STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

FILED
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CIRCUIT COURT
WAUKESHA COUNTY, WI

FLOORCARE USA, INC.,

Plaintiff,

v.

PAUL BRUNNER,

Involuntary Plaintiff,

Case No. 18CV1687

v.

SHERRI BRUNNER,

Defendant.

DECISION AND ORDER ON MOTION TO DISQUALIFY DEWITT LLP AND MOTION TO DISMISS

¶1. This case involves disputed share interests in a closely-held corporation, and the pending motion stems from the alleged concurrent representation of the corporation and its constituents.

¶2. Sherri Brunner ("Sherri"), through her attorneys, moved to disqualify the law firm of DeWitt LLP ("DeWitt") from representing Floorcare USA, Inc. ("Company") and Paul Brunner ("Paul") in this lawsuit or in any of the matters involved in or related to it. She also moved to dismiss the Company from the case for lack of standing, interest and authority to file suit. Her attorneys acknowledge that the Company is a proper party to the case, but contend that principles of corporate neutrality should prevent it from taking sides and prosecuting the position of one shareholder over another in a dispute over which of the two shareholders owns a majority stake in the Company.

¶3. After expedited briefing, the Court heard the motion on April 2, 2019. The parties stipulated to hearing the motion on the evidentiary submissions and no witnesses were called by the parties. The Court took the matter under advisement to prepare a written decision.

¶4. The Court finds the following facts and related conclusions of law from the pleadings and evidentiary submissions.

¶5. In or around 2002, Paul Brunner acquired full ownership of the Company.

¶6. In or around 2009, Paul Brunner's son, Brian Brunner ("Brian"), became a 25 percent owner of the Company, with Paul retaining a 75 percent interest. It is unclear from the submissions how Brian acquired his interest, *i.e.* by gift, purchase, or sweat equity.

¶7. On April 9, 2009, the Company, Paul, and Brian hired DeWitt to provide legal services to reorganize the Company, and to serve as general corporate counsel for the Company. DeWitt disputes this and contends that it represented the Company only, and not its constituents. By its own terms of engagement, however, it is clear that DeWitt represented Brian and Paul in addition to the Company.

¶8. The fact that DeWitt was representing all three is evident from the April 9, 2009 engagement letter ("Engagement Letter"), which is titled in bold, capital letters at the top of the letter: "LETTER OF ENGAGEMENT AND CONSENT TO MULTIPLE REPRESENTATION OF A BUSINESS AND ITS MEMBERS IN REORGANIZING A BUSINESS ENTITY AND ACTING AS ITS GENERAL COUNSEL."

¶9. The Engagement Letter provided, in pertinent part:

> You have requested that this law Firm (the "Firm") represent all of the members and prospective members in the business known as Floorcare USA, Inc. (the "Business"). You have also requested that this Firm serve as general counsel to the Business following its formation. You should keep in mind that the Firm is the legal counsel or attorneys for the Business. The Firm is not the legal counsel for any one of you, in particular, but not limited to, when your interests may be conflicting or potentially conflicting. If you wish

or intend that your individual interests be represented, then you should retain separate counsel other than the Firm.

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A lawyer has the duty to exercise independent professional judgment on behalf of each client. When a lawyer is requested to represent multiple clients in the same matter, he can do so if he concludes that he can fulfill this duty with regard to each of the clients on an impartial basis and obtains the consent of each client after an explanation of the possible risks involved in the multiple representation situation. Further, if at any time during the representation a lawyer determines that, because of differences between the joint clients, he can no longer represent each of the clients impartially, then the lawyer must, at that time, withdraw from the representation.

Each of you have been advised as to your right to obtain separate legal counsel to represent you in all matters relating to the organization, investment and operation, etc. of the Business and are aware of the advantages and disadvantages of separate representation. Each of you are fully aware of this but nevertheless want this Firm to represent the Business for all of you. Based on the information you have provided, we have concluded that we can represent the Business on an impartial basis. In determining whether you should consent to this joint representation, however, you should carefully consider the following: The first matter is that of the lawyer-client privilege. Although the law is not settled, it is our opinion that any information disclosed by you to us in connection with this representation will not be protected by the lawyer-client privilege in a subsequent legal proceeding asserted by or against one of you involving another of you. Moreover, we believe we cannot effectively represent the Business if information disclosed to us by one of you must be preserved by us in confidence from the other, and accordingly we may disclose to each of you all information we receive from any of you relating to our representation of the Business in connection with the formation of the Business, or as general counsel for the Business, regardless of your wish to keep the information confidential. If we are to represent the Business, it will only be on the express understanding that each of you has waived the lawyer-client privilege to the extent, but only to the extent, that the privilege might otherwise require us to preserve in confidence information disclosed by one of you to us from another of you in connection with any subsequent legal proceeding involving this transaction asserted by or against one of you involving the other.

Second, although at this time there does not appear to be any difference of opinion between any of you with regard to the major legal issues involved in organizing the Business, it may well turn out, upon further consultation, that one or more of you may have varying opinions with respect to the Business's capitalization and other organizational matters. Issues about which investors may disagree include but are not limited to the legal format of the Business, the amount and type of equity interests, terms of any loans or leases of property to the Business by the investors, debt equity ratio, salaries and fringe benefits, management responsibilities, restrictions on the sale or other transfer of the equity interests, circumstances under which the equity interests in the Business may or must be purchased by the Business or other shareholders, and selection of the Business's fiscal year. Should we determine that there are material differences between you on one or more of these issues that you cannot resolve on an amicable basis,

> or that we conclude cannot be resolved on terms compatible with the best interests of each party involved, then we must at that time withdraw from the representation. If this occurs, we will, if you wish, assist you in obtaining new counsel in this matter. You would, of course, be responsible for payment of all our accrued legal fees and any outstanding expenses we have advanced on your behalf.
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> ***
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> Third, in the event of litigation involving the interpretation of any document which we might draft in connection with this transaction, we may not be able to represent you in that particular proceeding.
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> ***
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> Conflict of Interest. Each of the undersigned recognize the inherit [sic] and actual conflict of interest of DeWitt Ross & Stevens, S.C., including Attorney John Movroydis, in performing services related to the Business and all the undersigned consent to such representation knowingly and of their own free will. Each of the undersigned have fully read this Letter of Engagement and have not signed this Letter of Engagement until they have fully understood it.

¶10. The Engagement Letter is signed by John Movroydis of DeWitt, and by both Paul and Brian, individually.

¶11. On or about October 22, 2015, a memorandum ("Memorandum") was prepared outlining a transaction in which Paul wished to sell 60 percent of his ownership interest in Floorcare to Brian in exchange for a payment of $410,000.00 plus 4 percent annual interest paid over 12 years. The Memorandum provides that the terms set forth within it would "BE TRANSPOSED TO A FORMAL CONTRACT OF SALE BY A LAW FIRM MUTUALLY AGREED TO BY THE PARTIES…. THIS AGREEMENT WILL BE RETROACTIVE TO 12/31/2014."

¶12. The Memorandum is unsigned.

¶13. On or about February 25, 2016, the shareholders and directors of the Company executed a Joint Unanimous Consent Resolution ("Consent Resolution"). The Consent Resolution was drafted by John Movroydis of DeWitt. The Consent Resolution resolves on behalf of the shareholders and directors that: (1) the directors of the Company are Brian and

Paul; (2) Brian is President and Secretary, and Paul is Vice President and Treasurer; (3) the registered agent of the Company is changed from Paul to Brian; and (4) the shareholders as of January 1, 2016, are Brian (85 percent) and Paul (15 percent).

¶14. The Consent Resolution also provides

> This is also to memorialize that Brian P. Brunner and Paul A. Brunner had agreed to and consummated the buyout of that portion of the shares of stock in the Corporation of Paul A. Brunner, consisting of Sixty Percent (60%) of his interest to Brian P. Brunner such that when added to Brian P. Brunner's current ownership interest at Twenty-five Percent (25%), Brian P. Brunner is the owner of Eighty-five Percent (85%) of the Corporation and Paul A. Brunner is the owner of Fifteen Percent (15%) of the Corporation. The terms of the buyout are as set forth on the attached Statement dated October 22, 2015, which the parties shall proceed to memorialize in a formal contract of sale as lawfully and mutually agreed to by the parties.

¶15. The Consent Resolution makes clear that the change in ownership is directly related to Paul's estate planning and corporate planning DeWitt prepared on behalf of him and his wife:

> Presently Paul A. Brunner and Mary F. Brunner are having their estate planning and corporate planning, including the Corporation developed by the law firm of DeWitt, Ross & Stevens, s.c., which the parties agree benefits the Corporation. The parties recognize that the work is interrelated and the Corporation agrees to pay, as invoiced, to pay the amount equal to one-third (1/3) of the total cost of this estate planning and corporate planning; one-third (1/3) is to be paid by Paul A. Brunner and Mary E. Brunner; and, one-third (l/3) is to be paid by Unisource Insurance Associates, LLC.

¶16. The Memorandum was attached to the Consent Resolution. The Consent Resolution is signed by Paul and Brian.

¶17. The parties did not provide the Court with a subsequent engagement letter relating to DeWitt's joint representation of the parties—specifically, the Company and Paul relating to the estate and corporate planning developed by DeWitt, and potentially Brian, as well, given his interest and role in the estate and corporate succession planning. The Court therefore finds that

the only engagement letter consenting to the joint representation of the parties, whether that be just the Company and Paul, or the Company, Paul, and Brian, is the Engagement Letter.

¶18. Although the Consent Resolution references memorializing the Memorandum in a formal contract of sale and the retention of legal counsel to prepare a Buy-Sell Agreement between the shareholders, no such documents were filed with the Court.

¶19. On March 15, 2017, Brian died. Sherri, Brian's wife, is the sole heir to, and personal representative of, Brian's estate, and succeeds to his shares in the Company.

¶20. Sherri claims that she is an 85 percent owner of the Company's stock. Paul maintains he owns 75 percent of the Company's stock.

¶21. After his passing, Brian's vacancy on the Company's Board of Directors has never been filled, leaving Paul the sole director. Apparently, he is also the Company's sole officer.

¶22. The Company's Articles of Incorporation require two directors to constitute the Board.

¶23. On September 19, 2019, the Company, through its attorneys DeWitt, filed a lawsuit against Sherri seeking declaratory relief. The lawsuit named Paul as an "Involuntary Plaintiff."

¶24. At the motion hearing, DeWitt argued that it needed to present the matter to the Court for a determination because of the conflicting positions of its shareholders. The lawsuit, however, makes clear that the Company, and its attorneys, are advocating on behalf of Paul. The lawsuit seeks a declaration that the share transfer did not occur, and to restore (or confirm) Paul as a 75 percent shareholder and Brian as a 25 percent shareholder, which was the share ownership immediately before the Consent Resolution.

¶25. Alternatively, the Company seeks a declaration that Brian breached the terms of the share transfer agreement by failing to make payments to Paul, and rescission of the agreement as an appropriate remedy for the breach.

¶26. The Company is considering a sale of the business, which would result in liquidating distributions to the shareholders, Paul and Brian (now Sherri).

¶27. DeWitt represents the Company in this lawsuit, and also represents Paul in various matters involving the Company and personal matters.

¶28. DeWitt is representing the Company in the sale negotiations, and concurrently represents Paul in the sale negotiations as well. In the sale negotiations, for example, Attorney Movroydis proposed that Paul receive an employment agreement as a condition of the sale, a position counsel for the Company would not pursue, but counsel for Paul would.

¶29. Sherri demanded that DeWitt withdraw from representing the Company in the lawsuit and from representing Paul in any matters related to the Company.

¶30. DeWitt declined to withdraw, contending, among other things, that there is no conflict of interest because it never represented Brian.

¶31. The legal bills reflect that DeWitt invoiced the Company for legal services directed against Brian and Sherri and for the benefit of Paul, including: (1) the possibility of filing a claim in probate or outside of probate against Brian's interests; (2) how the Company can pay a majority shareholder's fees in a shareholder dispute; and (3) coordinating strategy with Paul and aligning the interests of the Company with Paul.

DISCUSSION

¶32. Lawyers are champions for their clients. In taking on the representation of a client, lawyers assume duties of care, confidentiality, and loyalty. Principles of confidence and

trust were developed under the common law long before the adoption of rules governing lawyer conduct and professional responsibility. *Foley-Ciccantelli v. Bishops Grove Condo Ass'n, Inc.*, 2011 WI 36, ¶85, 333 Wis.2d 402, 797 N.W.2d 789. As the Wisconsin Supreme Court made clear in *Foley-Ciccantelli*, this Court's consideration of a motion to disqualify is guided by case law and the principles found in the Supreme Court Rules of Professional Conduct for Attorneys. *Id.* ¶86. Resolution of disqualification motions is guided in part by the rules of professional conduct because disqualification is one of the primary means of assuring that the rules are not violated. *Berg v. Marine Trust Co., N.A.*, 141 Wis.2d 878, 416 N.W.2d 643 (Ct. App. 1987).

¶33. A request to disqualify counsel must not be taken lightly. At its heart, it is preventing a client from his or her attorney of choice—his or her selection of a champion. A litigant's right to prosecute or defend a suit with an attorney of the litigant's choice is protected by the state Constitution. *Foley-Ciccantelli*, 2011 WI 36, ¶ 102 (citing WIS. CONST. art. I, §21(2)). These protections prevent courts from undercutting a suitor's choice of attorney through indiscriminate disqualification of counsel. *Berg*, 141 Wis. 2d at 887.

¶34. As a result of the concern for upsetting a party's right to select its counsel, the party seeking disqualification bears the burden of proving the necessity for disqualification. *State v. Gonzalez-Villarreal*, 2012 WI App 110, ¶ 8, 344 Wis. 2d 472, 478, 824 N.W.2d 161, 164 *citing Marten Transp. Ltd. v. Hartford Specialty Co.*, 194 Wis.2d 1, 24–25, 533 N.W.2d 452 (1995).

¶35. Supreme Court Rule 20:1.9 outlines an attorney's duty to former clients with respect to confidentiality and conflicts. It provides, in pertinent part,

> SCR 20:1.9 Duties to former clients. (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse

to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.

¶36. Applying this rule and established authority, disqualification is required if the Court determines (1) there was an attorney-client relationship that has ceased; (2) a subsequent representation of another person involves the same or a substantially related matter; (3) the interests of the subsequent client are materially adverse to the interest of the former client; and (4) the former client did not consent to the new representation. 2011 WI 36, ¶94. The Court will address these four matters in turn.

¶37. The first issue is whether DeWitt had an attorney-client relationship with Brian. A party seeking to disqualify counsel on the basis of a relationship with a former client must prove an attorney-client relationship existed. *Foley-Ciccantelli*, 2011 WI 36, ¶ 94; *Marten Transp. Ltd.*, 194 Wis.2d at 24–25. Whether an attorney-client relationship exists rests on the intent of the parties and presents a question of fact for the factfinder. *Edlebeck v. OJBFC, Bouraxis Properties, LLC*, 2013 WI App 13, ¶ 26, 345 Wis. 2d 846, 826 N.W.2d 123 (unpublished). Generally, an implied attorney-client relationship exists if an objective person in the position of the client would believe that an attorney-client relationship was formed.

¶38. DeWitt contends that it never represented Brian. Wisconsin subscribes to the entity rule which provides that a lawyer representing an entity represents the entity only and does not by virtue of that representation represent the organization's constituents. *Fouts v. Breezy Point Condo. Ass'n*, 2014 WI App 77, ¶ 12, 355 Wis. 2d 487, 494, 851 N.W.2d 845, 849; *see also Jesse v. Danforth*, 169 Wis. 2d 229, 239, 485 N.W.2d 63, 66 (1992). The Rules of Professional Conduct further codify the entity rule, noting, "A lawyer employed or retained by

an organization represents the organization acting through its duly authorized constituents." SCR 20:1.13(a).

¶39. Supreme Court Rule 20:1.13, however, does not foreclose an attorney from concurrently representing an organization and a constituent. That rule recognizes that "a lawyer representing an organization also may represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of SCR 20:1.7. If the organization's consent to the dual representation is required by SCR 20:1.7, the consent shall be given . . . by the shareholders." SCR 20:1.13(g).

¶40. The Court finds that the Engagement Letter expressly created an attorney-client relationship among DeWitt and the Company, Paul, and Brian. It expressly was designed to formalize a "dual or (in DeWitt's words "multiple") representation of Paul, Brian and the Company. The Engagement Letter recognized the representation was multiple: of the Company and its members, identifying Brian and Paul. Brian and Paul both signed the Engagement Letter in their personal capacities. Specifically, DeWitt informed Brian and Paul they could hire separate legal counsel, but "nevertheless want this firm to represent the business for all of you." DeWitt thereafter served as general corporate counsel under the engagement, and in doing so, drafted the Consent Resolution of the shareholders and directors (Brian and Paul) memorializing Paul's transfer of his shares to Brian. The Consent Resolution drafted by DeWitt recapitulated the share ownership post-transfer (Brian 85 percent and Paul 15 percent), which by the Consent Resolution was "confirmed, ratified and approved, and shall control any shareholding contrary or inconsistent with the following shareholding [referenced above]." The Consent Resolution drafted by DeWitt incorporated and attached the Memorandum. There can be no dispute DeWitt represented the Company, Brian and Paul with respect to the Company's affairs, and drafted

documents for the Company to be signed by Brian and Paul related to their ownership interests and management of the Company, exactly as contemplated by the Engagement Letter with the Company, Brian and Paul as joint or multiple clients.

¶41. Moreover, the Company did not draft the Engagement Letter, DeWitt did. In fact, the attorney who authored and signed the letter, John Movroydis, provided an affidavit accompanying the Company's brief opposing the motion. Attorney Movroydis provided no testimony with respect to the meaning of the Engagement Letter, the scope of DeWitt's representation or the identity of DeWitt's clients, other than saying he never provided legal services to Brian in his individual capacity.

¶42. The finding that DeWitt undertook the representation of Paul and Brian, in addition to the Company, is bolstered by its admitted representation of Paul on various matters, and also the Consent Resolution's statement that DeWitt is representing Paul and the Company on the "interrelated matters" involving estate planning and corporate planning, presumably corporate succession matters. Absent another engagement letter wherein the parties consent to the multiple representation referenced in the Consent Resolution, the consent for the concurrent representation identified in the Consent Resolution had to be the Engagement Letter.

¶43. The second issue is whether the former and current representations involve the same or substantially related matters. "The assessment of whether the former and current representations are 'substantially related' is case-specific and involves a process of factual reconstruction." *Foley-Ciccantelli*, 2011 WI 36, ¶ 108. A substantial relationship exists "if the factual contexts of the two representations are similar or related." *See Berg*, 141 Wis. 2d at 889 (citations omitted).

¶44. *Foley-Ciccantelli* teaches that this Court should determine whether the lawyer was exposed to confidential information in the prior representation and whether that confidential information will be relevant in the current representation. *Id.* ¶108. As the Supreme Court explained:

> A central concern underlying the substantially related standard in SCR 20:1.9, and disqualification based on a breach of duties owed a former client, is confidentiality between the attorney and the former client. Maintaining confidentiality of information relating to representation is a fundamental principle in the attorney-client relationship. This fundamental principle encourages clients "to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." SCR 20:1.6, ABA Comment 2. By protecting attorney-client confidentiality, a court maintains public confidence in the legal profession and protects the integrity of the judicial process.

Id. ¶100

¶45. *Foley-Ciccantelli* explains that matters are substantially related "if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second." As a result, a court need not find that an attorney has actually breached ethical standards or revealed client confidentiality.

¶46. The ABA Comment to Rule 1.9 provides further clarity on what is "substantially related:"

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. . . . A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

SCR 20:1.9, ABA Comment 3.

¶47. Questions about the existence of a conflict of interest should be resolved in favor of disqualification, and, with respect to the substantial relationship test, unless it can be clearly discerned that the matters are unrelated, the Court should find the matters sufficiently similar or related. *Berg*, 141 Wis. 2d at 889-890.

¶48. The Court finds that DeWitt's former representation of Brian is substantially related to the current representation. In fact, a plausible argument could be made that it is the *same* matter if the engagement in 2009 was driven by estate planning and corporate succession issues. Here, the lawsuit involves the issues for which DeWitt was engaged to perform legal services, as the Engagement Letter outlined: "capitalization and other organizational matters," "the amount and type of equity interests," "salaries," "management responsibilities," "restrictions on the sale or other transfer of equity interest," and "circumstances under which the equity interests in the Business may or must be purchased by the Business or other shareholders." DeWitt identified these very issues as ones on which the shareholders may have material differences that would necessitate DeWitt's withdrawal from the multiple representation.

¶49. The Consent Resolution, moreover, confirms that these matters involving the equity ownership, corporate planning, and estate planning are all "interrelated," justifying the Company paying for one third of the associated legal fees (with Paul and his wife paying a third and Unisource Insurance Associates, LLC paying the remaining third).

¶50. The third question is whether the representation of the current client is materially adverse to the interests of the former client Brian. As an initial matter, it bears mentioning that in looking at adversity, Brian's interests survive him. Since conflicts of interest and the applicable rules are concerned with the interests of the former client, so long as the former

client's interest survives, the rules and duties under them still apply. Applying a rule identical to SCR 20:1.9 (Oregon Rules of Professional Conduct 1.9), the Supreme Court of Oregon recognized conflicts of interest do not disappear because a former client is deceased:

> The wording of those rules focuses on the interests of the former client. That focus supports the Bar's position that, because a client's interests can and often do survive a client's death, the rules' protections extend to a former client even after his or her death. But it is not just any interests of the former client that must survive. In the context of the disciplinary rule, it is the former client's interests that pertain to the matter in which the lawyer previously represented the former client. It is those interests that must survive the former client's death.
>
> The rules also require that the former client's interests "are" in actual or likely conflict with (DR 5–105(C)) or materially adverse to (RPC 1.9(a)) the current client's interests. Accordingly, the attorney must assess whether the pertinent interests of the deceased former client will be adverse to the interests of the subsequent client during the subsequent representation. That is, the proper analysis is not whether the interests of the former and current client were adverse during the former client's lifetime, but whether the surviving interests of the former client are adverse to the current client during the subsequent representation.

In re Hostetter, 348 Or. 574, 584, 238 P.3d 13, 19–20 (2010). *Cf.* Wis. Stat. § 905.03(3) (providing that attorney-client privilege survives death of client and succeeds to personal representative of deceased client).

¶51. DeWitt contends that its representation of the Company is not materially adverse to Brian's interests (now held by Sherri) because it brought the lawsuit to seek a ruling from the Court regarding the divergent positions of its shareholders. Given the difficulties and emergent issues in resolving the ownership dispute and in constituting a Board of Directors, DeWitt contends that it was justified in filing a declaratory judgment action to determine the shareholders' respective ownership in the Company.

¶52. As DeWitt would have it, it was in the position akin to an insurance company with two *bona fide* claimants to a death benefit filing an interpleader action to have a court

determine which claimant is entitled to the proceeds. *See, e.g.*, Fed. R. Civ. P. 22. The problem, however, is that, unlike the interpleader analogy, where the insurance company is a nominal party not advocating for one or the other claimant, here the Company did not remain neutral. Instead, the Company filed its action seeking a declaration that the transfer of shares was not a valid agreement. What is more, it argued alternatively that, to the extent the share transfer agreement is valid and enforceable, the Court should declare that Brian breached the agreement by failing to make payments to Paul, warranting rescission. These positions are clearly adverse to Brian's (now Sherri's) interests.

¶53. The adversity presented by DeWitt's challenge to the Consent Resolution it drafted is noted in the ABA Comment [1] to Rule 1.9. That comment states that "[u]nder this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client." In this regard, the Court just notes the possibility of Attorney Movroydis being a witness regarding the Consent Resolution, and matters taken thereafter in relation to it, and the potential conflicts that this may present under SCR 20:3.7.

¶54. The last issue is whether Brian or Sherri consented to the present adverse representation. They did not. The Engagement Letter contained a consent to multiple representation, wherein Brian consented to DeWitt providing legal services to the Company, as well as Brian and Paul, acknowledging "the inherit [sic] and actual conflict of interest of DeWitt." Under SCR 20:1.9, the former client must consent to the "new representation," which implies the consent must be to the offending representation (in this case, by DeWitt on behalf of the Company regarding the share ownership dispute). Brian's previous consent to the multiple representation was based upon DeWitt's explanation of the conflicts, and assurances that

DeWitt's representation of the Company "would be on an impartial basis" and "meet rigorous ethical requirements." DeWitt identified potential areas of conflict among the investors, and promised withdrawal in the event such a conflict arose. One of those areas was "the amount and type of equity interests." Instead of withdrawing, DeWitt continued representing the Company and Paul and brought a lawsuit adverse to Brian's interests. Brian did not consent to this representation in the form of an advance waiver, and DeWitt does not contend that he did. And Sherri does not consent to DeWitt's representation of the Company in this lawsuit or of Paul in matters related to the prior representation. As a result, disqualification of DeWitt is appropriate.

¶55. DeWitt, however, contends that the Court should deny the motion because Sherri sat on her rights, and argues that principles of waiver and laches warrant denial of the motion. DeWitt relies upon *Batchelor v. Batchelor*, 213 Wis. 2d 251, 570 N.W.2d 568, 570 (Ct. App. 1997). In *Batchelor*, the party seeking to disqualify counsel knew of the opposing party's counsel in May and did not raise any objection on the basis of a conflict of interest until August. *Id.* at 258. During that time, several substantive issues had been addressed and at least two motions had been filed by the parties. *Id.* In the light of this delay and the hardship imposed on the opposing party, the Court of Appeals applied the doctrine of laches and held that as a result of her delay in seeking disqualification, she waived the right to raise the issue.

¶56. DeWitt contends that Sherri delayed in bringing the disqualification motion because her attorney worked with DeWitt for more than a year to resolve the underlying issues before filing the disqualification motion. From DeWitt's standpoint, the motion is a litigation tactic to increase costs to the Company and delay the proceedings.

¶57. The Court disagrees. The Court does not view the disqualification motion as a tactic, and does not see how increased costs to the Company and delay advantages Sherri in the

least. Further, based on the submissions, the Court does not believe that Sherri sat on her rights or delayed in pursuing the pending motion. To be sure, Sherri's attorney, Attorney Szymanski, made Attorney Movroydis aware of Sherri's conflict concerns before the lawsuit was filed. Before then, Attorney Szymanski suspected that Attorney Movroydis was representing both the Company and Paul, but Attorney Movroydis would say only that his bills are paid by the Company. When pressed after a May 2018 meeting, Attorney Movroydis would not disclose who he represented, but explained that he had an engagement letter on file with appropriate waivers.

¶58. It was not until the filing of the lawsuit in September 2018, and Attorney Movroydis finally providing the Engagement Letter to Attorney Szymanski on January 23, 2019, that it became clear to Sherri and her counsel that DeWitt previously represented the Company, Paul and Brian, and was presently representing the Company at the direction and control of Paul. The motion to disqualify was filed March 6, 2019.

¶59. Under the circumstances, the Court finds that Sherri did not waive her right to pursue disqualification or otherwise sit on her rights to the prejudice of the Company. The Court does not find unreasonable delay in filing the motion. In any event, those seeking equity must do equity. DeWitt's delay in providing information to Sherri and lack of candor in identifying the clients and interests it represented preclude the equitable relief it asks.

¶60. In the second part of her motion, Sherri seeks to prevent the Company from prosecuting the claims in this matter. It is denominated a motion to dismiss, but she acknowledges that the Company is a necessary and appropriate party to the action. She contends, however, that the Company should remain neutral in the lawsuit and certainly should not be funding it in pursuit of Paul's interests.

¶61. Sherri relies upon authority holding that corporations should remain neutral in disputes between shareholders. *See Jesse, et al. v. Four Wheel Drive Auto Co., et al.* 177 Wis. 627 (1922) (it is improper for a corporation to choose sides between two shareholders, particularly when the litigation has no bearing on the business operation or purpose); *Ewer v. Lake Arrowhead Association, Inc.*, 2012 WI App 64 (a claim based on the impairment of an individual right of a shareholder belongs to the shareholder and is properly brought by the shareholder directly); *John v. John*, 153 Wis.2d 343 (corporate neutrality is required when the lawsuit is purposed to predict or establish personal interest of the parties).

¶62. The Supreme Court recently applied this principle in *Ehlinger v. Huser*, 2010 WI 54, ¶1, 325 Wis.2d 287, 785 N.W.2d 328. *Ehlinger* involved a dispute over the definition of book value for a required buyout in the event a shareholder became disabled. *Id.* The disabled shareholder, unhappy with the determination of book value, brought a declaratory judgment action to find the buyout agreement unenforceable, and sought judicial dissolution. The opposing shareholder, seeking enforcement of the buyout agreement (to buy the other shareholder's shares for book value) was a named defendant, along with the corporation. The corporation funded the defense, including enforcement of the buyout. The Supreme Court examined, as a matter of first impression, whether it was improper for the corporation to pay one shareholder's litigation expenses in a dispute with another shareholder. *Id.* at ¶91. Given the dispute between the two directors, the Court concluded that the corporation could not have authorized indemnification of the defendant shareholder (who was also a director and officer). *Id.* at ¶¶98-100. The Supreme Court concluded that since the corporation had no present right or interest in the purchase of the shares (as the buyout was between the shareholders themselves), the corporation was a nominal party. *Id.* at ¶112. Having only a nominal interest in the litigation, and there being no corporate

obligation to indemnify, the corporation should not have paid for the litigation expenses of the defendant shareholder. *Id.* at ¶119.

¶63. As in *Ehlinger*, Brian and Paul's share transaction is between Brian and Paul only. The lawsuit is primarily between the shareholders, involving their personal interests, and the Company has no rights in the disputed share transaction. And to the extent the Company were to take a position in this dispute, the Court is hard-pressed to understand why it would not support the ownership reflected in its corporate records, specifically, the Consent Resolution.

¶64. The Court finds that the Company is, and should be going forward, a nominal party only. The claims and positions that advantage Paul should be prosecuted by Paul, not the Company. Sherri has filed claims against the Company for declaratory relief and judicial dissolution under Wis. Stat. § 180.1430(2), but *Ehlinger* makes clear that such claims can be handled impartially by neutral counsel. The Court asked the parties to brief matters regarding the captioning of the case and the posture of the litigation going forward, and alerted them that if representation of the Company is necessary (which it likely is as it is a defendant on Sherri's claims) and the shareholders cannot agree on an attorney to represent the Company going forward, the Court would consider appointing a receiver to manage and oversee Company operations pending a final resolution of the substantive issues.

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¶65. Accordingly, the Court grants the Defendant's motion to disqualify and grants in part her motion to preclude the Company from prosecuting claims advantaging Paul. DeWitt is

precluded from representing the Company in this lawsuit and from representing Paul on matters related to the Company and estate planning unless Sherri gives consent under SCR 20:1.9.

Dated this 3rd day of April, 2019.

BY THE COURT:

/s/ Michael J. Aprahamian

Circuit Court Judge