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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LUANNE CRAWFORD,

Plaintiff and Appellant,

v.

LOS ANGELES COUNTY OFFICE OF
EDUCATION et al.,

Defendants and Respondents.

B239649

(Los Angeles County
Super. Ct. No. BC439271)

APPEAL from an order of the Superior Court of Los Angeles County.

Rita Miller, Judge. Reversed with directions.

Helena Sunny Wise for Plaintiff and Appellant.

Ballard Rosenberg Golper & Savitt LLP, Linda Miller Savitt and Christine T.
Hoeffner for Defendants and Respondents.

Plaintiff Luanne Crawford appeals from an order disqualifying her counsel, Helena Sunny Wise, for examining a communication that she knew or reasonably should have known was protected by the attorney-client privilege and inadvertently disclosed to her by defense counsel and using that communication and the information it contained at depositions. We conclude that the interests of the defendants can be protected by remedies less draconian than disqualification of plaintiff's counsel. Therefore we reverse the order and remand the cause to the trial court for further proceedings consistent with the views we express here.

FACTS AND PROCEEDINGS BELOW

Plaintiff, an employee of defendant Los Angeles County Office of Education (LACOE), brought this action against LACOE and several of its employees alleging defamation and various employment-related torts including unlawful discrimination based on disability and retaliation for whistle-blowing.

In response to plaintiff's request for production of documents, defense counsel sent plaintiff's counsel, Wise, 907 pages of written material. Defense counsel inadvertently included in these materials 10 pages of attorney-client privileged documents consisting of communications between LACOE administrators, staff members and their attorneys. The first page of the series of documents Bates-stamped D-0546 through D-0551 was marked "Atty client" by LACOE's counsel and the other documents at issue showed on their face that they were sent to LACOE's General Counsel by LACOE administrators. (After hearing argument and conducting an in-camera review the trial court found these documents were protected by the attorney-client privilege.)

Wise did not alert defense counsel when she received these privileged documents. Instead, the trial court found, "she read the entire packet of documents, determined that some were helpful and some were 'worthless,' made copies of the documents, and, without any warning to defendant[s], used some of the documents when conducting a deposition[.]"

The defendants first learned that Wise possessed their privileged communications when she used them at the deposition of one of the defendants and defense counsel noticed that the first document marked as an exhibit had the words “Atty client” written on it. The defense attorney had not been involved in the document production and did not know whether the document had been disclosed inadvertently but he raised that possibility with Wise who made no offer to return the document and proceeded to use it as a basis for questions to the witness.

After trying and failing to obtain Wise’s agreement to return the inadvertently disclosed documents, defendants asked the court to order her to do so. The court found that the documents were privileged and issued an order directing Wise to immediately return the originals and all copies of the privileged material to defendants and authorized defendants to remove the original and any copies from the material included as an exhibit to the deposition.¹

Defendants moved to disqualify Wise on the grounds that she refused defendants’ demands for the return of the privileged documents and instead made “extensive use” of them and that disqualification “is the only measure to adequately remedy the prejudice [d]efendants already have suffered from [the] improper use of clearly-privileged documents.” The court granted the motion and ordered Wise “not to disclose any information obtained from the privileged documents, orally and in writing, to anyone, specifically including plaintiff and any other counsel plaintiff may retain during the course of this case.” The court subsequently ordered defendants to preserve the documents in question and stayed further proceedings in the case until the resolution of plaintiff’s appeal from the disqualification order.

¹ The documents are not part of the record.

DISCUSSION

Our Supreme Court's decision in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 (*Rico*) states the procedure to be followed when an attorney is inadvertently given the opponent's privileged communications.

In *Rico*, a personal injury case, plaintiff's attorney obtained notes written by defense counsel "through inadvertence" on the part of the defense. (*Rico, supra*, 42 Cal.4th at p. 812.) The notes discussed defense counsels' litigation strategy and summarized a meeting with their expert witnesses. Plaintiff's attorney read through the notes, made copies, analyzed their contents, shared the notes with his co-counsel and plaintiff's experts and used them in deposing defendants' experts. Based on this conduct, the trial court disqualified plaintiff's counsel from the case.

When the disqualification order reached our high court the court framed two questions: What action is required of an attorney who inadvertently receives privileged documents? What remedy is appropriate? (*Rico, supra*, 42 Cal.4th at p. 810.)

In answer to the first question, the court adopted the standard of attorney conduct set out in *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657. Under that standard if an attorney inadvertently "receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified." (*Rico, supra*, 42 Cal.4th at p. 817.)

Our high court described the *State Fund* rule as creating an "objective standard" that is "fair and reasonable." (*Rico, supra*, 42 Cal.4th at pp. 819, 817.) In applying the

rule, the Supreme Court held, “courts must consider whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much review was reasonably necessary to draw that conclusion, and when counsel’s examination should have ended.” (*Id.* at p. 818.)

In this case the court found that Wise received privileged documents sent inadvertently as part of a document production. The first set of documents, marked “attorney-client” was sent by a LACOE administrator to other LACOE administrators and defense counsel. The other set of documents were addressed to LACOE’s General Counsel by LACOE administrators. Such documents came to Wise with a presumption of confidentiality (Evid. Code, § 917, subd. (a)) irrespective of their contents so there was no need for Wise to further examine them to ascertain whether they were privileged. Her proper response under the holding in *Rico* was to stop reading the documents and immediately notify defense counsel of their receipt. She then should have attempted to “resolve the situation by agreement or . . . resort to the court for guidance.” (*Rico, supra*, 42 Cal.4th at p. 817.) The trial court found that Wise instead read the entire packet of documents, determined which ones could benefit her case and which ones she deemed “worthless,” made copies of the beneficial documents and used some of them and the information they contained in the depositions she conducted.

Wise disagrees with the trial court’s finding that she knew or should have known the subject documents were privileged but, she maintains, even assuming the court was correct, her disqualification unfairly punishes her client when there are less onerous alternatives for protecting defendants. (*Neal v. Health Net, Inc.* (2002) 100 Cal.App.4th 831, 844 [the purpose of disqualification must be “prophylactic” not “punitive or disciplinary”].) We review the court’s disqualification order for abuse of discretion. (*Rico, supra*, 42 Cal.4th at p. 819.)

Addressing the question of remedy, the *Rico* court again adopted the views expressed in *State Fund* that “mere exposure” to an adversary’s confidences is insufficient to warrant an attorney’s disqualification, which the *Rico* court regarded as a

“draconian” result, but that disqualification “‘might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified above, *assuming other factors compel disqualification.*’” (*Rico, supra*, 42 Cal.4th at p. 819, italics added.)

The *Rico* court found that disqualification of plaintiff’s counsel was justified “‘because of the unmitigable damage caused by [counsel’s] dissemination and use of opposing counsel’s notes on strategy and expert witnesses.’” (*Rico, supra*, 42 Cal.4th at p. 819.) The use of the document “‘undermined the defense experts’ opinions and placed defendants at a great disadvantage” such that without disqualification of plaintiff’s counsel and their experts, the damage caused by [counsel’s] use and dissemination of the notes was irreversible. (*Ibid.*)

In addition to *Rico*, defendants cite us to *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 54-55, in which the court applied the rules laid down in *Rico* and upheld the trial court’s disqualification of an attorney whose client supplied numerous documents protected by the defendant’s attorney-client privilege and who thereafter extensively reviewed the documents, failed to immediately return the documents and affirmatively employed the documents to pursue the client’s lawsuit against the defendant. (*Id.* at p. 41.) The court concluded disqualification was necessary to protect the rights of the defendant, to preserve the integrity of the judicial proceedings and because there was a “‘genuine likelihood’” that [counsel]’s review of the privileged material could affect the outcome of the proceedings.” (*Id.* at pp. 54-55.)

The case before us does not involve unmitigable, irreversible damage to the defendants. The documents Wise received did not implicate defendants’ trial strategy nor analyze the potential testimony of any witness. Rather, they pertained to a purportedly negative relationship between plaintiff and another member of the LACOE staff. At oral argument defendants were unable to articulate how they were prejudiced by the communications’ disclosure to plaintiff. For her part, plaintiff maintains that she does not need the information contained in the communications or the information she gained

using that deposition to support most of her case. The trial court has the authority to fashion a protective order which among other things could exclude from the case evidence of plaintiff's relationship with the subject of the improperly retained documents² and has already issued an order that Wise not disclose any information obtained from the privileged documents to anyone including plaintiff and any other counsel plaintiff may retain during the course of this case. Such orders are sufficient to protect the interests of the defendants and to preserve the integrity of the judicial proceedings.

DISPOSITION

The order of disqualification is reversed and the cause is remanded to the trial court with directions to issue a new order precluding plaintiff's use in any manner of the information contained in the privileged documents inadvertently produced in this action. Each party to bear its own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.

² The court could, for example, enter an order precluding plaintiff, plaintiff's witnesses and plaintiff's attorneys from presenting any evidence or argument concerning, or making reference to, the relationship between plaintiff and the staff member referred to in the inadvertently produced privileged documents.