify was that Vivone is managed by the entity, JSV Community Properties, Inc. (hereinafter "JSV"), of which, Dr. Eugene Cherny owns 100% of the voting stock. *Id.* Dr. Cherny is also the sole owner of an entity called Heartland Plastic & Reconstructive Surgery, P.C. (hereinafter "Heartland"). *Id.* Heartland was currently being represented by Attorney Doug Fulton with regard to an application for an Iowa Certificate of Need for Ambulatory Surgery Center. *Id.* Mr. Fulton and Mr. Mallory, counsel for Liquor Bike, are both partners at Brick Gentry, P.C. *Id.*

Liquor Bike resisted the motion on November 22, 2019 arguing no conflict existed and that the motion to disqualify was filed for strategic purposes. APP023-APP029.

The motion came to a hearing on January 10, 2020. APP032. Following the hearing, the District Court entered an Order disqualifying attorney Billy Mallory and

Brick Gentry, P.C. from further representation of Liquor Bike in this matter. APP204-APP208. The District Court further ordered that Billy Mallory and Brick Gentry, P.C. be “prohibited from discussing this dispute with [Liquor Bike] or [Liquor Bike’s] new counsel.” *Id.*

Liquor Bike filed a timely Petition for Writ of Certiorari from this Order. APP209. The Supreme Court granted the petition for writ of certiorari and stayed the underlying district court proceedings on March 11, 2020.

STATEMENT OF FACTS

To understand the conflict alleged, one must first properly identify the parties and entities involved.

Vivone was formed in September 2014, and originally had two members, Dr. Cherny and Brenda L. Rowe. APP082. Dr. Cherny owned 51% of the membership interests and Ms. Rowe owned 49% of the membership interests. *Id.* In March 2017, Dr. Cherny transferred his ownership interest in Vivone to a new entity, JSV. APP117. JSV is a real estate holding company for Dr. Cherny’s real estate investments. APP046-APP047. JSV has four owners: Dr. Cherny and his three children. APP063-APP064, APP118. Dr. Cherny owns 55% of JSV and 100% of the voting stock, while each of his three children own 15% of JSV and non-voting stock. APP118.

Heartland was formed in 1990. APP134. It is the professional corporation through which Dr. Cherny operates his medical practice, and he is the sole owner. APP041.

Heartland is not a parent company to Vivone or JSV. APP064. To the contrary, recognizing their distinct corporate statuses, Heartland leases the building out of which it operates from JSV. APP068-APP069, APP150. Furthermore, Vivone and JSV do not and could not as a matter of law have any ownership interest or affiliation with Heartland. APP064; *see also* Iowa Code § 496C.11(1) (“No shareholder or other person shall make any voluntary transfer of any shares in a professional corporation to any person, except to the professional corporation or to an individual who is licensed to practice in this state a professional which the corporation is authorized to practice.”).

When it comes to real estate matters, Vivone and JSV have always and only been represented by David Wetsch, who is still counsel for Vivone in this matter. APP069. As Dr. Cherny testified:

Q. But in the state of Iowa, if it has to do with real estate, nobody else represents you but David Wetsch; correct?

A. Yes.

Q. And he is the one who formed all your real estate entities; correct?

A. Yes.

Q. And he's the one who's represented those real estate entities from day one; correct?

A. Yes.

Id. Vivone, JSV, and Dr. Cherny individually have never retained or used Brick Gentry, P.C. before as counsel. APP073. This includes using completely separate counsel for a divorce proceeding. APP135; *see also In re Marriage of Cherny*, No. 17-0245, 2018 WL 2727712 (June 6, 2018).

On April 4, 2019, Heartland retained Brick Gentry, P.C. “with regard to an application for an Iowa Certificate of Need for an Ambulatory Surgery Center.” APP119-APP121. The engagement letter acknowledged that attorney Doug Fulton would be the primary attorney working on the matter, and was executed by Dr. Cherny on behalf of Heartland. APP119. Attorney Fulton assisted Heartland in submitting an Application for Certificate of Need in December 2019, which include information on the funding and expenditures for the project. APP146-APP203. This application and all related materials were public record. *Id.*; APP064-APP065.

In July 2019, counsel for Vivone, David Wetsch, began communicating with counsel for Liquor Bike, Billy Mallory of Brick Gentry, P.C., regarding the alleged encroachment at issue in this case. APP122. It was only after Mr. Mallory and Mr. Wetsch were unable to negotiate a prelitigation resolution that this matter was filed. APP124. At that time, having known of Mr. Mallory’s representation of Liquor Bike for months, Vivone requested that Mr. Mallory accept service, which was agreed to and completed on October 1, 2019. APP125-APP128. Thereafter, Mr. Mallory filed

an Answer, Affirmative Defenses, and Counterclaim on behalf of Liquor Bike on October 22, 2019. APP010.

The parties then engaged in discussions on discovery and trial scheduling resulting in a Trial Scheduling and Discovery Plan being filed on November 4, 2019. APP129-APP133. A trial scheduling conference with the court has not occurred to date, so a trial date has not been set at this time.

Only then, nearly two months after the filing of the Petition and five months after this dispute arose, did the allegation of conflict of interest arise. The obvious reason for the assertion of conflict at this late date is that Vivone believes Mr. Mallory will vigorously pursue Liquor Bike's defense and claims in this matter. Therefore, it seeks to deprive Liquor Bike of its litigator of choice, not as a result of any actual belief in a conflict of interest.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ORDERING THE DISQUALIFICATION OF COUNSEL FOR DEFENDANT.

A. Preservation of Error

The disqualification motion was fully briefed, subject to a contested evidentiary hearing, and ruled upon by the District Court. APP204. Liquor Bike then filed a timely Petition for Writ of Certiorari, which was granted. APP209. Therefore, the issue is preserved for appellate review.

B. Standard of Review

A ruling on an attorney disqualification motion is reviewed for abuse of discretion. *Doe v. Perry Cmty. Sch. Dist.*, 650 N.W.2d 594, 597 (Iowa 2002). An abuse of discretion exists when the court’s ruling is based on clearly untenable grounds, such as reliance upon an improper legal standard or error in the application of the law. *Bottoms v. Stapleton*, 706 N.W.2d 411, 415 (Iowa 2005). “[T]he trial court’s factual findings in disqualification cases will not be disturbed on appeal if they are supported by substantial evidence.” *Killian v. Iowa Dist. Ct.*, 452 N.W.2d 426, 428-29 (Iowa 1990). “The party moving for an attorney’s disqualification bear the burden of proving the facts necessary to establish the disqualification is proper.” *NuStar Farms, LLC v. Zylstra*, 880 N.W.2d 478, 482 (Iowa 2016).

C. Discussion.

The writ is necessary because the District Court’s disqualification order was entered without substantial evidentiary support and was the result of an erroneously application of law.

The right of a party to choose his or her own attorney is important, but it must be balanced against the need to maintain “the highest ethical standards” that will preserve the public’s trust in the bar and in the integrity of the court system. *Id.* at 430. In balancing these interests, a court must also be vigilant to thwart any misuse of a motion to disqualify for strategic reasons. *See id.*; accord 1 Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* § 10.2, at 10–10 (3d ed. 2004 Supp.) (stating “policymaking with respect to conflicts of interest regulation must take account of the opportunities for manipulation and tactical infighting”).

Bottoms, 706 N.W.2d 411, 415 (Iowa 2005). Because of the potential for abuse by opposing counsel, disqualification motions are subjected to “particularly strict judicial scrutiny.” *Harker v. Commissioner*, 82 F.3d 806, 808 (8th Cir. 1996).

The “starting point in evaluating a claim that an attorney should be disqualified from representing a party is the ethical principles outlined in the Iowa Rules of Professional Conduct.” *Bottoms*, 706 N.W.2d at 415 (citing *Killian*, 452 N.W.2d at 429). In this matter, because Brick Gentry was representing both Heartland and Liquor Bike, the applicable rule involves concurrent conflicts of interest and provides in relevant part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

See Iowa R. Prof’l. Conduct 32:1.7.

Ignoring all corporate structures, the District Court determined that a disqualifying conflict existed because Dr. Cherny was a current client of Brick Gentry and a current adversary of a current client of Brick Gentry, Liquor Bike. APP205. Therefore, using Comment 6 to Rule 32:1.7, the District Court found Brick

Gentry's representation of Liquor Bike was "directly adverse" to Dr. Cherny and could not be allowed. *Id.* The District Court's analysis is factually and legally flawed.

First, factually, Brick Gentry's client was Heartland, not Dr. Cherny individually. The engagement letter from Brick Gentry clearly states the agreement is to "represent Heartland Plastic & Reconstructive Surgery, P.C. with regard to an application for an Iowa Certificate of Need for an Ambulatory Surgery Center." *See* APP119. The engagement letter was addressed to and signed by Dr. Cherny as the corporate representative of Heartland. *Id.* "A lawyer employed or retained by an organization represents the organization through its duly authorized constituents." *See* Iowa R. Prof'l Conduct 32:1.13(a). Rule 32:1.13 sets forth an "entity concept" that rests of two notions:

[1] that an organization of persons, often in corporate form, is a separate jural entity having distinct rights and duties and capable, among other things, of entering into contracts and either bringing suit or being sued in its own name[, and 2] under the law of agency, a lawyer is an agent of the employing organization and it is the organization, as principal, to which the lawyer is professionally responsible, not its directors, officers, owners or other agents.

See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 91-361. Under this entity concept, Brick Gentry represents Heartland through Dr. Cherny, but that alone does not make Dr. Cherny Brick Gentry's client. *Id.*; *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-390 ("Rule 1.13(e) contemplates that a

client-lawyer relationship between a constituent, including a stockholder, and corporate counsel, must be specifically formed, rather than arising automatically by virtue of the client-lawyer relationship with the organization.”). As such, Brick Gentry has no duty of loyalty to Dr. Cherny as a constituent, and if Dr. Cherny’s and Heartland’s interests ever became adverse, Brick Gentry’s obligation would be to Heartland. *See* Iowa R. Prof’l Conduct 32:1.13(f), cmt. 10.

It is also important to note that Dr. Cherny is not even the Plaintiff in this case, Vivone is. Like Heartland, Vivone is a separate and distinct legal entity. Unlike Heartland, Vivone is not solely owned by Dr. Cherny, but instead has a minority shareholder. *See* APP082, APP115, APP117.

Dr. Cherny, Vivone, JSV, and Heartland are simply not one and the same or interchangeable. The corporations are separate and distinct entities, and contrary to the district court’s ruling, must be treated as such for purposes of the conflict of interest analysis. *See* Iowa R. Prof’l Conduct 32:1.13(a). To treat all entities in this matter as the same simply because “[t]he roads for all organizations related to Plaintiff in this matter lead back to Dr. Cherny,” APP205, completely eviscerates the “entity concept” embraced by Rule 32:1.13. Further, there is no “closely-held corporation exception.” As another court has aptly held:

An individual . . . may consider himself “interwined” with his business. However, when a business adopts a corporate structure, it isolates liabilities among separate entities. By creating a separate legal entity with isolated liabilities, a corporation (or, in this case, a limited liability

company) becomes a stand-alone entity to which the lawyer owes a duty of loyalty and independent judgment. This principle is clearly laid out in Maine Rule of Professional Conduct 1.13. *See* M.R.P.C. 1.13 Reporter's Note 2009 ("Lawyers who represent organizations must be mindful that their duties as lawyers are owed to the organization itself, notwithstanding the lawyer's interactions with the client through its individual agents."). Defendant apparently advocates for a "closely-held-corporation exception" to this principle. In the Court's view, such an exception would allow closely held corporations to use the corporate form as both a shield and a sword. In so doing, the exception would create confusion for lawyers who develop relationships with closely held companies as well as for the members of those companies.

See Concordia Partners, LLC v. Ward, No. 2:12-CV-138, 2012 WL 3229300, at *6 (D. Me. Aug. 6, 2012).

When appropriately treated as separate and distinct entities, the "directly adverse" conflicts of interest analysis under Rule 32:1.7(a)(1) and comment 6 simply does not apply. As Dr. Cherny recognized, Heartland has no interest in the border dispute or any other interest that would be directly adverse to Liquor Bike. APP052.

Instead the applicable legal authority is comment 34 to Rule 32:1.7, which provides:

A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* rule 32:1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

See Iowa R. Civ. P. 32:1.7 cmt. 34.

The record presented does not show any circumstances to support a finding that Dr. Cherny was an individual client of Brick Gentry. There was no evidence suggesting that Dr. Cherny ever personally sought or received legal advice from Brick Gentry or that he sought or received legal advice from Brick Gentry in any other capacity except as an officer and owner of Heartland. There was also no testimony or evidence presented showing an understanding between Heartland and Brick Gentry that Brick Gentry would avoid representation adverse to Heartland's constituents, i.e. Dr. Cherny individually. Finally, there was no evidence presented that there is "a significant risk" that the obligations to or representation of Heartland "will be materially limited by the lawyer's responsibilities" to Liquor Bike. *See* Iowa R. Prof'l. Conduct 32:1.7(a)(2). While there were references to "intimate details of [Dr. Cherny's] professional and financial life" being given to Brick Gentry, APP043, Dr. Cherny acknowledged that the information provided were public records. APP064-APP065; *see also* General Instructions for Certificate of Need Application Submission 2019 ¶ 17, Iowa Department of Public Health, *available at* <https://idph.iowa.gov/policy-and-workforce-services/cert-of-need> ("The application, other materials in the project file and any evidence offered at hearing are considered public record and are available for public inspection, copying, and disclosure under Iowa Open Records Law – Iowa Code Chapter 22."). Dr. Cherny

did not assert or argue that he provided any additional information to Brick Gentry beyond the publicly available information or that any information was provided outside the needed scope of the application for certificate of need. APP064-APP065. Further, there was no evidence or testimony showing how this financial information would in any way be relevant to the boundary dispute at issue in this case. Accordingly, Vivone has failed to meet its burden on proof. *Bottoms*, 706 N.W.2d at 418 (holding the moving party bears the burden of proving facts that established the necessary factual prerequisite for disqualification).

Furthermore, even if the court were to find a conflict of interest, Vivone has failed to show any harm or prejudice. When a party seeks to disqualify an opponent's counsel, that party "must demonstrate a concrete harm or prejudice that has resulted to the party or to the fairness or integrity of the proceeding." *See* 16 Iowa Prac. Series, *Lawyer & Judicial Ethics* § 5:7(f). In this matter, no evidence was presented showing any concrete harm or prejudice to Vivone by Brick Gentry's representation of Heartland and Liquor Bike. The only potential evidence was the allegation that Brick Gentry was given "intimate" financial information of Dr. Cherny for the application submitted by Heartland. APP043. However, as stated above, this financial information is public record, and there was absolutely no allegation that any of this financial information would be relevant in the present border dispute.

“A party’s right to select its own counsel is an important public right and a vital freedom that should be preserved; the extreme measure of disqualifying a party’s counsel should be imposed only when absolutely necessary.” *Machecca Transp. Co. v. Philadelphia Idem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006). Because there is no factual or legal support to establish a conflict of interest or any other circumstance that would warrant or necessitate disqualification, the District Court erred in granting the Motion to Disqualify Counsel. Accordingly, the writ should be sustained, and this matter should be remanded allowing Liquor Bike’s chosen counsel to remain as counsel in the case.

II. THE DISTRICT COURT ERRED IN ORDERING THAT BILLY MALLORY AND BRICK GENTRY, P.C. BE PROHIBITED FROM DISCUSSING THIS DISPUTE WITH THEIR CLIENT OR REPLACEMENT COUNSEL.

Even if a conflict of interest is found and the disqualification of Billy Mallory and Brick Gentry is upheld, the Supreme Court should strike the portion of the district court order prohibiting Billy Mallory and all other attorneys at Brick Gentry from discussing this dispute with Liquor Bike or Liquor Bike’s replacement counsel. While Iowa courts have not spoken to this question, former Chief Justice Cady authored a treatise finding the growing trend to “permit exchange of work product and allow an explanatory briefing by the departing lawyers regarding their work to replacement counsel.” See 16 Iowa Prac. Series, *Lawyer & Judicial Ethics* § 5:7(f). Specifically, he observed:

The courts have recognized that where an attorney has been disqualified, that attorney's present client in the pending suit will suffer the loss of experienced counsel who generally has expended considerable time and efforts in preparing and litigating the client's case. To soften the harsh impact of such a loss, new or substitute counsel has been permitted access to the work product of disqualified counsel and limited consultation with disqualified counsel for the purpose of explanation of such work product.

Id. (quoting *Black v. Missouri*, 492 F. Sup. 848, 871 (W.D. Mo. 1980)); *see also Jenkins by Agyei v. Missouri*, 931 F.2d 470, 484 (8th Cir. 1991). Thus, Billy Mallory should be permitted to turn over Liquor Bike's file to new counsel and consult with new counsel for the limited purposes of explaining the litigation, its history, and any work product.

IV. CONCLUSION

For the reasons set forth above, the Court should find that the District Court erred in ordering the disqualification of Billy Mallory and Brick Gentry, P.C. in the present case. This Court should sustain the writ of certiorari, and remand this matter with direction that allows Liquor Bike's chosen counsel to remain as counsel of record in the case.

STATEMENT REQUESTING ORAL ARGUMENT

Defendant-Appellant hereby respectfully requests that this case be submitted with oral argument.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that I have filed the attached Defendant-Appellant’s Brief with the Clerk of the Iowa Supreme Court through the electronic document management system on the 9th day of June 2020.

/s/ Billy J. Mallory
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June 2020, I served the attached Defendant-Appellant’s Brief through the electronic document management system upon the following attorneys:

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this Brief contains 3,583 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because the Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the 2016 edition of Microsoft Word in 14-point font plain style.

/s/ Billy J. Mallory
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CERTIFICATE OF ATTORNEY’S COSTS

I hereby certify that the cost of printing the foregoing Defendant-Appellant’s Brief was \$0.00 (exclusive of sales tax, postage and delivery).

/s/ Billy J. Mallory
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