



IN THE COURT OF APPEALS OF IOWA

RANDALL M. BENNETT,	)	
Plaintiff-Appellee,	)	Filed December 27, 1979
vs.	)	
ERIC SWANSON,	)	<u>306</u>
Defendant-Appellee,	)	2-62889
and	)	
CITY OF DAVENPORT, IOWA,	)	
Defendant-Appellant.	)	

Appeal from Scott District Court - Nathan Grant, Judge.

Defendant-city appeals from interlocutory order denying their counsel permission to withdraw from representation of defendant-employee. - Reversed and remanded.

John D. Stonebraker, of McDonald, Stonebraker & Cepican, Davenport, and Scott Hartsook, City Legal Department, Davenport, for defendant-appellant.

Dorothea O'Dean, of Winstein, Kavensky, Wallace & Doughty, Rock Island, Illinois, for defendant-appellee.

Allan Hartsook, of Klockau, McCarthy, Lousberg, Ellison & Rinden, Rock Island, Illinois, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant-city appeals from an interlocutory order denying their counsel permission to withdraw from the representation of defendant-employee, asserting that a potential conflict of interest exists sufficient to justify withdrawal. We reverse the trial court and remand for further proceedings.

The petition commencing this case alleged that defendant-employee shot plaintiff while defendant-employee was in his capacity as a police officer employed by defendant city. Plaintiff's petition named both the police officer and the city as defendants. The city engaged a law firm to represent both it and its employee. Subsequently, the law firm discovered that the city's duty to indemnify the police officer may be at issue. Furthermore, the police officer's employment was terminated by the city and the same law firm was retained by the city to defend the police officer's civil service litigation against the city. In light of these potential, if not actual, conflicts of interest, the law firm moved for leave to withdraw from representation of the police officer. The trial court denied the motion on the ground that whether there was a conflict of interest was a factual question to be resolved in further proceedings.

We conclude that the trial court erred in refusing to allow the law firm to withdraw from the representation of the police officer. It is clear from the above-stated facts that requiring the law firm to represent both the city and its employee would require it to represent potentially "differing interests" since they are the type of interests that would "adversely affect either the judgment or the loyalty of a lawyer to a client." Iowa Code of Professional Responsibility for Lawyers, Definition 1. In such a situation, it is recommended that a law firm discontinue its representation of both differing interests in litigation. Iowa Code of Professional Responsibility for Lawyers, EC 5-14, EC 5-15. If the law firm believed that the exercise of its independent professional judgment on behalf of the police officer would be or would likely be adversely affected by its representation of the city, it was obligated to discontinue such multiple representation. Iowa Code of Professional Responsibility for Lawyers, DR 5-105(C). A demonstrated conflict of interest is not necessary to establish grounds for withdrawal; a potential conflict of interest is sufficient. See Rowan v. LeMars Mutual Insurance Co., 230 N.W.2d 905, 914 (Iowa 1975). Since a potential conflict of interest

existed in the representation of both the city and the police officer to the extent that continued representation of both would be a violation of DR 5-105(C), the law firm should have been allowed to withdraw from its representation of the police officer. Iowa Code of Professional Responsibility for Lawyers, DR 2-110(B)(2), (C)(2). The potential conflict between representation of the city and the police officer raised by the issue of whether the police officer was acting within his scope of employment was sufficient to allow the law firm to withdraw its representation of the police officer so that the police officer could be represented by independent counsel. See Martyn v. Donlin, 148 Conn. 27, 32, 166 A.2d 856, 859 (1961). See also City Council of Elizabeth v. Fumero, 143 N.J. Super. 275, 288, 362 A.2d 1279, 1286 (Law Div. 1976). In addition, the law firm's representation of the city in defending against the police officer's civil service litigation, raises further doubt about the ability of the law firm to adequately represent both parties in the case at bar. See Township of Edison v. Mezzacca, 147 N.J. Super 9, 16-17, 370 A.2d 511, 514 (App. Div. 1977). Consequently, the trial court should have allowed the law firm to withdraw from representation of the police officer and erred in denying the law firm's motion for leave to withdraw.

REVERSED AND REMANDED.

Donielson and Snell, JJ., each concur specially.

DONIELSON, J. (specially concurring)

While I concur in the majority's result, I agree with Judge Snell's special concurrence that we should also hold the city obligated to defend the police officer. I believe, however, section 613A.8, The Code 1979, is more appropriate support for this position. That section provides: "The governing body shall defend any of its officers, employees and agents, whether elected or appointed" Id. The clear meaning of this section is that the city must defend the police officer. Although I accept the reasoning of Judge Snell's special concurrence, requiring the continued defense by the city, I believe section 613A.8, The Code 1979, is the more directly controlling authority.

SNELL, J. (specially concurring)

We are not called on to determine whether the city is obligated to continue to provide for the defense of the police officer under section 613A.8, The Code 1979, since that issue is not directly presented on appeal. However, since that issue is inextricably entwined with the issue of whether the law firm should be allowed to withdraw from its representation of the police officer, I believe it is both proper and necessary to address it at this time.

The city should not be relieved from its obligation to defend the police officer. The city has undertaken the obligation to defend its employee, and the attorney's withdrawal from representation of the employee because of a conflict of interest will not relieve the city of the obligation it has assumed. Cf. Transamerica Insurance Co. v. Keown, 451 F.Supp. 397, 405 (D.N.J. 1978) (once insurer undertook obligation to defend insured, conflict of interest did not relieve it of its obligation to defend by providing independent counsel); Foster v. Calderwood, 118 N.H. 508, 511, 389 A.2d 1388, 1390 (1978) (once insurer undertook defense of insured, insurer was obligated to conduct defense with due regard for all interests of insureds); Pacific Insurance Co. v. Pacific Northwest Research Foundation, 39 Or. App. 873, ___, 593 P.2d 1278, 1280 (1979) (even though insurance contract does not require insurer to defend insured, once insurer has commenced representation of insured, it cannot later withdraw that representation). In the case of Martyn v. Donlin, 148 Conn. 27, 166 A.2d 856 (1961), a case cited by the city as support for allowing withdrawal of the law firm, and a case factually similar to the case at bar, once it was determined that the municipality and the police officer should be represented by independent counsel, the municipality did not rescind its undertaking to represent the police officer; rather, it retained its corporation counsel for itself and employed private counsel for the police officer. Martyn v. Donlin, 151 Conn. 402, 413, 198 A.2d 700, 706 (1964). That is the proper practice for the city in this case to follow as well. Thus, I would conclude that the city remains obligated to provide counsel for the police officer's defense by reason of its assumption of that obligation once litigation was commenced. In light of that obligation, the city's concurrence in the selection of independent counsel for the police officer is required. Township of Edison v. Mezzacca, 147 N.J. Super. 9, 16, 370 A.2d 511, 514 (App. Div. 1977).