

SUPREME COURT - STATE OF NEW YORK

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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TAAHA SHAIKH, an infant by his natural mother and guardian, RIZWANA SHAIKH, RIZWANA SHAIKH, individually and SHOUKAT SHAIKH,

Plaintiffs,

-against-

LaTOYA WAITERS AND LaTOYA D. WAITERS,

Defendants.
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TRIAL PART: 35

NASSAU COUNTY

INDEX NO: 020847-98

MOTION DATE: 5/12/00

MOTION SEQ. NO: 001

The following papers having been read on this motion:

- Notice of Motion, dated 4-25-00 1**
- Affirmation in Opposition, dated 6-06-00 2**

This is a motion by defendants seeking to disqualify plaintiffs' counsel, Steven Cohn, P.C., from representing the plaintiffs Taaha Shaikh, an infant by his mother and guardian Rizwana Shaikh, Rizwana Shaikh, individually and Shoukat Shaikh.

This action seeking damages for personal injuries arises from an automobile collision. The occupant of one of the vehicles was the infant plaintiff, Taaha Shaikh, who was a passenger in an automobile driven by his mother who is also his guardian and a plaintiff individually. The same law firm represents the infant plaintiff, his mother and his father, also a plaintiff. The sole defendants are those associated with the other vehicle in the accident. The Court previously stayed all proceedings in this action pending further order of this Court.

Plaintiffs filed and served a summons and complaint to which defendant answered and interposed a counterclaim against plaintiff, Rizwana Shaikh. On the counterclaim, Rizwana

is represented by separate counsel, who have not submitted any papers in regards to this motion. In response to the motion, plaintiffs attempt to justify the representation of multiple plaintiffs by arguing that since the infant plaintiff alleges no negligence against his mother, that with his clients' consent it is proper to represent co-plaintiffs.

Attorney conduct in New York State is governed by a version of the Model Code of Professional Responsibility, which has been adopted by the Appellate Divisions of the Supreme Court as Part 1200, Title 22, NYCRR. New York Disciplinary Rule 5-105 (A) is the main provision governing issues of conflict between multiple clients. Under this section, “[a] lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests...” *New York Code of Professional Responsibility* (DR 5-105 [A]).

In addition, the Ethical Considerations (EC), while not mandatory, express the New York State Bar Association's additions to the rules governing the conduct of lawyers. EC 5-17 addresses the issue of representation of multiple co-plaintiffs in a simultaneous action. This consideration states that, “[t]ypically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent... co-plaintiffs or co-defendants in a personal injury case...” *New York Code of Professional Responsibility* (Canon 5, EC 5-17).

Merely because the infant plaintiff fails to assert a counter-claim against his mother, does not resolve the issue of her negligence, so to eliminate the potentially “differing interests” of co-plaintiffs. Commentators have stated that, “a passenger will almost always be advised to assert claims against all other drivers, including the passenger's driver. The

same lawyer's representing both passenger and driver incurs a substantial risk of a disqualifying conflict..." Charles W. Wolfram, *Modern Legal Ethics*, § 7.3.3 p. 353 (West Publishing Company, 1986). The infant plaintiff Taaha should be advised to assert a claim against the driver of the automobile of which he was a passenger, his co-plaintiff Rizwana. Consequently, the same attorney cannot properly represent the potentially "differing interests" of mother-driver and infant-passenger.

Although the meaning of "differing interests" is not immediately apparent, certain general principles may be derived from other cases. The foremost of these principles, is that an attorney who represents both plaintiff driver and plaintiff passenger has "created a conflict of interest and [has] violated Disciplinary Rule 5-105 (A). *Pessoni v. Rabkin* 220 AD2d 732 (2nd Dept. 1995). In *Pessoni*, an attorney who formerly represented the driver of an automobile involved in a collision also represented the driver's wife and children, who had been passengers. The court denied a motion for a hearing to determine the attorney's *quantum meruit* share of attorney fees generated by settlement of claims asserted by wife and children holding that the attorney should have declined to represent the driver, wife and children in the first instance.

While the *Pessoni* case addresses issues of withholding attorney's fees, rather than attorney disqualification, it nonetheless holds that multiple representation of plaintiff driver and plaintiff passenger amounts to a violation of DR 5-105 (A).

Despite differing interpretations of DR 5-105 (A), courts generally are reluctant to accept an attorney's joint representation of both driver and passenger. In *Sidor v. Zuhoski*,

261 AD2d 529 (2nd Dept. 1999), an attorney attempted to represent both the estate of a mother-driver and an infant-passenger as simultaneous plaintiffs. The Court affirmed the removal of counsel from continuing to represent both plaintiffs “[u]nder New York law, because a child may properly bring an action against his or her parents, it is improper for an attorney to represent both the parents and the child in an automobile accident action brought against the owner driver of the other vehicle.” *Id.*

In addition, the Court finds the wisdom of *Fugnitto v. Fugnitto*, 113 Misc.2d 666, App. Term (1982) especially persuasive. In *Fugnitto*, a car driven by Patricia Fugnitto, in which her infant son was a passenger, was involved in an intersection collision with another automobile driven. Mrs. Fugnitto commenced an action individually and on behalf of her infant son. Upon trial of the liability issue, a single attorney represented both Mrs. Fugnitto and her infant son as plaintiffs. The Court held that an objection to the dual representation in this case could not be considered timely, as it was not raised before appeal. Nevertheless, the Court stated that, “we emphatically disapprove the representation by counsel of both the driver and the passenger of a vehicle had a timely motion to disqualify been made, our conclusion in this case might well have been different.” *Id.* at 669.

Factually and legally the *Fugnitto* and the *Sidor* cases nearly duplicate the matter before this Court. While *Fugnitto* examined the issue of disqualification of an attorney on appeal, the underlying concern for a potential conflict of interest applies equally here. Thus this Court adopts the holding in *Fugnitto* in emphatically disapproving of the joint representation by counsel of both the driver and the infant passenger of a vehicle.

A conclusion that a Disciplinary Rule violation has occurred under our present set of facts does not, however end the inquiry. Despite a clear conflict of interest, an attorney would withstand disqualification from a dual representation where all concerned have consented to the compromised representation. New York Disciplinary Rule 5-105(C) states that,

a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. DR 5-105, 22 NYCRR § 1200.24(c).

With respect to consent, DR 5-105 (C) 22 NYCRR § 1200.24 was amended effective June 30, 1999, to change the standard for obtaining client consent. Roy Simon, *Simon's New York Code of Professional Responsibility* p. 320 (West Group 2000 Edition). To satisfy the consent requirement of DR 5-105 not only must there be client consent but an objective test also exists. The objective test prong of the consent requirement is that of what a disinterested lawyer would believe. The phrase has been interpreted to mean that a lawyer is not permitted to seek client consent to a conflict if a disinterested lawyer would advise the client to refuse consent and that a client consent that is given is not valid if the objective test of a disinterested lawyer is not met. Roy Simon, *Simon's New York Code of Professional Responsibility*, supra p. 335 and EC 5-16.

Here, neither party has addressed the issue of what a disinterested attorney would believe and while affidavits of consent have been submitted by both parent-

plaintiffs, they are lacking in specificity as to the nature of the advice that formed the basis of their consent to the joint representation or to the factors which they considered in deciding to consent. Moreover, it is plain to this Court that a disinterested lawyer would not believe that there can be competent representation in this type of case where by not joining the driver parent as a defendant, there is a risk of non-recovery in the event that the named defendant is exculpated from fault. In this regard there is a brief description of the accident but the papers submitted in opposition to this motion are notably lacking in any analysis of the merits of the case.

Although plaintiff's attorney asserts that the consent of his adult clients cures the conflict because Taaha is an infant, as a matter of law, he is "presumed to lack the ability to knowingly consent" *Matter of H. Children*, 160 Misc.2d 298 (Family Ct., Kings County, 1994); Domestic Relations Law § 2; CPLR 105[j]. Consent to compromised representation by a minor is invalid, and the representation of multiple plaintiffs in such a situation is thus improper. See Charles W. Wolfram, *Modern Legal Ethics*, *supra* § 7.2.4 p. 347.

After an actual conflict of interest has arisen, an attorney will often seek to end his or her representation of one client to avoid violating DR 5-105 (A). However "an attorney who undertakes joint representation of two parties in a lawsuit [should] not continue as counsel for either one after an actual conflict of interest has arisen" (*Matter of H. Children*, 160 Misc. 2d 298, 300) since continued representation of either plaintiff would necessarily result in a violation of an attorney's fiduciary obligations of

preserving his or her clients confidentiality, as well as the duty to pursue a client's interest vigorously. *Cardinale v. Golinello*, 43 NY2d 288 (1977), *Greene v. Greene*, 47 NY2d 447. Consequently, not only must plaintiff's counsel be disqualified from simultaneously representing both infant and mother, but he must also be prohibited from continuing his representation of either client in relation to this matter.

Any qualified adult may be appointed as guardian ad litem of an infant. However, the guardian ad litem must have no interest adverse to that of the child. David Siegel, *New York Practice Third Edition* 309-14 (1999). Rizwana Shaikh's interest has been established as adverse to that of her child, Taaha. Accordingly, Rizwana Shaikh must be discharged as Taaha Shaikh's guardian and a proper guardian must be appointed on his behalf.

The defendants' motion to disqualify plaintiffs' counsel is granted in its entirety and the firm's representation of all plaintiffs is terminated. Further, Rizawana Shaikh shall no longer be permitted to act as guardian for the infant plaintiff in this action. All proceedings are stayed for a period of sixty days to afford plaintiffs the opportunity to obtain new representation and to apply to this Court for the appointment of a proper guardian for infant Taaha. CPLR Article 12.

A conference shall be held before the undersigned at the County Courthouse, 262 Old Country Road, 3rd Floor, Mineola, N. Y. on September 27, 2000 at 9:30 A.M. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend conference may

result in the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 *et seq*).

The foregoing constitutes the Order and Decision of this Court.

ENTER

DATED: July 10, 2000



HON. DANIEL PALMIERI
Acting J.S.C.

The Court acknowledges Hofstra law-student intern Jason P. Klopfer for his assistance in the preparation of this decision

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