

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

RICHARD R. WISSLER AS EXECUTOR OF THE
ESTATE OF MARTHA WISSLER AND RICHARD R.
WISSLER,

Plaintiff(s),

-against-

LARRY R. ASHKINAZY, D.D.S.,

Defendant(s).

ORIGINAL RETURN DATE: 02/07/02
SUBMISSION DATE: 02/07/02
INDEX No.: 11754/90

MOTION SEQUENCE #11

The following papers read on this motion:

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By this motion defendant seeks an order pursuant to Disciplinary Rules 5-105 and 5-108 of the Code of Professional Responsibility precluding the law firm of Carole A. Burns & Associates from representing the plaintiff as trial counsel and directing said law firm not to communicate any knowledge it may have of the defendant to plaintiff's counsel or anyone else.

This case arises out of a claim of dental malpractice brought on behalf of the estate of decedent Martha Wissler by her husband, Richard R. Wissler.

As alleged by counsel for defendant, they were advised at a recent deposition that the law firm of Carole A. Burns & Associates was going to serve as trial counsel for the plaintiffs. Defendant moves to disqualify said firm as trial counsel on the ground that Carole A. Burns was a partner in Newman Schlau Fitch Burns & Lane when they first appeared in this action and Ms. Burns had been a partner in the firm for many years before when defendant was represented in other matters by this firm. Moreover, Arnold Stream, another current associate of Carole A. Burns & Associates, was associated with defendant's firm in 1990 and worked for the partner handling the defense of this action. While counsel for defendant concedes that Mr. Stream did not work on the file in this action, he refers to the possibility that Mr. Stream worked on other matters involving defendant.

"An attorney traditionally has been prohibited from representing a party in a lawsuit where an opposing party is the lawyer's former client. Underlying this rule is the notion that an attorney, as part of his fiduciary obligation, owes a continuing duty to a former client -- broader in scope than the attorney-client evidentiary privilege -- not to reveal confidences learned in the course of the professional relationship. (citation omitted). To obtain disqualification of the attorney, the former client need not show that confidential information necessarily will be disclosed in the course of the litigation; rather, a reasonable probability of disclosure should suffice. (citations omitted)." (**Greene v Greene**, 47 NY2d 447; 453).

However, "no presumption of disqualification will arise if either the moving party fails to make any showing of a risk that the attorney changing firms acquired any client confidences in the prior employment (citation omitted) or the nonmoving party disproves that the attorney had any opportunity to acquire confidential information in the former employment." (**Kassis v Teacher's Ins. & Annuity Ass'n**, 93 NY2d 611, 617).

In this case, the defendant has not shown that any information, confidential or otherwise, about him, this action or any other action or legal matter involving him has been acquired by the Burns law firm by reason of Ms. Burns' and Mr. Stream's former association with the law firm of Newman Schlau Fitch Burns & Lane [the predecessor to Newman Fitch Altheim Myers, P.C.]. While defendant has shown that both Ms. Burns and Mr. Stream were in a position to have acquired information about Dr. Ashkinazy more than ten years ago, this showing will not suffice for disqualification. At this juncture, it is pure speculation that Ms. Burns and/or Mr. Stream acquired any confidential information about Dr. Ashkinazy ten years ago and that there is any possibility that such information will be disclosed during the course of this action.

The Court furthermore notes that both Ms. Burns and Mr. Stream represent to this Court that they have no knowledge of the 'other matters' referred to by defendant's counsel, no information concerning any aspect of defendant's personal or professional life, and cannot recall ever meeting or speaking with defendant.

Here, the defendant has failed to show that there is any risk that Ms. Burns and/or Mr. Stream acquired any client confidences regarding Dr. Ashkinazy in their prior employment.

Accordingly, the law firm of Carole A. Burns & Associates will not be disqualified from serving as trial counsel for plaintiffs.

Defendant's motion is **ENTERED**

This decision constitutes the order of the court.

Dated: 3-15-02 **MAR 27 2002** HON THOMAS P. PHELAN ?
J.S.C.

NASSAU COUNTY
COUNTY CLERK'S OFFICE