

NORTH CAROLINA: FILED IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY: 2009 JAN 26 PM 3:57 SUPERIOR COURT DIVISION
08-CVS-7955

HOPE-A WOMEN'S CANCER CENTER,
P.A. and RALEIGH ORTHOPAEDIC
CLINIC, P.A.

Plaintiffs,

v.

STATE OF NORTH CAROLINA, et al.,

Defendants.

ORDER RE: AMENDED MOTION TO DISQUALIFY

THIS MATTER came on for hearing before the undersigned Judge of Superior Court at the January 23, 2009, civil session of the Wake County Superior Court upon defendant's Amended Motion To Disqualify Robert F. Orr and Jason Kay as counsel for plaintiffs.

Procedural Background

Plaintiffs filed this civil action on May 6, 2008 to challenge several aspects of the process by which the State Medical Facilities Plan ("SMFP") is prepared. The initial complaint listed the law firm of Nelson Mullins Riley & Scarborough ("Nelson Mullins") as counsel of record. Following the institution of this action, not less than 9 separate health care entities and or associations have sought to intervene as Defendant-Intervenors and each has filed a motion to dismiss.

This case was declared an exceptional case pursuant to Rule 2.1 of the General Rules of Practice by the Chief Justice on September 4, 2008 and this Court was assigned the case.

This Court has not ruled on the defendant-intervenors motions to intervene in this case as of this time. The present unpleasantness over the representation of plaintiffs by Mr. Orr and Mr. Kay is the only matter presently before the Court for disposition. On November 14, 2008, The North Carolina Institute For Constitutional Law, a North Carolina non-profit corporation ("NCICL"), filed notice of appearance as additional counsel of record for the plaintiffs. Mr. Orr and Mr. Kay, Senior Counsel and Senior Staff Attorney for NCICL, respectively, signed the notice of appearance.

The State of North Carolina thereafter filed a motion to disqualify the NCICL from representing the plaintiffs on the ground that the NCICL is a corporation and thus, not authorized to practice law in North Carolina pursuant to N.C.G.S. 84-5.

The Court held a status conference in late December. At that conference the Court advised that it would hear the motion to disqualify first and would do so in January, 2009.

On December 31, 2008, Plaintiffs filed an Amended Complaint. The signature page of the Amended Complaint identifies Nelson Mullins as counsel and contains five (5) signatures of counsel from that firm. The NCICL is not listed. However, Mr. Orr and Mr. Kay both signed as counsel and listed their addresses and phone numbers identical to that of the NCICL.

On January 9, 2009, the State of North Carolina filed an Amended Motion To Disqualify Mr. Orr and Mr. Kay on the grounds that North Carolina law prohibits not only the NCICL, but Mr. Orr and Mr. Kay, as employees of NCICL from representing Plaintiffs in this case.

The Court scheduled the motion for hearing on January 23, 2009 and set a briefing schedule. The defendant-intervenors filed a response agreeing with the State of North Carolina's position on the disqualification issue. Briefs and reply briefs were submitted together with case law. An Amicus brief was also submitted. The Court, prior to the hearing, has read all briefs and reply briefs submitted. At the hearing, the parties had the opportunity to present arguments to the Court. At the conclusion of the hearing, in open Court, the Court announced that, in its discretion, the Amended Motion to Disqualify was denied and that the Court would prepare its own Order setting forth the grounds for its decision.

The Court has determined, in its discretion, that Mr. Orr and Mr. Kay should be allowed to represent the plaintiffs in this case. Here's why.

There is no dispute that the NCICL is a non-profit North Carolina corporation nor that NCGS 84-5 provides: "It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State...." The State of North Carolina relies primarily on ***Gardner v. North Carolina State Bar, 316 N.C. 285 (1986)***. The Court has determined that the answer to this dispute is found in the following language in ***Gardner***:

*In their final argument, petitioners contend that CPR 326 violates Article I of the North Carolina Constitution and the Fourteenth Amendment of the United States Constitution by allegedly preventing the individual petitioner Gardner from practicing law by denying him the right to appear before a court. **There is no merit in this argument. Petitioner Gardner is only prevented from***

representing his employer's insureds. He may freely appear in court to represent Nationwide itself. As an attorney licensed in North Carolina he may also represent other parties desirous of his services so long as he does not do so in conjunction with Nationwide; if he chooses by contract to devote his entire time to Nationwide's affairs, he cannot be heard to complain. Gardner at 295.

Here, NCICL is not a litigant nor does it now appear as counsel. Nor does NCICL have any business relationship with the plaintiffs as the affidavits submitted indicate that Mr. Orr and Mr. Kay are representing them on a pro bono basis. NCICL simply pays the lawyers salaries. If NCICL wishes to permit the lawyers to perform pro bono legal services in a public service issue lawsuit for third party litigants, it is not NCICL practicing law, it is the lawyers. The fact that Mr. Orr and Mr. Kay are paid by NCICL is not the point.

A corporation can certainly permit and authorize its in house counsel to engage in performing pro bono legal services for third parties as part of community service not in conjunction with the business of the corporation. The Court does not see any difference here. To restrict a North Carolina licensed lawyer's ability to participate in public policy litigation on a pro bono basis with the corporation's blessing and not in conjunction with the corporation's business does not violate the provisions of G.S. 84-5. To find otherwise flies in the face of common sense and reason.

Hypothetical Example: Progress Energy employs full time North Carolina licensed in-house legal counsel to perform legal services for Progress Energy. There is no question that the in-house counsel can appear in North Carolina courts on behalf of Progress Energy. **He may freely appear in court to represent Nationwide itself, Gardner, supra at 295.**

As far as this Court is concerned, Progress Energy can, in its judgment, permit in-house counsel to represent outside clients if it decides to do so for pro bono work or the lawyer, with permission of Progress Energy, can take on an outside case not in conjunction with Progress Energy's business, for a fee. This is a matter entirely between Progress Energy and its attorney employee.

In either case, by permitting pro bono public service legal work for outside clients or authorized private representation for outside clients on a fee basis, Progress Energy is not engaged in the practice of law period, paragraph. The lawyer is engaging in the authorized practice of law in either example, **not** Progress Energy. This hypothetical example mirrors what is happening in this case.

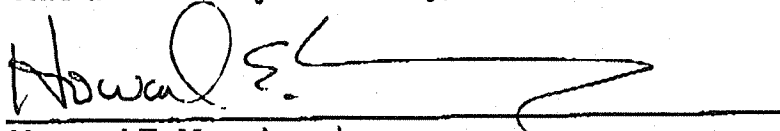
NCICL engages in many activities which are not the practice of law. Like the Progress Energy example, If NCICL chooses to permit its lawyers to represent third party litigants in public interest litigation and chooses to continue to pay their salaries, so be it. NCICL is not, by permitting them to represent third party

litigants and at the same time paying their salaries, engaging in the unauthorized practice of law in violation of G.S. 84-5.

The Court agrees that NCICL may not appear as counsel of record on the pleadings in representing a third party litigant. However, NCICL has cured the problem in this case by the Amended Complaint. Accordingly, Mr. Orr and Mr. Kay, as licensed North Carolina lawyers may sign pleadings and represent the Plaintiffs in this case. The fact that NCICL may permit them to do and continue to pay their salaries does not bar their participation as counsel in this case. The motion to disqualify Mr. Orr and Mr. Kay is denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, IN THE COURT'S DISCRETION, THAT THE AMENDED MOTION TO DISQUALIFY IS DENIED.

This the 26th day of January, 2009.

A handwritten signature in black ink, appearing to read "Howard E. Manning, Jr.", written over a horizontal line. The signature is stylized and extends to the right.

**Howard E. Manning, Jr.
Superior Court Judge**

Certificate of Service

This is to certify that the foregoing Order Re: Amended Motion to Disqualify in 08CVS 7955 Wake County Superior Court was served by facsimile transmission this the 26th day of January, 2009 as follows:

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