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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-909

Filed: 6 August 2019

Lincoln County, No. 17 CVS 661

EVERBANK COMMERCIAL FINANCE, INC., Plaintiff,

v.

THE HUNOVAL LAW FIRM, PLLC, MATHIAS H. HUNOVAL, and CHRISTINA R. HUNOVAL, Defendants/Third-Party Plaintiffs,

v.

CSI FINANCE LEASING, INC., Third-Party Defendant.

Appeal by Defendants/Third-Party Plaintiffs from order entered 24 April 2018 by Judge Karen Eady-Williams in Lincoln County Superior Court. Heard in the Court of Appeals 14 March 2019.

Gregory P. Chocklett for plaintiff-appellee.

Christina R. Hunoval and David C. Cordes for defendants-appellants.

MURPHY, Judge.

A trial court does not abuse its discretion in disqualifying a lawyer from acting as trial counsel when its determination that the lawyer is likely to be a necessary

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witness, and that no exceptions apply, is supported by reason. However, the trial court abuses its discretion in extending the scope of the disqualification to legal representation outside of trial without any supporting evidence or arguments before the trial court. Accordingly, we affirm in part and reverse in part.

BACKGROUND

The Hunoval Law Firm, PLLC (“the Hunoval Law Firm”) was a law firm consisting of two attorneys – Mathias H. Hunoval (“Mr. Hunoval”) and Christina R. Hunoval (“Mrs. Hunoval”).¹ In August 2015, the Hunoval Law Firm leased electronic and computer equipment from CSI Leasing, Inc. (“CSI”) for use in the Firm. Both Mr. Hunoval and Mrs. Hunoval personally guaranteed the lease. CSI subsequently assigned its interest in the lease to Everbank Commercial Finance, Inc. (“Everbank”) in January 2016.

The Hunoval Law Firm failed to make payments due to Everbank, and Everbank sought payment of the outstanding balance due under the lease through a breach of contract action filed against the Hunoval Law Firm and Mr. Hunoval and Mrs. Hunoval, individually (collectively, “the Defendants”). Mrs. Hunoval represented all Defendants. In its answer, Defendants challenged Everbank’s

¹ The Hunoval Law Firm has since been dissolved.

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standing as a valid assignee and asserted several affirmative defenses and counterclaims.²

Everbank subsequently filed a motion to disqualify Mrs. Hunoval as counsel for Mr. Hunoval and the Hunoval Law Firm. In its motion, Everbank claimed Mrs. Hunoval should be disqualified from acting as counsel under Rule 3.7 of the North Carolina Rules of Professional Conduct because she “is a necessary witness to this case, and she has none of the exceptions to Rule 3.7(a) . . . that would allow her to testify and serve as an advocate for all parties.” In response to Everbank’s motion, Mrs. Hunoval argued that she was not a necessary witness because her testimony was obtainable by other means. In support of her argument, she submitted an affidavit by Mr. Hunoval, in which he claimed that “[t]estimony as to any material facts in dispute could be provided by [him] as witness during the trial of this case” and Mrs. Hunoval “does not have any different or additional knowledge of any facts related to the case.”

The trial court entered an order disqualifying Mrs. Hunoval as counsel for Mr. Hunoval and the Hunoval Law Firm, concluding:

After reviewing the file, case law, and hearing arguments of counsel, the [c]ourt has determined that [Mrs.] Hunoval is likely to be a necessary witness in this action to testify about disputed facts and is disqualified to serve as counsel for co-defendants.

² Defendants also filed a Third-Party Complaint against CSI, which was later settled out of court.

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The Hunoval Law Firm and Mr. Hunoval timely appealed this order.

ANALYSIS

We note at the outset that the trial court's order disqualifying Mrs. Hunoval as counsel is an interlocutory order, from which there is generally no right of immediate appeal. *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013). However, an appeal from an interlocutory order may be taken if the appellant "is able to show the existence of a substantial right that would be lost absent an immediate appeal." *Harris & Hilton, P.A. v. Rasette*, 252 N.C. App. 280, 282, 798 S.E.2d 154, 156 (2017). "This Court has held that an order disqualifying counsel is immediately appealable because it affects a substantial right." *Id.* at 282-83, 798 S.E.2d at 157 (citation and internal quotation marks omitted). Accordingly, the trial court's order is appealable, and we have jurisdiction over this interlocutory appeal.

Rule 3.7 of the North Carolina Rules of Professional Conduct provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

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N.C. Rev. R. Prof. Conduct 3.7(a). “Rule 3.7 prohibits a lawyer from simultaneously serving in these dual roles because ‘combining the role of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.’” *Rassette*, 252 N.C. App. at 283, 798 S.E.2d at 157 (quoting N.C. Rev. R. Prof. Conduct 3.7, cmt. 1) (alterations omitted).

Our standard of review for disqualification of counsel is well established:

Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge’s ruling on a motion to disqualify will not be disturbed on appeal. Under the abuse of discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.

Rassette, 252 N.C. App. at 283, 798 S.E.2d at 157 (2017) (citations and internal quotation marks omitted).

A. Necessary Witness

A witness’s testimony is necessary within the meaning of Rule 3.7(a) “when it is relevant, material, and unobtainable by other means.” *State v. Smith*, 230 N.C. App. 387, 391, 749 S.E.2d 507, 510 (2013) (citation and internal quotation marks omitted); *see also* N.C. St. Bar, 2011 Formal Ethics Opinion 1. Defendants do not contest the relevancy or materiality of Mrs. Hunoval’s testimony. Rather, they argue the trial court abused its discretion in concluding that she was “likely to be a

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necessary witness in this action” because there was insufficient evidence that her testimony was unobtainable by other means.

The underlying action for which Mrs. Hunoval attempts to serve as counsel was a dispute over a lease agreement for computer and electronic equipment. Mrs. Hunoval was one of the two individuals guaranteeing the lease agreement, with the other individual being Mr. Hunoval. Mrs. Hunoval argued, and Mr. Hunoval submitted in his affidavit, that her testimony was not necessary because it was obtainable by other means through Mr. Hunoval as the other individual guaranteeing the lease agreement. However, in its motion to disqualify, Everbank argued it intended to call Mrs. Hunoval as a witness and that her testimony was necessary because “[i]t appears that [Mrs.] Hunoval’s testimony will contradict the testimony of her co-defendant, [Mr.] Hunoval” Everbank expanded upon this contention at the hearing before the trial court, arguing, “She’s denied that they breached the contract. Mathias Hunoval, her husband, sent an email to my client acknowledging the debt to both Everbank and CSI. So there’s a direct conflict right there.” Given this, the trial court’s determination that Mrs. Hunoval’s testimony was unobtainable by other means and that she was likely to be a necessary witness was supported by reason.

B. Substantial Hardship

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Defendants contend that even if Mrs. Hunoval was likely to be a necessary witness, she should not have been disqualified from acting as trial counsel because the “substantial hardship” exception of Rule 3.7(a)(3) applied. In determining whether disqualification would work substantial hardship on the client, the Comments to Rule 3.7(a) call for a balancing “between the interests of the client and those of the tribunal and the opposing party.” N.C. Rev. R. Prof. Conduct 3.7, cmt. 4.

It states:

Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer’s testimony, and the probability that the lawyer’s testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer’s client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

Id. To establish abuse of discretion, Defendants must show the trial court’s decision was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. The trial court may have balanced the interests of Mrs. Hunoval against those of the tribunal and opposing party and determined, particularly given the probability that Mrs. Hunoval’s testimony will conflict with that of other witnesses, that the interests of the tribunal and opposing party require

disqualification.³ Defendants have not shown that this exercise of discretion was manifestly unsupported by reason.

C. Pretrial Disqualification

While we hold the trial court did not abuse its discretion in granting the motion to disqualify Mrs. Hunoval as counsel, we conclude the trial court abused its discretion in disqualifying Mrs. Hunoval from representation in other capacities. Rule 3.7(a) states “*a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . .*” N.C. Rev. R. Prof. Conduct 3.7(a) (emphasis added). “[E]ven though an attorney may be prohibited from being an advocate during trial, the attorney may, nevertheless, represent his client in other capacities, such as drafting documents and researching legal issues.” *Cunningham v. Sams*, 161 N.C. App. 295, 299, 588 S.E.2d 484, 487 (2003). There was no evidence or argument before the trial court as to why Mrs. Hunoval should be disqualified from legal representation outside of trial. The trial court’s order also does not state any reasoning behind its decision to extend Mrs. Hunoval’s disqualification to all matters in this case. We conclude this decision was an abuse of discretion and accordingly reverse.

³ While the better practice would have been for the trial court to explain the interests it balanced, Defendants conceded at oral argument that the trial court considered “all arguments raised” under this exception. *See State v. Stroud*, 147 N.C. App. 549, 564, 557 S.E.2d 544, 553 (2001) (concessions made by a party at oral argument act as abandoning an argument); *see also Couch v. Bradley*, 179 N.C. App. 852, 855, 635 S.E.2d 492, 494 (2006) (absent a specific request, a trial court is not required to make findings of fact to show the reasons for its decision).

CONCLUSION

The trial court did not abuse its discretion in concluding that Mrs. Hunoval was likely to be a necessary witness and should be disqualified under Rule 3.7(a) of the North Carolina Rules of Professional Conduct from serving as trial counsel for Mr. Hunoval and the Hunoval Law Firm. However, the trial court abused its discretion in extending the scope of disqualification to matters outside of trial. We affirm in part and reverse in part.

AFFIRMED IN PART; REVERSED IN PART.

Chief Judge McGEE and Judge BERGER concur.

Report per Rule 30(e).