

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Jan 20 2021

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

Case Nos. 2015-CP-26-1084 / 2013-CP-26-5535 (combined)
Appellate Case No. 2017-001646

Supreme Court Case No. 2020-001478

Jericho State Capital Corp. of Florida..... Plaintiff

v.

Chicago Title Insurance Company,..... Defendant

AND

Lynx Jericho Partners, LLC..... Plaintiff

v.

Chicago Title Insurance Company..... Defendant

of whom Jericho State Capital Corp. of Florida and Lynx Jericho Partners, LLC

are the..... Respondents

and Chicago Title Insurance Company is the Petitioner.

**RETURN TO RESPONDENT’S MOTION TO STRIKE AMICUS CURIAE BRIEF OF
PALMETTO LAND TITLE ASSOCIATION
AND TO DISQUALIFY WOMBLE BOND DICKINSON U.S., LLP**

Palmetto Land Title Association (“PLTA”) submits this return in response to Respondent’s Motion to Strike Amicus Curiae Brief of Palmetto Land Title Association and to Disqualify Womble Bond Dickinson U.S., LLP (the “Motion”) filed on January 12, 2021. This Return is supported by the Affidavits of Matthew Tillman and G. David Ziegler, Jr.

In the Motion, Respondent seeks three items of relief, two of which are moot. Respondent seeks to strike the Amicus Curiae Brief filed on behalf of PLTA and to disqualify Womble Bond Dickinson, U.S., LLC (“Womble”), but such relief is not necessary because Womble withdrew the Amicus Curiae Brief it filed on January 12, 2021, and Womble is no longer representing PLTA.

The Motion also seeks to prohibit Womble from disseminating any work product to PLTA or its attorneys, including the proposed Amicus Curiae Brief (the “Proposed Brief”). Specifically, Respondent alleges that the PLTA and its attorneys should be prohibited from utilizing the Proposed Brief in preparing a new amicus curiae brief to be submitted by new counsel. (Motion at 2, 5.) However, granting the Respondents’ Motion would unnecessarily and unfairly penalize PLTA for its attorneys’ inadvertent error. As explained below, because the Proposed Brief is not the product of the use of confidential or proprietary information related to the Respondent, and because it contains solely legal and policy arguments, PLTA should be allowed to utilize the Proposed Brief with new counsel. The Court should not grant Respondents’ Motion and punish PLTA by requiring PLTA to have new counsel write a new brief from scratch when the Proposed Brief adequately and fairly sets forth PLTA’s interest and position in this case. Instead, PLTA should be allowed to present its arguments in the form it agrees to with the newly retained undersigned counsel, including arguments and work product contained in the Proposed Brief.

First, Mr. Tillman, who is the author of the Proposed Brief, has never been involved in any representation of the Respondent. (Tillman Aff. ¶ 5.) Although Respondent claims that Womble was its primary law firm for various matters, it does not allege that Mr. Tillman was ever involved in representing Respondent, or that Mr. Tillman had any interaction or knowledge of any of Womble’s representation of the Respondent concerning the subject property or any other matter. Mr. Tillman confirmed in his Affidavit that he had no knowledge of Womble’s prior representation of the Respondent. (*Id.* ¶ 5.) Womble’s representation of Jericho ended nine years before Mr. Tillman was ever contacted by PLTA. (*Id.* ¶¶ 4-5.)

Second, the Proposed Brief does not contain any confidential or pertinent information obtained from Womble’s prior representation of Respondent. As Mr. Tillman states in his Affidavit, he was completely unaware of Womble’s prior representation of Respondent and therefore did not utilize any information relevant to Womble’s representation of Respondent in any way. (*Id.* ¶ 10.) Instead, the only documents he utilized in preparing the Proposed Brief were the Court of Appeals’ opinion, the subject ordinance and insurance policies, and relevant case law, statutes, and secondary case materials. (*Id.* ¶ 11.)

Third, the matters determined by the Court of Appeals do not have anything to do whatsoever with the foreclosure of the subject property. Instead, the issues relate to insurance coverage over the losses arising from a completely separate action by Horry County. (*Id.* ¶ 10.) Moreover, PLTA’s brief is singularly focused on the Court of Appeals’ determinations that directly impact the practice of real estate law in South Carolina and the issuance of title insurance, and nothing that would benefit from any knowledge related to the underlying foreclosure of the subject property. The Proposed Brief has solely legal and policy arguments, and does not cite a single fact related to the foreclosure.

It is well-settled that a conflict of a lawyer should not penalize the client. Undoubtedly, “[t]he penalty from not having work product made available to substitute counsel is against the client. *First Wisconsin Mortg. Tr. v. First Wisconsin Corp.*, 584 F.2d 201, 205 (7th Cir. 1978). Therefore, where work product was not derived from and does not contain confidential or proprietary information related to the conflict of interest, then the work product should be turned over to substituted counsel. *See Chronicle Pub. Co. v. Hantzis*, 732 F. Supp. 270, 273–74 (D. Mass. 1990) (allowing for the turnover of work product from withdrawn counsel to substituted counsel); *Behunin v. Dow Chem. Co.*, 642 F. Supp. 870, 872-74 (D. Colo. 1986) (finding that the disallowance of the turnover of work product to substitute counsel was “neither necessary nor prudent” as “denying turnover of work product would not serve the purpose of withdrawal and would have a severely harmful effect upon broader interests of justice and society”); *E.E.O.C. v. Orson*

H. Gygi Co., 749 F.2d 620, 622 (10th Cir. 1984) (finding that the Court fulfilled the professional responsibility while lessening the hardship on the Defendant/Appellant by allowing his disqualified counsel to provide substituted counsel with all work product relevant to its defense); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 236 (2d Cir. 1977) (holding that the dismissal of the complaint and suppression of any facts, documents, or information obtained by disqualified counsel was too severe a remedy and unwarranted); *Lorber v. Winston*, No. 12-CV-3571 ADS ETB, 2012 WL 5989464, at *2–3 (E.D.N.Y. Nov. 29, 2012) (determining that burden resulting from the disallowance of shared work product would outweigh any potential possibility of taint); *Arnold v. Cargill Inc.*, No. CIV.01-2086 DWF/AJB, 2004 WL 2713259, at *4 (D. Minn. Nov. 23, 2004) (allowing for disqualified counsel to turn over to potential successor counsel, provided that it agrees to be bound by a protective order, all class certification and liability period filings, along with all Court orders issued in the case); *Lone Star Indus., Inc. v. S. Red-E-Mix, Inc.*, No. CIV. A. 90-2349-JWL, 1995 WL 775348, at *3 (D. Kan. Dec. 18, 1995) (holding that withdrawn counsel may discuss the files and status of the pending case with successor counsel as long as he did not share any confidential information he may have received in the past).

Here, it is undeniably clear that the Proposed Brief was not the product of any information that Mr. Tillman obtained from Womble’s prior representation of Respondent in an unrelated matter. Respondent has not identified any portion of the Proposed Brief that it believes was derived from confidential or proprietary information Respondent provided to Womble as its attorneys. Instead, Respondent argues only that its position and that of PLTA are directly adverse, and therefore the entire Proposed Brief is tainted. Such a conclusion is unsupported by the facts and the text of the Proposed Brief, which is clearly focused solely on policy and legal arguments. As a result, the Proposed Brief should be available to PLTA and its substituted counsel to utilize.

Finally, Respondent includes in its Motion an argument that PLTA should not be permitted to file any amicus curiae brief, regardless of which attorney drafts the brief, demonstrating PLTA’s true purpose in filing the Motion. In particular, Respondent argues that PLTA should not be permitted to file any amicus curiae brief because Chicago Title Insurance Company, the Petitioner, is a member of PLTA. These allegations and matters are more appropriately addressed in response to a pending Motion for Leave to File an Amicus Brief, none of which is currently pending. However, in response, PLTA states that there is no evidence of any conflict or bias of PLTA that would prevent the Court from considering PLTA’s Motion for Leave to File Amicus Curiae Brief.¹

Respondent alleges that PLTA and Petitioner have “close contacts” because Petitioner’s counsel has formerly served on PLTA’s Board, and because Petitioner is a member of PLTA. (Mot. at 2-3.) First, Demetrius (“Jim”) K. Koutrakos, counsel of record for Petitioner, is not currently a member of the Board of PLTA. (Ziegler Aff. ¶ 10.) Similarly, none of Petitioner’s employees currently sit on PLTA’s Board. (*Id.* 9.) Neither Mr. Koutrakos nor anyone else employed by Petitioner had a vote on whether or not PLTA would submit an amicus curiae brief or whom it would hire to do so. (*Id.* ¶¶ 9-10.)

Instead, as set forth in the Affidavit of G. David Ziegler, Jr. and PLTA’s Motion, the Court of Appeals’ Opinion in this case affects *all* title insurance companies who operate in South Carolina, not just Petitioner. (*Id.* ¶ 7.) It also affects other members of PLTA, including real estate attorneys, (whom are mostly title insurance agents), other title insurance agents, and title abstractors. (*Id.* ¶¶ 3-4.) The Court of Appeals decision has the potential to significantly impact the current practice of real estate law in South Carolina, title search procedures, and existing insurance contracts. (*Id.* ¶ 7.) Therefore, PLTA’s interest in the case goes beyond the interest of one member and in fact supports PLTA’s mission as a whole—to

¹ Contemporaneously with this Return, PLTA filed a Motion for Leave to File Amicus Curiae Brief by and through its substituted counsel, Mary M. Caskey of Haynsworth Sinkler Boyd, P.A.

represent stakeholders concerning issues that could affect the efficient transfer of real estate titles in South Carolina.

For all of these reasons, the Motion should be denied and PLTA should be allowed to utilize the Proposed Brief.

Respectfully submitted,

s/Mary M. Caskey

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