

SUPREME COURT OF NEBRASKA

Mid America Agri Products/Horizon, LLC v. Rowlands

286 Neb. 305 (2013) · No. No. S-12-473 · Decided July 19, 2013

SUMMARY

The Nebraska Supreme Court denied a writ of mandamus seeking disqualification of opposing counsel after a side-switching expert had consulted with the relators’ attorneys and was later retained by the opposing party. The court held that the expert was not a “support person” under Nebraska Rule of Professional Conduct § 3-501.9 and that an irrebuttable presumption of shared confidences applies only to individuals who obtained confidential information as lawyers. Disqualification of counsel therefore required a fact-specific showing that confidential information was unfairly obtained and threatened to taint further proceedings.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Wright, J.; Heavican, C.J.; Connolly, J.; Stephan, J.; McCormack, J.; Cassel, J.
JURISDICTION	Nebraska
DECIDED	July 19, 2013
DOCKET	No. S-12-473
DISPOSITION	writ_denied
PROCEDURAL POSTURE	Original mandamus action by the defendants-relators in an underlying commercial action seeking to compel the district court to disqualify opposing counsel after the opposing party retained an expert who had previously received confidential information from the relators' counsel.
STANDARD OF REVIEW	Mandamus requires a clear right to relief, a corresponding clear legal duty, and no other plain and adequate remedy. Factual findings recommended by a special master are treated like a special verdict and will not be set aside unless clearly against the weight of the evidence. The application of professional-conduct rules is reviewed independently as a question of law.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential.

PARTIES

Mid America Agri Products/Horizon, LLC, et al. v. Honorable Donald E. Rowlands, Judge, District Court for Lincoln County, Nebraska

TOPICS

civil procedure

commercial litigation

commercial

PRACTICE AREAS

civil procedure

legal ethics

professional responsibility

commercial litigation

mandamus

QUESTIONS PRESENTED

1. Whether a retained expert who previously received confidential information from opposing counsel is a support person under Nebraska Rule of Professional Conduct § 3-501.9(f).
2. Whether an irrebuttable presumption of shared confidences applies when a side-switching expert previously received confidential information from one party and is later retained by an adverse party.
3. Whether Horizon established a clear right and corresponding legal duty warranting mandamus to disqualify Lansing's counsel.
4. Whether the district court's order disqualifying O'Neil from testifying also prohibited him from further consulting or participating in the matter.

HOLDINGS

1. Horizon was not entitled to mandamus because it failed to establish clearly and conclusively a clear right to disqualification or a corresponding legal duty requiring the district court to disqualify Lansing's counsel.
2. A retained litigation expert is not a support person within the meaning of § 3-501.9(f).
3. An irrebuttable presumption of shared confidences applies only to individuals who obtained confidential information while working as lawyers; a side-switching expert is subject instead to a rebuttable presumption.
4. The order disqualifying O'Neil from testifying implicitly prohibited all further contact by O'Neil with Lansing and its counsel and disqualified O'Neil from any further participation in the matter after the March 30, 2012, disqualification order.

KEY QUOTATIONS

"The central concern in cases in which counsel has retained a side-switching expert is whether counsel has unfairly obtained confidential information about the opposing party." (286 Neb. at 318)

"A rebuttable presumption of shared confidences should be applied to a side-switching expert." (286 Neb. at 320)

"If, following his disqualification, O'Neil were to consult with Lansing as a nontestifying expert, the proceedings would be tainted." (286 Neb. at 321)

FACTUAL BACKGROUND

Horizon's counsel contacted Howard O'Neil about serving as an expert concerning National Grain and Feed Association rules and shared case-related opinions, impressions, and confidential information with him. O'Neil later declined to serve as Horizon's expert but was retained by Lansing, Horizon's opponent, and prepared an expert report addressing related subject matter. The district court disqualified O'Neil from testifying but found no evidence that he conveyed Horizon's trial strategy, work product, or mental impressions to Lansing's counsel and declined to disqualify that counsel.

PROCEDURAL HISTORY

Lansing Trade Group and Lansing Ethanol Services sued Mid America Agri Products/Horizon concerning forward corn contracts. The district court disqualified the side-switching expert, Howard O'Neil, from testifying but denied Horizon's motion to disqualify Lansing's counsel. The Nebraska Supreme Court granted leave to commence an original mandamus proceeding, appointed a special master, and denied the writ after finding that Lansing rebutted the presumption that O'Neil had conveyed Horizon's confidential information to Lansing's counsel.

DISPOSITION

writ_denied

CASES CITED

- Schropp Indus. v. Washington Cty. Atty.'s Ofc., 281 Neb. 152, 794 N.W.2d 685 (2011)
- Larkin v. Ethicon, Inc., 251 Neb. 169, 556 N.W.2d 44 (1996)
- McCully, Inc. v. Baccaro Ranch, 279 Neb. 443, 778 N.W.2d 115 (2010)
- Stetson v. Silverman, 278 Neb. 389, 770 N.W.2d 632 (2009)
- State ex rel. Freezer Servs., Inc. v. Mullen, 235 Neb. 981, 458 N.W.2d 245 (1990)
- State ex rel. FirstTier Bank, 244 Neb. 36, 503 N.W.2d 838 (1993)
- State ex rel. Creighton Univ. v. Hickman, 245 Neb. 247, 512 N.W.2d 374 (1994)
- Lamar Co. v. City of Fremont, 278 Neb. 485, 771 N.W.2d 894 (2009)
- Bechtold v. Gomez, 254 Neb. 282, 576 N.W.2d 185 (1998)
- North Pacifica, LLC v. City of Pacifica, 335 F. Supp. 2d 1045 (N.D. Cal. 2004)
- People v. Speedee Oil Change Systems, Inc., 20 Cal. 4th 1135, 980 P.2d 371, 86 Cal. Rptr. 2d 816 (1999)
- City of Santa Barbara v. Superior Court, 122 Cal. App. 4th 17, 18 Cal. Rptr. 3d 403 (2004)
- Shadow Traffic Network v. Superior Court, 24 Cal. App. 4th 1067, 29 Cal. Rptr. 2d 693 (1994)
- In re Complex Asbestos Litigation, 232 Cal. App. 3d 572, 283 Cal. Rptr. 732 (1991)