IN THE INDIANA SUPREME COURT
APPEAL NO: _____

NORTHCREST R.V. PARK, BARBEE LANDING MOBILE HOME PARK, KUHN LAKE LAKESIDE RESORT	)	Indiana Court of Appeals Cause No. 18A-EX-01243
Appellants (Complainants below)	)	Appeal from Indiana Utility Regulatory Commission, Cause No. 44973
-vs-	)	The Hon. James Huston, Chair The Hon. Sarah Freeman The Hon. David E. Ziegner The Hon. David Ober Commissioners
LAKELAND REGIONAL SEWER DISTRICT	)	
Appellee (Respondent Below)	)	The Hon. Lora L. Manion, Administrative Law Judge

REPLY BRIEF IN SUPPORT OF LAKELAND REGIONAL SEWER DISTRICT'S VERIFIED MOTION TO DISQUALIFY

Appellee, Lakeland Regional Sewer District ("Lakeland"), filed a Verified Motion to Disqualify, seeking to disqualify the law firm of Lewis & Kappes P.C. ("L&K") from further participation in this matter due to its violation of Rule 1.12 of the Indiana Rules of Professional Conduct.[1]

Aaron Schmoll, the Administrative Law Judge assigned to IURC Cause No. 44798, and current Director at L&K, joined L&K during the pendency of the action below. While IURC Cause No. 44798 was dismissed for lack of ripeness, the case was promptly refiled,

[1] The Complainants appear to suggest that the motive behind Lakeland's Motion to Disqualify is that the Motion is being used as a "procedural weapon." Contrary to this baseless assertion, Lakeland's Motion to Disqualify is predicated upon the troubling conduct of L&K in employing the Administrative Law Judge who only shortly before issued an Order containing dicta in Complainants' favor while the matter with the exact same issues, regulatory environment, governing law, and parties continued to pend without notifying the tribunal or the parties and failing to screen Mr. Schmoll.

and involved the same parties, issues, and governing law. Therefore, the IURC actions identified as Matter 1 and Matter 2 in the Complainants' Response, should be treated as a continuation of the same action for purposes of Rule 1.12.

When Schmoll joined L&K after having presided as ALJ in this matter, no written notice was given to the parties or the IURC and no screening provisions were set into place. In fact, Schmoll's affidavit does not say that he did not discuss Matter 44798 during his interview process or after he began employment with L&K. Mr. Schmoll's affidavit only states that he was not involved with Matter 44973 and has not consulted or advised anyone who has worked on that matter. Nowhere in his affidavit does he attest that he has not discussed and/or consulted with anyone at L&K about Matter 44798, the matter which he presided over.

The crux of the Complainants' Response pertains to a showing of prejudice. In its Verified Motion to Disqualify, Lakeland alleges that it has been prejudiced in several discernable manners, discussed more fully in Section III below. However, prejudice clearly lies in L&K's blatant violation of Rule 1.12 in failing to notify the parties and IURC of its employment of the ALJ who presided over a portion of an active cases against the parties and issues pending before this Court. Further, prejudice lies in Lakeland's inability to assess the degree of Schmoll's participation in the underlying proceedings. The Complainants urge this Court to adopt a rule that a clear showing of actual prejudice must be shown or even the most blatant violation of the Rules of Professional Conduct is meaningless and cannot result in disqualification. That cannot and should not be the rule. The Complainants seek to benefit from Lakeland's inability to discern the degree

by which it has been prejudiced by L&K's employment of the ALJ who presided over the underlying matter involving the same parties, same issues, and same laws. [2]

I. THE IURC MATTERS SHOULD BE TREATED AS THE SAME MATTER FOR PURPOSES OF A RULE 1.12 ANALYSIS SINCE THE MATTERS INVOLVE THE SAME ISSUES, GOVERNING LAW, PARTIES, AND REGULATORY ENVIRONMENT

The Complainants go to great lengths to distinguish between IURC Cause No. 44798 and IURC Cause No. 44973. In fact, the only real distinction between the two matters is that they possess different cause numbers because Cause No. 44798 was dismissed due to lack of ripeness. However, the distinctions between the IURC matters end there, since the matters involve the exact same parties, issues, governing law, and arguments.

The only reason for a different cause number is that Mr. Schmoll dismissed Cause No. 44798 due to lack of ripeness but invited the Complainants to refile their claims against Lakeland once a full bill was issued the following month. In fact, the Complainants tried to revive their dispute under Cause No. 44798 and not re-file a new action in their Petition for Rehearing filed with the IURC on May 16, 2017. (See Complainants' Petition for Rehearing attached hereto as Exhibit "A.") The IURC Ordered the Complainants refile their Complaint under a new cause number.

[2] If the disqualification issue arose during the underlying dispute, then Lakeland would have sought and been permitted to conduct discovery as to the disqualification and/or conflict issue. However, because the violation of Rule 1.12 was not discovered until the appeal was filed with the Indiana Court of Appeals, discovery was not permitted to assess the degree of Schmoll's participation in the underlying proceedings to identify actual prejudice. Moreover, ultimately the facts relating to the issue of prejudice are within the sole knowledge of Schmoll and L&K.

It cannot be lost that the Complainants, when filing Cause No. 44973, explicitly incorporated the entire record from Cause No. 44798. So, the Complainants not only believed the matters to be related, but they explicitly wanted to make the actions related. Schmoll's Order, dismissing Cause No. 44798, was incorporated into the record of Cause No. 44973 and is currently part of the record on appeal in front of the Indiana Supreme Court. For that reason, the matters should be not be treated as two separate actions, as the Complainants urge, since the current dispute involves the same parties, same issues, and all pleadings and orders from Cause No. 44798 were incorporated into Cause No. 44973's Court record.

Lastly, the Complainants themselves argued the following in their Joint Reply in Support of their Petition for Reconsideration filed on June 25, 2018 in front of the IURC:

> "This case has the exact same facts, exact same regulatory environment, exact same governing legal authority. In this case, the Commission clearly intended to bind itself and the parties by the instructive language included in Cause No. 44798."

(See Complainants' Joint Reply in Support of their Petition for Reconsideration attached hereto as Exhibit "B," page 8.) In arguing that the IURC in Cause No. 44973 should follow the dicta in Mr. Schmoll's Order, the Complainants argue that the two IURC actions have the exact same facts, exact same regulatory environment and exact same governing legal authority. In addition, they involve the same parties. Despite these representations made previously in this matter, the Complainants now go to great lengths to argue that the underlying IURC actions are distinct and should not be treated as the same action for a Rule 1.12 analysis. This argument places form over substance. The underlying IURC

actions are identical and should be treated as the same action for purposes of a Rule 1.12 analysis.

II. L&K IS IN CLEAR VIOLATION OF RULE 1.12(c)(1) and (c)(2) AND L&K'S VIOLATION OF RULE 1.12 PREJUDICES LAKELAND

L&K has been in clear violation of Rule 1.12(c)(2) since its employment of Schmoll on August 1, 2017 (the date Schmoll accepted employment with L&K). Rule 1.12(c)(2) states that for L&K to have "[continued] representation" of Appellants, written notice should have been provided, "to the parties and any appropriate tribunal *to enable them to ascertain compliance* with the provisions of this rule." Ind. Rules of Prof'l Conduct 1.12(c)(2) (Emphasis added). Here, L&K did not notify anyone of Schmoll's employment. These requirements are put in place to avoid prejudice to opposing parties. L&K's failure to notify the IURC and opposing parties, along with its failure to screen Mr. Schmoll precluded Lakeland from ever being able to discern and demonstrate that prejudice existed.

For over 14 months, the presiding ALJ over Matter 44798, which Complainants incorporated fully into Matter 44973, has been employed as a partner with the firm representing Northcrest, Barbee Landing, and Kuhn Lake, all of which are parties to this appeal. Further, Appellants have unwaveringly replied up Mr. Schmoll's Order from Matter 1 as the foundation of its arguments throughout these proceedings. (See "Brief of Appellants NBK Complainants" at 10, 13, 14, 16, 22, 23, 28, 29, 38, 45, and 51; see also the second IURC Complaints, Appellants Appendix, Vol II, pp.78, 188; see also "Joint Reply in Support of Petition for Reconsideration," Appellants Appendix, Vol. IX, pp. 199-200).

Despite these glaring likelihoods of prejudice against Lakeland, L&K hired Schmoll, and at no time during this 14-month-period, notified any party or the tribunal—blatantly violating Rule 1.12(c)(2).

The Complainants submitted Mr. Schmoll's Affidavit in Support of their Response in Opposition to the Motion to Disqualify. Mr. Schmoll's affidavit is important because of what it does not say. Mr. Schmoll attested that he was not involved with Cause No. 44973, he did not work on Cause No. 44973, and/or consult with or advise anyone who has worked on Cause No. 44973. (See Aaron Schmoll's Affidavit attached as Exhibit A to their Response, Paragraph 16.) What is notable in Mr. Schmoll's affidavit is what is absent: Mr. Schmoll does not attest, under penalties of perjury, that he has not discussed and/or advised L&K as to his Order issued in Cause No. 44798, which is a part of the Court record currently pending on appeal with this court. This fact alone justifies disqualification from this action.

L&K fully incorporated Cause No. 44798 into 44973 and have unwaveringly relied upon Mr. Schmoll's Order before the IURC, the Court of Appeals, and this Court. In fact, the Order issued by Mr. Schmoll is part of the Records in this proceeding.

The Complainants rely upon *Red Arrow Ventures v. Miller* and state that the Court held that failing to demonstrate prejudice mandates rejection of a motion to disqualify. See 692 N.E.2d. 939 (Ind.Ct.App. 1998). That is not the holding of *Miller*. The Court in *Miller* held that the motion to disqualify should be denied because prejudice was not alleged by the defendant. Here, Lakeland clearly alleges that it has been prejudiced. While Lakeland cannot establish the full extent to which it has been prejudiced because

discovery is not permitted at this juncture, and because the facts demonstrate prejudice area solely within the knowledge of Schmoll and L&K, Lakeland has fully articulated the manner in which it has been prejudiced herein and in its Motion to Disqualify. Therefore, *Miller* is inapplicable.

III. CONCLUSION

Based upon the foregoing, Lakeland requests this Court to disqualify L&K from continued representation of the Complainants.

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WORD COUNT CERTIFICATION

I verify that this Reply Brief in Support of Verified Motion to Disqualify contains no more than 2,100 words in compliance with Rule 34(G).

_/s/Eric M. Blume_____

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2019, the foregoing document was served upon the following parties by the electronic E-Filing system:

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