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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

SUNESIS TRUCKING COMPANY, INC.  
Plaintiff

Case No: CV-18-908636

Judge: CASSANDRA COLLIER-WILLIAMS

THISTLEDOWN RACETRACK, LLC, ET AL  
Defendant

**JOURNAL ENTRY**

DEFENDANTS' THISTLEDOWN RACETRACK, LLC AND JACK ENTERTAINMENT, LLC MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL, FILED 02/19/2019, IS DENIED.

OPINION AND ORDER IS SIGNED AND ORDERED RECORDED. ORDER ATTACHED. OSJ.

<u>OSJ</u>	
Judge Signature	Date

CLERK OF COURTS  
CUYAHOGA COUNTY, OH

2019 APR 22 P 3:34

**FILED**



Complaint in the original litigation alleging breach of the parties' February 1999 contract regarding payment for the hauling of straw and manure.

Lowe, with co-counsel Meghan P. Connolly, filed a notice of voluntary dismissal without prejudice of this action on December 21, 2017. On December 19, 2018, Plaintiff re-filed its Complaint, referencing the original case number and again setting forth one sole cause of action for breach of the 1999 4-year contract, which Plaintiff contends was renewed multiple times pursuant to the contract and the parties' actions.

It is undisputed that Lowe engaged in correspondence with Defendants' previous counsel prior to this matter being re-filed. The substance of said correspondence and any consequence thereof is the basis for Defendants' Motion to Disqualify.

Defendants' Motion indicates that the nature of Plaintiff's counsel's actions and correspondence compel a finding that "Lowe is a necessary witness on, among other things, the contested material issue of Plaintiff's alleged damages." Defendants' Motion at P. 1.

Defendants contend that in March, 2018, Lowe sent a letter to Defendants' prior counsel, Jan Roller, presenting a new claim of damages owed by Defendants to Plaintiff based upon on a separate provision of the parties' contract. It was an obligation on the Defendants to "assure that any and all trainers/owners who have horses that are bedded on shavings shall be required to purchase shavings from only North Randall Grain at the price of \$7.50 per standard bag." Lowe indicated that North Randall Grain assigned its rights under Section 7 of the contract and that his client was seeking more than \$3 million. This triggered back and forth correspondence and certain statements made by Lowe regarding his client's potential and alleged theories and damages. A "fictitious name registration" and a second assignment (allegedly executed by Lowe) from North Randall Grain to Plaintiff would later be presented to Defendants. Defendants state

that when they indicated they would not engage with Plaintiff regarding the assignments, Plaintiff re-filed its Complaint reverting to the original damages theory.

Defendants' primary argument is that under Ohio Prof.Cond.R. 3.7(a) and (b), and pursuant to caselaw, Lowe is now a necessary witness and the nature of his involvement requires disqualification because he is required to testify regarding Plaintiff's alleged damages. Defendants further argues that Lowe's conduct has created a conflict of interest with his client which imputes and requires disqualification of his lawfirm.

## **II. LAW AND ANALYSIS**

### **A. RULE 3.7: LAWYER AS WITNESS**

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;
- (3) the disqualification of the lawyer would work substantial hardship on the client.

"A motion to disqualify counsel is the proper method for a party to bring an alleged breach of ethical duties to the court's attention." *SST Castings, Inc. v. Amana Appliances, Inc.*, 250 F. Supp. 2d 863 (S.D. Ohio 2002). A trial "court has inherent authority to supervise members of the bar appearing before it; this necessarily includes the power to disqualify counsel in specific cases." *Kala v. Aluminum Smelting & Ref. Co.*, 81 Ohio St.3d 1, 4 (1998), see also *Royal Indemn. Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31 at 35-36 (1986).

Generally, a court will not interfere with a party's right to the counsel of its choice; however, this right is limited by the ethical rules governing attorneys. *Henry Filters, Inc. v. Peabody Barnes, Inc.*, 82 Ohio App.3d 255, 262 (6th Dist. 1992). "[L]ower courts have a duty to

ensure that the attorneys who practice before it do not violate the disciplinary rules and those courts have the inherent power to disqualify an attorney from acting as counsel in a case where the attorney cannot or will not comply with the Code of Professional Responsibility and such action is necessary to protect the dignity and authority of the court.” *Carr v. Acacia Country Club Co.*, 8th Dist. No. 91292, 2009-Ohio-628, ¶15 (citing *Horen v. Bd. of Edn.*, 174 Ohio App.3d 317, 322, 2007-Ohio-6882).

## **B. ANALYSIS**

Much authority exists regarding the interpretation of Rule 3.7(a). Before looking at the exceptions which allow for an attorney to represent a client despite a likelihood that he or she must testify, of which both (1) and (3) may be applicable in this case, this Court must determine if Attorney Lowe “is likely to be a necessary witness.”

“In order to determine whether a lawyer is likely to be necessary witness, a trial court must first determine that the proposed testimony is material and relevant to the issues being litigated and that the evidence is unobtainable elsewhere. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and availability of other evidence. A party’s mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony.” *Jay-Seicean v. Seicean*, 2018-Ohio-891.

This Court must look no further than Defendants’ Reply Brief on this topic. In response to Plaintiff’s Evidence Rule 408 argument regarding the inadmissibility of settlement negotiations based on this situation, Defendants state, “None of these issues are remotely

relevant to the per-load hauling fee claim that Sunesis has now pivoted back to asserting.”

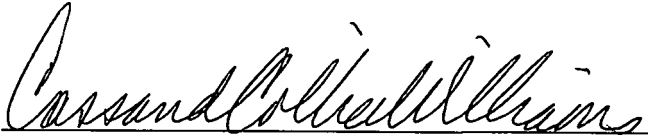
[Emphasis Added] Defendants’ Reply Memorandum at p. 7.

The only issue to be litigated in this case is the “per load hauling fee” portion of the contract at issue. One could assume that the North Randall Grain shavings issue is now an “uncontested issue” which would comport with the first exception to 3.7(a). Defendants’ admission that this issue is not remotely relevant to the current and only cause of action also renders as moot the question of whether the shaving issue and Lowe’s actions and correspondence could be obtained elsewhere.

### **III. CONCLUSION**

Defendants’ Motion to Disqualify is hereby DENIED. Attorney James A. Lowe and his law firm, Lowe Eklund Wakefield, Co., LPA., are hereby permitted to continue representation of the Plaintiff in the matter currently pending before this court (Case No. CV-18-908636).

**IT IS SO ORDERED.**

  
JUDGE CASSANDRA COLLIER-WILLIAMS