

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

ROBERT W. HERRING, JR. M.D., )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 17-0732-BC  
 )  
 NASHVILLE GASTROINTESTINAL )  
 SPECIALISTS, LLC, )  
 )  
 Defendant/Counter-Plaintiff. )

**MEMORANDUM AND ORDER: (1) GRANTING  
DEFENDANT/COUNTERPLAINTIFF'S MOTION TO  
DISQUALIFY; AND (2) SETTING 3/16/18 DEADLINE FOR  
PLAINTIFF TO OBTAIN NEW COUNSEL**

On December 20, 2017, the Court held in abeyance ruling on Defendant/Counter-Plaintiff's *Motion to Disqualify* Attorney Ron Pursell and the law firm of Pursell & Ramos, PLC from representing the Plaintiff, to obtain supplemental affidavits and/or declarations by the parties addressing three matters<sup>1</sup> specified by the Court.

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<sup>1</sup> The three matters identified for supplementation were the following.

- (1) Additional Information Needed – While the obligation and duty to remit payment to the Plaintiff may have arisen under Paragraph 9 of the Share Exchange Agreement which Attorney Pursell did not prepare, it is unclear from the *Complaint* for disqualification purposes, whether there is an undisputed method, calculation or formula to be applied to the remittance of payments to be made to Dr. Herring which would not implicate disqualification; or, alternatively, whether the method of calculation is disputed, and deciding that dispute depends upon interpreting a separate corporate document that was drafted by Attorney Pursell or to which Attorney Pursell had provided legal advice to the Defendant. Additional information is needed on the issues relating to calculating the Paragraph 9 payments.
- (2) Additional Information Needed – whether the Employment Agreement referenced in Count II was one of the corporate documents which Attorney Pursell either drafted or provided legal advice to the Defendant.
- (3) Additional Information Needed – whether the “corporate governance documents” to which Attorney Pursell provided legal advice to the Defendant addressed the issue of termination. If, for example, Attorney Pursell participated in the drafting of the corporate governance

After reviewing the additional submissions of Counsel<sup>2</sup> and applying Rule of Professional Conduct (“RPC”) 1.9, the Court concludes that the facts of record disqualify Attorney Ron Pursell and his law firm of Pursell & Ramos, PLC from representing the Plaintiff.

It is therefore ORDERED that Defendant/Counter-Plaintiff’s *Motion to Disqualify* is granted.

It is further ORDERED that by March 16, 2018, Plaintiff shall file a notice of appearance of Counsel. Thereafter the Court shall issue an order to schedule a Rule 16 Conference.

The basis for disqualification is that the record shows that Attorney Pursell had discussions with Defendant’s members which revealed their impressions, conclusions, beliefs and understandings related to some of the contractual provisions involved in this case.

These findings derive from the statement in the *Second Declaration of Dr. Howard Mertz* that in reviewing and preparing an agreement for a physician to join Defendant NGS in 2006, “Mr. Pursell had access to information about the compensation,

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documents that detail the legal issue of termination, then Attorney Pursell could have potentially had confidential information pertaining to the rights and obligations of termination as it related to the Plaintiff when he was advising the Plaintiff regarding the “Defendant’s threat to terminate his employment.”

<sup>2</sup> The supplemental filings are (1) the January 12, 2018 *Second Declaration of Dr. Howard Mertz* filed in support of the Defendant/Counter-Plaintiff’s *Motion to Disqualify* and (2) the January 18, 2018 *Supplemental Declaration Of Robert W. Herring, Jr., M.D.*; and the January 19, 2018 *Plaintiff’s Response To Defendant/Counter-Plaintiff’s Supplemental Filing To Motion To Disqualify Counsel*, both filed in opposition to the *Motion To Disqualify*.

employment, and duties of employed physicians, and about NGS's policies related to such matters, and Mr. Pursell discussed such issues with the shareholders and employees of NGS." *Second Declaration of Dr. Howard Mertz*, pp. 3-4 ¶ 9 (Jan. 12, 2018).

Additionally, Dr. Mertz states in his *Declaration* that Attorney Pursell "provided legal advice about physician contracts and about the corporate documents that address what happens to shares owned by a physician whose employment with NGS is terminated" and "gave specific legal advice about Sections 1.04, 2.03, and 2.04 of the NGS bylaws (among other Sections)." *Second Declaration of Dr. Howard Mertz*, p. 4 ¶¶ 11-12 (Jan. 12, 2018).

The *Second Mertz Declaration* also establishes that "Mr. Pursell provided legal advice related to NGS's standard practice for compensating physicians and for deducting expenses. Specifically, Mr. Pursell reviewed physician contracts, prepared a Physician Agreement for a new physician who joined the group, and discussed issues related to the contracts with NGS employees. For instance, the Physician Agreement that Mr. Pursell prepared included specific terms that described NGS's standard practice for compensating physicians via separate accounting for professional and facility revenue, overhead, and bonuses."

The *Second Mertz Declaration* additionally states, "I personally participated in discussions with Mr. Pursell regarding NGS's internal process for compensating physicians, including taking into account professional and facility revenue and expenses, and how the contract should address such items. The process I discussed with Mr. Pursell

is the same process used to calculate the payments to Dr. Herring under the Share Exchange Agreement after the transition in 2016 and that now appears to be at issue in the lawsuit. I considered my communication with Mr. Pursell about the contracts and how NGS calculates physician compensation and how it accounts for revenue and expenses to be confidential.”

One of the three claims asserted in the Counterclaim in this case is that the Plaintiff breached his Employment Agreement with the Defendant. The *Second Mertz Declaration* refers to discussions between the Defendant and Attorney Pursell in a former representation which discussions are substantially related to the Employment Agreement.

Thus, even though the record now establishes that the Employment Agreement and the Employee Handbook referenced in Count II of the Complaint were not one of the corporate documents which Attorney Pursell drafted and that the terms and conditions of Dr. Herring’s employment were established before Mr. Pursell provided any legal representation to NGS, nevertheless, the discussions referred to in the *Second Mertz Declaration* about shareholders and employee issues have a substantial relationship between Attorney Pursell’s former representation involving the Defendant and the issues in this case. *See Clinard v. Blackwood*, No. 01A01-9801-CV-00029, 1999 WL 976582, at \*12 (Tenn. Ct. App. Oct. 28, 1999), *aff’d*, 46 S.W.3d 177 (Tenn. 2001). Attorney Pursell’s disqualification, therefore, has been ordered.

s/ Ellen Hobbs Lyle  
ELLEN HOBBS LYLE  
CHANCELLOR  
BUSINESS COURT DOCKET  
PILOT PROJECT

cc by U.S. Mail, email, or efile as applicable to:

Ron H. Pursell  
Edward A. Hadley  
Tim Harvey