ORIGINAL 20020179

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

SEP 6 2002

STATE OF NORTH DAKOTA

Supreme Court No. 20020179

Continental Resources, Inc.,

Petitioner,

vs.

The Honorable Allan Schmalenberger, Judge of the Bowman County District Court, Southwest Judicial District; McKennett Stenehjem Reierson Forsberg Hermanson, P.C.; Kent Reierson, Individually; James H. Bragg; J. Michael Gleason, d/b/a Gleason Land Co.; and Julie K. McKinley a/k/a Julie K. King,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR SUPERVISORY ORDER

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FACTS

This brief is in response to the Court's request for briefs addressing "the finding that the title work completed by Kent Reierson was not the same matter or substantially related to the issues before the trial court in this litigation". Most of the facts have previously been set out for the Court in the prior briefs of the parties. The Respondents Bragg, Gleason and McKinley request, however, that the Court order that the two sealed Affidavits of Kent Reierson which are held in the office of Judge Schmalenberger be requested and reviewed, as they contain the relevant correspondence between Reierson and Continental Resources and documents concerning the title work completed in 1995. The Affidavits set forth in more detail the work which was undertaken, along with the opinions on the title which were provided to Continental Resources, along with copies of the billing for such work completed for Continental Resources.

Diamond Resources, Inc., the land company doing work for Continental Resources, asked Reierson to conduct a quick title check on five oil and gas wells and a salt water disposal well which Continental Resources wished to purchase from a company called Baloco. (Reierson Affidavit, ¶3, Supplemental Appendix, pp. 1-2.) The initial contact took place March 23, 1995, and a closing was to be attempted Wednesday, March 29, 1995. The closing was reset for Friday, March 31, 1995. The information provided to Reierson is set forth in Reierson's Affidavit in Support of Motion to Resolve Alleged Conflict and attached to that Affidavit (Supplemental Appendix, pp. 1-117). Based on the information provided, Reierson provided six opinion letters set forth in Exhibits B1 to B7 attached to the Affidavit of Reierson in Support of Plaintiffs' and Third-Party Defendant's

Motion to Resolve Alleged Conflict of Interest. As related in the prior briefs, this Motion to Resolve Alleged Conflict was brought pursuant to Reierson's response to a letter from Continental's counsel, asserting there was a conflict. (Petitioner's Appendix, p. 136.)

The title opinion letters simply set forth the working interest represented to be owned by the seller and which would be conveyed to Continental Resources. No attention was directed to the ownership of the minerals or other revenue interests, except for the working interests which entitled Continental Resources to operate the wells that they were purchasing. The billing for April 17, 1995, attached to the Affidavit of Kent Reierson Opposing Continental's Motion to Disqualify Counsel (see Respondents' Supplemental Appendix, pp. 121-124)[1] shows that the work was completed concerning the purchase of the wells on March 30, 1995, with a brief review from additional indexes on March 31, 1995. That completed the title work on the purchase of the wells.

In July of 1995, Diamond Resources contacted Reierson to complete a full drilling title opinion upon Section 32-130-104, Bowman County, North Dakota. This section contained one of the wells previously purchased by Diamond Resources from Baloco, the Wallman #1-32. The purpose was to put together a drilling title opinion and set out the ownership interests and issues which may have an impact on Continental drilling an oil and gas well upon that piece of property. The title was complicated and an additional attorney,

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[1]Respondents' Supplemental Appendix is being submitted in a sealed envelope, as it contains the billings to Continental Resources from Reierson for the title work he completed for Continental in 1995, and other information which is confidential but which is not directly in issue or harmful to Continental's issues in the present litigation before the District Court.

William D. Walters, was retained to work in conjunction with Reierson to work on that title opinion. The title opinion upon Section 32-130-104 was never completed. (See Affidavit of Kent Reierson in Support of Motion to Resolve Alleged Conflict of Interest, Respondents' Supplemental Appendix, p. 3, ¶5.) Draft title opinions on a portion of the tracts covering Section 32-130-104 were provided to Continental Resources on November 21, 1995. At that time, the matter was put on hold by Continental pending further direction. Reierson received no response from Continental to a subsequent letter dated February 29, 1996, concerning whether or not the work should be completed (see Exhibit D2 attached to Reierson Affidavit, Respondents' Supplemental Appendix, p. 113). Reierson closed the file with a letter on August 5, 1996, since no work had been done since November of 1995 nor directions received (see Exhibit D3, Reierson Affidavit, Respondents' Supplemental Appendix, p. 114).

Reierson did title work only concerning any issue related to land men purchasing interests or allegations that any party had utilized confidential information to purchase interests. The title work Reierson completed was merely title work on six wells that Continental sought to purchase and beginning a drilling title opinion. The allegations in the case presently being litigated before the District Court relate to monies owed the Plaintiffs Bragg and Gleason and Third-Party Defendant Julie McKinley, by Continental Resources for mineral interests they own in Bowman County. Continental's allegations are that it is entitled to a constructive trust to those interests, even though Bragg, Gleason and McKinley purchased the interests either one year after they ceased working for Diamond/Continental or were in areas unrelated to any area they had worked. Hence, the

title work completed by Reierson and the present litigation before the Court are clearly not the same and, hence, the only issue is whether or not the matters are substantially related.

STANDARD OF REVIEW

The standard of review appears to have varied in other states concerning the weight which would be given the trial court's decision. In State of West Virginia v. Wilkes, 566 S.E. 2d 560, there was a reference by a concurring justice that the trial court's finding "should be entitled to a measure of consideration and deference". State v. Wilkes, supra, 566 S.E.2d at 567. In a Montana case, Pro-Hand Services Trust v. Monthei, 2002 MT 134; 310 Mont. 165; 49 P.3d 56, the court stated as follows: "The denial of a motion to disqualify an attorney is within a district court's discretionary powers . . . Therefore, we will review such decision for an abuse of discretion." Pro-Hand Services Trust, supra, 49 P.2d at 58, ¶9. This Court's review should at least give the trial court's decision consideration and deference if an abuse of discretion standard is not applied.

LAW AND ARGUMENT

In determining whether a matter is substantially related, this Court has viewed the issue as one in which the attorney who had previously represented the former client had acquired confidential information that could affect the matter in controversy. Clooten v. Clooten, 520 N.W.2d 843, 847 (N.D. 1994). North Dakota has had little opportunity to address Rule 1.9(a) of the North Dakota Rules of Professional Conduct. Other states which have looked at the issue of whether or not a matter is substantially related have generally focused on the same question that this Court did in Clooten, supra. See State of West Virginia v. Wilkes, 566 S.E.2d 560, 564 (West Virginia 2002). (Confidential

information may not be used unless that information has become generally known and lies outside the parameters of the confidential information which may be used against the former client in a subsequent action.) Pro-Hand Services Trust v. Monthei, 2002 MT 134; 310 Mont. 165, 170; 49 P.3d 56, 59 (2002) (whether or not there is a "reasonable probability" that confidences were disclosed which are relevant to the subsequent litigation).

The cases are generally consistent in placing the burden on the former client to establish that the matters are substantially related. See State v. Wilkes, supra, 566 S.E.2d at 563, Pro-Hand Services Trust v. Monthei, 2002 MT 134; 310 Mont. 165, 170; 49 P.3d 56, 59 (2002) (party claiming disqualification must inform the court of the confidential information previously disclosed).

In State v. Wilkes, supra, 566 S.E.2d 560, the West Virginia Supreme Court directly addressed the issue concerning whether or not an attorney's current representation involved a "substantially related matter" to that involving a former client. The Court took a well-reasoned approach and cited prior cases as follows: "Under Rule 1.9(a) of the Rules of Professional Conduct, determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances and legal issues of the two representations." State v. Wilkes, supra, 566 S.E.2d at 563, citing State, ex rel. McClanahan v. Hamilton, 189 W.V. 290, 430 S.E.2d 569 at 570 (1993). In that case, there was documentary evidence submitted under seal of the type of legal work that had been performed by the attorneys sought to be disqualified while they were employed by the law firm presently representing the party

seeking disqualification. State v. Wilkes, 566 S.E.2d at 564. One of the factors involves the interval between earlier and later representation, even though that issue is not specifically addressed in Rule 1.9 or its commentary. State v. Wilkes, supra, 566 S.E.2d at 564. The West Virginia Supreme Court cited with approval the following quote: "Old information may continue to be secret and thus subject to a broad duty on the part of the lawyer not to reveal or use it adversely. But if the old information is not realistically relevant to the later representation, its presumed possession should not lead to a finding of substantial relationship sufficient to bar the later representation. Wolfram, *Former-Client Conflicts*, 10 Geo. J. Legal Ethics 677, 731-32 (1997)." State v. Wilkes, 566 S.E.2d at 565.

The West Virginia Supreme Court also addressed the contention that prior representation of the former client provides greater insight and what they refer to as a "playbook" rationale. Once again, the West Virginia Supreme Court dismissed that contention that in the absence of specific confidential information which may be used directly in issue or is of unusual value in the subsequent matter that the "playbook" theory is inapplicable. State v. Wilkes, 566 S.E.2d 566. Hence, the West Virginia Supreme Court decision in a case seeking a supervisory writ which there was sealed information provided contending that attorneys should be disqualified for their prior representation of the adverse party, held that where there is no information which "will be directly in issue or of unusual value in the matter now pending in the circuit court" there is no basis for disqualification and the matters are not substantially related. State v. Wilkes, 566 S.E.2d 566.

The Supreme Court of New York has also addressed the issue of whether or not matters were substantially related in a motion to disqualify brought by a former client. Crawford v. Antonacci, 746 N.Y.S. 2d 94 (2002). In Crawford, the Court upheld the trial court's decision that the attorney would not be disqualified. In that case, the attorney had previously represented the plaintiff in a Workers Compensation claim concerning an injury to the plaintiff's back. The current case before the trial court involved the plaintiff's shoulder and was 13 years after the prior injury. Even though both matters asserted a loss of enjoyment of life, the Court found that information related to the prior injury would be discoverable and subject to routine disclosure and therefore, even if the attorney had confidential information concerning the loss of enjoyment of life to the claimant, that was not sufficient to disqualify the attorney from representing the defendant in the claim brought by the former client. Crawford v. Antonacci, supra, 746 N.Y.S. 2d 95. In that case, there was a short vigorous dissent which would have granted the plaintiff's motion. That dissent, however, sets out useful principals in determining whether or not a matter is substantially related and how the issue should be approached. The dissent stated:

> Claims of conflict of interest are frequently fact specific, rarely clear cut and necessarily implicate the weighing of competing interests . . . The application of a party seeking disqualification of an adversary's attorney must be closely scrutinized to forestall the abuse of disqualification as a litigation tactic and to protect an individual's right to freely choose counsel . . . .

Crawford v. Antonacci, 746 N.Y.S. 2d 95.

In this case, the Court can see from the two Affidavits of Reierson and the materials attached that the work he completed for Continental Resources in 1995 was related to

determining title ownership. It had no relationship to the issues presently before the trial court. The only collateral issue that Continental can show is that a discovery request had been made for title opinions covering wells under which Bragg, Gleason and McKinley owned an interest. As set forth in the prior Respondents' Brief, the only reason for such title information was to confirm that Continental was not contending there was a title defect. In fact, Continental has confirmed that it is withholding the Plaintiffs and Third-Party Defendant's revenue is not on the basis of any title defect but on its contentions that it is entitled to a constructive trust of the revenue owed Bragg, Gleason and McKinley. Hence, there is no dispute about the title owned by Bragg, Gleason and McKinley under the Wallman Well. This interest amounts to $26.00 out of hundreds of thousands of unpaid revenue

CONCLUSION

Looking at the facts, circumstances and issues, it is clear that seven years have passed since Reierson completed the title work for Continental Resources. As this Court is aware, title completed seven years ago is subject to changes as people buy and sell minerals and land. Hence, in an active oil area such as Bowman County, the passage of seven years can substantially change the record ownership. Hence, the relevance of any title work from seven years ago to issues before the trial court related to a breach of fiduciary obligation and use of confidential information to purchase mineral rights is nonexistent. The question that needs to be asked is, what information that Reierson used or produced in completing the title work for Continental can be used adversely to Continental? If there is none, it cannot be said to be substantially related. Continental has

failed to show any title dispute concerning the mineral ownership by Bragg, Gleason or McKinley. The title work completed by Reierson is simply not relevant to the issues before the trial court. Furthermore, any information related to the title, which has substantially changed over seven years, is available in the public records in the courthouse of Bowman County. The focus of the inquiry concerning whether or not a matter is substantially related is whether confidences have been disclosed which could now be harmful to the former client. As stated by the Supreme Court of West Virginia, has Continental Resources met its burden in showing there was information provided to Reierson that would be directly in issue or of unusual value in the matter now pending before the trial court? See State v. Wilkes, 566 S.E.2d 566. The District Court had the specific issues before it, studied the sealed Affidavits of Reierson, and has been involved in the litigation of the issues, as well as related issues on the Kloeckner case, J. Michael Gleason, et al v. Continental Resources, Inc., Bowman County Civil No. 99C-061. The trial court has intimate knowledge of the issues before it and determined that the matters were not substantially related. The Respondents respectfully request the Court to deny Continental Resources' Petition for a Supervisory Writ.

Dated this 6th day of September, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of (1) Respondents' Supplemental Brief in Opposition to Petition For Writ of Mandamus or Supervisory Writ, and (2) Respondents' Supplemental Appendix were on the 6th day of September, 2002, mailed to the following:

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