

17 Ohio St. 3d 88, *, 477 N.E.2d 630, **;
1985 Ohio LEXIS 319, ***; 17 Ohio B. Rep. 211

LEXSEE 17 OHIO ST. 3D 88

**GUCCIONE, APPELLANT, ET AL., v. HUSTLER MAGAZINE, INC. ET AL.,
APPELLEES**

No. 84-807

Supreme Court of Ohio

17 Ohio St. 3d 88; 477 N.E.2d 630; 1985 Ohio LEXIS 319; 17 Ohio B. Rep. 211

May 15, 1985, Decided

PRIOR HISTORY: [***1] APPEAL from the Court of Appeals for Franklin County.

The original complaint in this action was filed in 1977 by the plaintiff-appellant, Robert C. Guccione, against defendants-appellees, Larry Flynt and Hustler Magazine, Inc., alleging libel and invasion of privacy based on certain publications contained in several issues of the magazine "Hustler." In March 1980, at trial, the jury returned a verdict in favor of Guccione and awarded \$ 1,150,000 in compensatory damages against both defendants and punitive damages of \$ 26,000,000 against Flynt and \$ 11,000,000 against Hustler Magazine, Inc. The awards for punitive damages were reduced by the trial court to \$ 2,000,000 and \$ 850,000, respectively.

On appeal, the court of appeals affirmed the finding of liability but reversed the award of damages and remanded the case for a new trial on damages.

In 1982, Guccione filed a motion for admission and continued admission of out-of-state counsel, seeking the admission of Samuel N. Greenspoon and Jeffrey H. Daichman of the firm of Grutman, Miller, Greenspoon & Hendler of New York, New York. Both are members in good standing of the bar of New York. Defendants opposed the admission [***2] of Greenspoon and Daichman claiming that they intended to call representatives of the Grutman firm to testify on behalf of Flynt.

In 1983, the trial court conducted a hearing and entered an order refusing to admit Greenspoon and Daichman on the ground that Norman Roy Grutman, a member of the Grutman law firm who participated in Guccione's trial, may be called as witness during the remand trial on damages.

The court of appeals dismissed the appeal from the order of the trial court holding that an order denying plaintiff's motion for permission to be represented by an out-of-state counsel not admitted to practice in Ohio, in addition to competent Ohio counsel representing plaintiff, is not a final appealable order; to wit, not being

an order made in a special proceeding and affecting a substantial right under R.C. 2505.02.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

DISPOSITION: *Judgment reversed and cause remanded.*

HEADNOTES

Appellate procedure -- Order denying permission to out-of-state counsel to represent litigant is final and appealable -- R.C. 2505.02, construed.

SYLLABUS

An order denying permission for out-of-state counsel (otherwise [***3] competent) to represent a litigant is a final appealable order.

COUNSEL: *Vorys, Sater, Seymour & Pease, Thomas M. Taggart and C. William O'Neill, for appellant.*

Topper, Alloway, Goodman, DeLeone & Duffey, John J. Duffey and Stephen Lewis, for appellees.

JUDGES: COX, J. CELEBREZZE, C.J., SWEENEY, LOCHER, HOLMES, C. BROWN and DOUGLAS, JJ., concur. COX, J., of the Seventh Appellate District, sitting for Wright, J.

OPINION BY: COX

OPINION

[*89] [***631] The issue before the court is:

Did the court of appeals err in finding that an order denying plaintiff's motion for permission to be represented by out-of-state counsel is not a final appealable order, and, specifically, that it is not an order made in a special proceeding and affecting a substantial

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right?

We hold that an order denying permission for out-of-state counsel (otherwise competent) to represent a litigant is a final appealable order.

R.C. 2505.02 in part defines a final order as "an order affecting a substantial right made in a special proceeding * * *." This court in *Bernbaum v.. Silverstein* (1980), 62 Ohio St. 2d 445, 446, fn. 2 [16 O.O.3d 461], stated in a case analogous to the instant case that [***4] a motion to disqualify counsel affects a "substantial right." Thus an order excluding counsel (otherwise competent) is a substantial right and is appealable.

Further, this court in *Russell v.. Mercy Hospital* (1984), 15 Ohio St. 3d 37, 39, citing *Amato v.. General Motors Corp.* (1981), 67 Ohio St. 2d 253 [21 O.O.3d 158], [*90] stated that modern courts have been less than precise in defining "special proceeding." The *Russell* court then quoted the holding in *Amato, supra*, at 258 that:

"* * * whether an order is made in a special proceeding is resolved through a balancing test. This test weighs the harm to the 'prompt and orderly disposition of litigation,' and the consequent waste of judicial resources, resulting from the allowance of an appeal, with the need for immediate [**632] review because appeal after final judgment is not practicable."

According to the analysis in *BancOhio Natl. Bank v.. Rubicon Cadillac, Inc.* (1984), 11 Ohio St. 3d 32, an order excluding counsel cannot be effectively reviewed after a final judgment if the court erroneously deprives a party of his chosen counsel. The burden on that party at

the end of the case [***5] to show that he was prejudiced would in effect be an "insurmountable burden." See *Armstrong v.. McAlpin* (C.A. 2, 1980), 625 F. 2d 433, 441.

The reasoning of *Russell v.. Mercy Hospital, supra*, at 42, governs this matter:

"It appears far less likely that appeals from orders granting disqualification * * * [in this matter refusing to permit out-of-state attorneys] motions will be taken for purely tactical reasons, however. The granting of a disqualification motion by a trial court is a fair indication that a legitimate and nonfrivolous issue has been raised. It is incumbent upon courts, when a legitimate question of propriety arises, to dispose of matters promptly in order to facilitate and improve the justice system. Immediate appealability of orders granting disqualification [refusing permission] motions fulfills this purpose." (Bracketed material added.)¹

1 The assignment of error before the appellate court was:

"The trial court abused its discretion when it denied plaintiff-appellant's motion for admission of an out-of-state counsel on the sole ground that said counsel or members of their firm may be called as witnesses in the trial of this action."

[***6] Accordingly, the judgment of the court of appeals is reversed and the cause is remanded to that court for further proceedings.

Judgment reversed and cause remanded.