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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2190-23

P.M.H. and K.G.H., h/w,
individually and on behalf of
minors L.H. and P.H.,¹

Plaintiffs-Appellants,

v.

NORTHFIELD BOARD OF
EDUCATION, K.K.,
M.V., and P.B.,

Defendants-Respondents.

Submitted May 22, 2024 – Decided June 14, 2024

Before Judges Currier, Susswein and Vanek.

On appeal from an interlocutory order of the Superior
Court of New Jersey, Law Division, Atlantic County,
Docket No. L-0420-21.

Dilworth Paxson LLP, attorneys for appellants
(P.M.H., of counsel and on the briefs).

¹ In accordance with Rule 1:38-3(f)(4), and to protect the privacy of the family at issue in this appeal, we refer to the individuals involved by initials and pseudonyms.

Cooper Levenson, PA, attorneys for respondents (Jennifer Broeck Barr and Rebecca D. Winkelstein, on the brief).

PER CURIAM

By leave granted, we review a series of Law Division orders applying the Rules of Professional Conduct (RPC) to plaintiffs' legal representation and granting defendants leave to file a counterclaim. Plaintiffs P.M.H (Peter) and K.G.H. (Kate), individually and on behalf of their minor children L.H. (Lucas) and P.H. (Paige), allege Lucas was abused by his kindergarten teacher beginning in 2018. When the complaint was filed, all plaintiffs were represented by Peter, a partner with the law firm of Dilworth Paxson LLP (DP law firm).

In orders dated November 13, 2023, January 10, 2024, and January 16, 2024, the trial court disqualified Peter from representing Lucas, barred the rest of the DP law firm from further participation in the case, appointed a guardian ad litem (GAL) for Lucas, and granted defendants leave to file an amended answer including a counterclaim. On January 26, 2024, the trial court denied plaintiffs' motion for reconsideration. Based on a thorough review of prevailing law and application of the RPCs, we affirm all of the orders on appeal with the exception of one. We vacate and reverse the January 16, 2024 order, finding the

court improperly exercised its discretion in permitting Peter to continue to represent Kate and Paige.

I.

We need not recite the entirety of the facts developed by the parties at this point in the litigation. We recount only those relevant to our determination of the orders on appeal.

In 2018, Lucas started kindergarten and shortly thereafter he reported to his parents he was "severely frightened" of his teacher, defendant K.K., because she "ridiculed certain activities [Lucas] engaged in, specifically coloring and reading," and "encouraged [Lucas's] peers to ridicule him as well."

Peter and Kate—collectively, "the parents"—allege K.K.'s behavior was tantamount to abuse and caused Lucas to suffer serious mental health issues which, among other problems, "limited his ability to learn." K.K. denied the allegations. The parents met with school officials M.V. and P.B., and requested Lucas be moved to a different kindergarten classroom and provided with an accommodation in light of the impairment he suffered from the abuse. After the school district denied the requests, the parents enrolled Lucas in a private school.

The school investigated allegations against K.K., after which P.B. told the parents there was "no[] support [for] any of the allegations that [Lucas] made."

The District also commenced a harassment and bullying investigation. On July 24, 2019, defendant Northfield Board of Education (the Board) affirmed the school's prior determination that there had been no harassment or bullying "as defined by the State of New Jersey and the District policies."²

The parents sought medical help for Lucas during the summer between kindergarten and first grade. The family moved to a new municipality so Lucas could attend a different school, but his mental health condition did not improve and "[h]e cried many times a day every day." Additionally, Lucas "spoke regularly about [K.K.] and how she would get mad at him when he made any mistake at all."

In January and February of 2020, Lucas attended a residential treatment program at Children's Hospital of Philadelphia (CHOP). When Lucas failed to make progress in the program, his parents spoke to the doctors and chose to withdraw him. Lucas has since been diagnosed with post-traumatic stress disorder (PTSD), disruptive mood dysregulation, and generalized anxiety. The parents allege Lucas continues to act fearfully any time he is near the school. At the time of this appeal, Lucas had not returned to a traditional school setting.

² On October 11, 2019, the parents filed a petition with the Commissioner of Education for review of the Board's decision. The disposition of that petition is not in the record.

On May 7, 2021, plaintiffs filed a ten-count amended complaint alleging negligent retention and supervision; intentional and negligent infliction of emotional distress; assault; conspiracy; violations of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50; violations of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101- 12213; violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and loss of consortium, companionship, and society.

Nearly two years after the amended complaint was filed, on March 10, 2023, Peter brought Lucas to CHOP after an apparent suicide attempt. Peter certified Lucas told him "he attempted to end his life by attempting to jump out a [seventh-]story window and attempting to hang himself with a cord which was wrapped around his neck because he was asked to do schoolwork which triggered his memory of [K.K.]."

While at CHOP, Lucas reported to doctors his "father has been physically aggressive with him in the past and as recent[ly] as [one] week ago." Lucas further reported:

his father has hit him in his head, slapped him in his face, and hit him on his bottom, all with an open[] hand. [Lucas] reports that in the past his father has left marks on his bottom, reporting that his father is "very strong." [Lucas] reports that the physical behaviors typically take place [one to three] times per day, every [five]

days, and [are] typically triggered by his father becoming "pissed" with him for not completing his school work. [Lucas] reported that [one] week ago his father hit him in the head once, for "lying [three] times" to his former psychiatrist about his father reminding him of his former [k]indergarten teacher [Lucas] also reported a history of verbal aggression from both his mother and father, reporting that his father has told him that his "work is bull---t," and he reports that both of his parents have called him an "a--hole." [Lucas] reported feeling safe with his mother, and stated feeling "good-ish" with his father. [Lucas] elaborated on this statement by reporting that his father yells a lot, and he feels like he will continue to do so.

Doctors spoke with Peter and told him they would be reporting the allegations to the New Jersey Division of Child Protection and Permanency (DCPP). Peter "reported that while he has physically reprimanded [Lucas]" and confirmed Lucas's "report of what occurred one week ago, as well as hitting [Lucas] on his bottom," the physical punishments did "not occur as frequently as [Lucas] reported." Peter "also acknowledged that he should not behave in this manner."

At several points throughout Lucas's stay at CHOP, Peter declined permission for Lucas to participate in group therapy and activities because he had not finished his homework. On March 15, 2023, a nurse reported Peter was "unhappy with [Lucas's] homework on the floor" and "[s]ecurity was notified [at] this time." A doctor spoke to Peter outside of Lucas's room while a "nurse

spoke to [Lucas and] discussed if [he was] feeling unsafe with anyone to call [a] nurse anytime."

Lucas was discharged from CHOP and admitted to Compass Health (Compass) in Chicago for additional treatment. The Compass intake form notes there was an ongoing DCPD investigation and documents that Peter told doctors Lucas "made false statements to the staff [at CHOP] that resulted in a mandatory report to [DCPD]." Peter further told Compass Lucas falsely said his "parents were physically abusing him multiple times per day, every[]day." When asked about these allegations, Lucas told Compass he did not "know why [he] said it but [he] did even though it was a lie."

In an undated letter, DCPD notified the parents that its investigation concluded the allegations of abuse or neglect were "not established." DCPD explained in the letter that allegations are not established "when some credible evidence indicates that a child was harmed or placed at some risk of harm by an action or inaction . . . of the child's parent . . . but the action or inaction did not rise to the level of abuse or neglect."

Through discovery, defendants received portions of Lucas's medical records from CHOP and Compass in August 2023. On October 4, 2023, defendants filed a motion to disqualify Peter and the DP law firm from

representing any party in the action asserting there was a conflict of interest as Lucas's injuries may have been caused, in whole or in part, by Peter.

On November 13, 2023, the trial court granted defendants' motion in part and disqualified Peter from serving as counsel for plaintiffs. The trial court predicated its decision on RPC 3.7(a), as Peter was likely to be a necessary witness should this matter go to trial. The DP law firm was not prohibited from representing "any and all of the plaintiffs in this case."

Plaintiffs moved for reconsideration. Defendants cross-moved for reconsideration and for leave to file an amended answer to include a counterclaim. On January 10, 2024, in a written order and statement of reasons, the trial court granted defendants leave to amend their pleadings based on the discovery received in August 2023.

The trial court also found it "erred when it previously found that there was not an immediate particular divergence between [Peter] and [Lucas]." Therefore, the trial court determined Peter was disqualified from representing Lucas and the DP law firm was disqualified from representing any party to the case. The trial court appointed a GAL for Lucas and explained:

Based on the court's prior findings, it is determined that [the parents] both have a conflict of interest in acting as the GAL for [Lucas] The factual basis of . . . defendants' counterclaim, which the court

has granted leave to file, claims that the [parents] are the cause or a contributing cause of the child's alleged injuries. The conflict arises from the information received as part of [Lucas's] medical file based on statements he made to that medical provider. The court finds the appointment of a GAL is necessary to protect and evaluate the interest of [Lucas] based on this scenario.

The trial court clarified that the appointment of a GAL should not be construed as evidence either parent did anything wrong. Rather, "[t]he appointment of a GAL was made due to the conflict which has arisen between [Lucas] and his parents." The order prohibited the parents from speaking with Lucas about the pending litigation.

Peter requested clarification of the January 10, 2024 order "specifically as to the contours of [his] role." In response, the trial court issued an amended order on January 16, stating Peter could represent himself, Kate, and Paige, but not Lucas. The order also clarified "[a]ll other attorneys at [the DP law firm] shall be disqualified and shall be adequately screened from the matter."

Plaintiffs filed a motion for reconsideration of the January 10, and 16, 2024 orders. The trial court denied plaintiffs' motion in an oral decision and entered a memorializing January 26, 2024 order. We granted plaintiffs' motion for leave to appeal these interlocutory orders.

II.

On appeal, plaintiffs seek to vacate the January 26 order and contend Peter and the DP law firm should not have been disqualified from representing any plaintiff, a GAL is not necessary, and the court erred in permitting defendants to file an amended answer to include the counterclaim. We are unpersuaded.

Our review of a trial court's "determination of whether counsel should be disqualified is . . . de novo." City of Atl. City v. Trupos, 201 N.J. 447, 463 (2010). Motions to disqualify opposing counsel are governed by RPC 1.7(a), which sets forth

a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

The Rule permits exceptions to disqualification if:

- (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation,

(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

[RPC 1.7(b).]

"[M]otion[s] for disqualification call[] for [the court] to balance competing interests, weighing the "need to maintain the highest standards of the profession" against a "client's right freely to choose [their] counsel."" Dental Health Assocs. S. Jersey, P.A. v. RRI Gibbsboro, LLC, 471 N.J. Super. 184, 192 (App. Div. 2022) (fourth alteration in original) (quoting Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988)). "[T]he court maintains an independent interest in assuring that conflict-free representation occurs, since the existence of conflict undermines the integrity of the court" and exposes it to "unjustified attacks over the fairness of the proceedings." State v. Davis, 366 N.J. Super. 30, 38 (App. Div. 2004) (citing State in the Int. of S.G., 175 N.J. 132, 140 (2003)).

People "are entitled to retain qualified counsel of their own choice, [but] there is no right to demand to be represented by an attorney disqualified because

of an ethical requirement." Alam v. Ameribuilt Contractors, 474 N.J. Super. 30, 36 (App. Div. 2022) (quoting Reardon v. Marlayne, Inc., 83 N.J. 460, 477 (1980)). "[D]isqualification motions are, nevertheless, viewed skeptically in light of their potential abuse to secure tactical advantage." Escobar v. Mazie, 460 N.J. Super. 520, 526 (App. Div. 2019). However, "[i]f there [is] any doubt as to the propriety of an attorney's representation of a client, such doubt must be resolved in favor of disqualification." Herbert v. Haytaian, 292 N.J. Super. 426, 438-39 (App. Div. 1996) (first alteration in original) (quoting Reardon, 83 N.J. at 471).

Plaintiffs first argue defendants' motion to disqualify Peter as counsel was improperly based on a single inaccurate allegation from Lucas that he suffered harm by his father's actions, despite DCPD's conclusion abuse or neglect was "not established" under N.J.A.C. 3A:10-7.3(c)(3). Plaintiffs assert that Justice Albin's concurring and dissenting opinions in S.C. v. N.J. Dep't of Children & Families, sets forth the Legislature did not intend a conclusion of "not established" to allow parents to "suffer collateral civil consequences." 242 N.J. 201, 249 (2020) (Albin, J., concurring in part and dissenting in part).

We are unpersuaded that a conflict based on facts revealed through discovery is an inappropriate predicate for disqualification. The majority

opinion in S.C. does not support allowing a conflict in representation to persist in violation of the applicable RPCs simply because there has been a DCPD investigation and report. Furthermore, while Peter was not found to have committed abuse or neglect, DCPD did determine there was some evidence of harm to Lucas.

We need not opine further on the propriety of a "not established" finding forming the basis for attorney disqualification because the trial court did not base its decision on a factual determination that Peter harmed Lucas. Rather, the trial court found Peter "acting as both the lawyer and the guardian of [Lucas] creates an immutable conflict of interest with [Lucas] who is also his client." Whether the fact-finder ultimately concludes Peter contributed to Lucas's injuries is not relevant to our application of the RPCs. It is the allegation, grounded in the record, that creates the conflict.

We are also unconvinced by plaintiffs' argument the trial court failed to engage in a "painstaking analysis of the facts," Dewey, 109 N.J. at 205 (quoting Reardon, 83 N.J. at 469), as required before disqualifying counsel. The record reflects a detailed, thorough consideration by the trial court. The trial court considered the facts in the record and found, under New Jersey Division of Child Protection and Permanency v. G.S., there was a "trigger for concern" of "a

manifest particularized divergence between" Lucas's "factual contentions or legal assertions" and "the remedies [Peter may] wish . . . to advocate." 447 N.J. Super. 539, 572 (App. Div. 2016). The records produced during discovery establish Peter's personal interests in the litigation may not align with Lucas's because the child's allegations as to each of his parents' actions could provide the basis for a conclusion that they caused or contributed to Lucas's damages, either individually or collectively.

Although RPC 1.7(b)(1) provides an attorney who has a conflict of interest may proceed to represent a client if that "client gives informed consent, confirmed in writing, after full disclosure and consultation," we see no evidence in the record that consent to waive a conflict of interest under the RPCs has been or could be given by the minor child. Here, the bar to representation under RPC 1.7 is not waived.

Since Peter is disqualified as counsel for Lucas, the trial court properly disqualified the DP law firm from representing any of the plaintiffs. RPC 1.10(a) sets forth that "[w]hen lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. . ." None of the exceptions to RPC 1.10(a) have

been asserted. Because Peter is a partner at the DP law firm, the trial court did not err in disqualifying the firm.

The trial court also did not err in concluding the DP law firm was disqualified from representing all plaintiffs under RPC 1.9(a), which reads: "A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing." The trial court found the DP law firm "represented all plaintiffs since the inception of the case," including in a federal court action. Accordingly, under RPC 1.9(a), the DP law firm is disqualified from representing any plaintiff in this matter, as the DP law firm still owes a duty of loyalty to Lucas.

The conflict with the DP law firm representing all of the plaintiffs also precludes Peter from representing Kate and Paige. Despite previously ruling to the contrary, the trial court set forth in the January 16, 2024 order: "[Peter] is free to represent himself, [Kate] and [Paige] as the court finds none of their interests currently conflict with the other as their position concerning causation issues are consistent and [Paige] is asserting a consortium claim only." Although neither party proffers extensive argument in their merits briefs as to

the propriety of Peter continuing to represent Kate and Paige, we are obliged to ensure compliance with the RPCs. R. 1:18; see G.S., 447 N.J. Super. at 580 (noting the court "ha[s] the authority to raise the potential conflict of interest[] sua sponte").

As stated, the DP law firm is disqualified on the basis of the divergence of the plaintiffs' interests. Peter is a lawyer with the DP law firm. To allow Peter to continue representation when he is a partner at the disqualified DP firm is incongruous with and violative of the RPCs. See State v. Bellucci, 81 N.J. 531, 541 (1980) ("As a matter of professional responsibility, if an attorney is obligated to decline or withdraw from employment, his associates or partners may not accept.").

Although under RPC 3.7(a), Peter would not be permitted to "act as advocate at a trial" for any plaintiff other than himself, as he "is likely to be a necessary witness," this issue is now moot. Peter may proceed as a self-represented litigant only, without the assistance of the DP law firm, and may not represent any other plaintiff in the litigation.

III.

We next address plaintiffs' argument that the trial court abused its discretion in granting defendants leave to file an amended answer to include a

counterclaim. Plaintiffs allege the trial court improperly relied on defense counsel's certification which contained an intentionally false statement that "with the exception of the one[]time [Lucas] was left alone with doctors and made the statements at issue, [Peter] was the one who made reports to [Lucas's] doctors." Plaintiffs assert this was an "intentional omission of context regarding [Lucas's] suicide attempt because of PTSD caused by [K.K], [Lucas's] medication imbalance, and speech disability." Accordingly, plaintiffs contend because the trial court relied on this certification in granting defendants leave to amend, the decision must be reversed.

We review a trial court's decision under Rule 4:9-1 on a motion for leave to amend a pleading for an abuse of discretion. The Court has explained "that 'Rule 4:9-1 requires that motions for leave to amend be granted liberally' and that 'the granting of a motion to file an amended complaint always rests in the court's sound discretion.'" Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) (quoting Kernan v. One Wash. Park Urb. Renewal Assocs., 154 N.J. 437, 456-57 (1998)).

"An abuse of discretion 'arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'"" Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment,

440 N.J. Super. 378, 382 (App. Div. 2015) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte, 185 N.J. at 501.

We see no abuse of discretion in the trial court's order granting defendants' application for leave to amend. The trial court granted leave to amend based on the medical records which defendants produced in August 2023. The trial court was not required to make a factual determination as to the truth of counsel's assertions because the medical records alone formed a sufficient basis to allow the amendment.

Nor do the disputed proofs regarding the parents' potentially contributory actions warrant denial of the motion, as contended by plaintiffs. When the interests of justice favor granting leave to amend, "[s]uch motions should generally be granted even if the ultimate merits of the amendment are uncertain." G&W, Inc. v. Borough of E. Rutherford, 280 N.J. Super. 507, 516 (App. Div. 1995).

We are also unconvinced by plaintiffs' argument the trial court did not sufficiently consider the prejudice that would be caused by disqualification of

counsel if defendants were permitted to assert a counterclaim. Disqualification is required even without the counterclaim being filed. Thus, allowing the amendment does not present any identifiable prejudice.

IV.

Plaintiffs' final argument is the trial court should not have appointed a GAL for Lucas. Plaintiffs contend a GAL is not necessary because Peter was properly representing Lucas's interests. In the alternative, plaintiffs assert Kate should have been designated Lucas's GAL as there were no allegations she had caused harm to Lucas.

"The decision to appoint a [GAL] is reposed in the discretion of the trial judge, and rightly so because the decision is informed by the experience the judge gains as the judge sifts through a daily docket of contested matters." J.B. v. W.B., 215 N.J. 305, 333 (2013). "[T]he basic role of the [GAL] is to assist the court in its determination of the . . . minor's best interest." In re Adoption of a Child by E.T., 302 N.J. Super. 533, 539 (App. Div. 1997); see also In re Adoption of J.E.V., 226 N.J. 90, 116 (2016) ("We also remind trial judges of their power to appoint a [GAL] . . . when the child's best interests are not being adequately protected by counsel for the parties" as "[t]here may well be cases when the child's interests differ from the parties."). Under Rule 4:26-2(b)(1),

the court's appointment of the parent as a GAL is conditioned on "the absence of a conflict of interest between parent and child."

The trial court did not abuse its discretion in appointing a GAL under Rule 4:26-2 since, given all of the evidence in the record, "a conflict of interest exists between the guardian and the minor." We see no error in the trial court's determination it was an "inextricable and unavoidable fact" that discovery suggested Lucas could have been harmed by each of his parents, in different ways. Lucas's admission to the doctors at CHOP included that his mother had "a history of verbal aggression" and both parents had called him an "a--hole." There is also countervailing evidence that Lucas told doctors he felt "safe with his mother." Plaintiffs allege in the complaint that K.K.'s name-calling and other verbal abuse contributed to Lucas's ongoing psychological injury. Although these issues are left to the trier of fact, they warrant appointment of a non-parent GAL to represent Lucas in the litigation. See In re Guardianship of J.R., 174 N.J. Super. 211, 224 (App. Div. 1980) ("Where courts are forced to choose between a parent's right and a child's welfare, they choose the child by virtue of their responsibility as *parens patriae* of all minor children, to protect them from harm.").

To the extent we have not considered any of plaintiffs' remaining arguments, we are satisfied they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, and reversed and vacated in part. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office


CLERK OF THE APPELLATE DIVISION