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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

JODY THULIN,

Plaintiff and Appellant,

v.

GATEWAY UNIFIEDED SCHOOL DISTRICT,

Defendant and Respondent.

C066700

(Super. Ct. No.
167034)

Did the trial court abuse its discretion by disqualifying plaintiff's lawyer and his law firm from representing her in a wrongful termination lawsuit after the lawyer directed plaintiff to review almost 40,000 e-mails purloined by one of the lawyer's other clients from their mutual employer, the Gateway Unified School District? The lawyer, Robert E. Thurbon, argues he should not have been disqualified as a matter of law because the three e-mails he read were not privileged, the potentially privileged e-mails were segregated and sealed by independent counsel, and the remaining e-mails were public records and discoverable. The trial court rejected Thurbon's logic that the

"ends justify the means." We conclude the trial court chose a difficult but justifiable course in the exercise of its inherent authority to protect the integrity of the judicial process by refusing to dismiss plaintiff's lawsuit, as requested by the district, but removing the lawyers who fell short of practicing the high ethical standards expected of servants of the law. We affirm.

FACTS

In May 2008 plaintiff Jody Thulin became assistant superintendent of business and chief business official for the Gateway Unified School District (District). The superintendent was John Strohmayer. In a memo to the school board and the superintendent in February 2009, Thulin accused Strohmayer of improper and illegal financial practices. The board hired a lawyer, Jeff Kuhn, to investigate her charges.

On June 1, 2009, Strohmayer sent two e-mails that could be important in the ensuing litigation between Thulin and the District. In both e-mails, Strohmayer referenced the difficulties surrounding Thulin. Thulin would later characterize the e-mails as "smoking guns."

Strohmayer retired on June 30, 2009. Robert Hubbell, the incoming superintendent, interviewed members of the existing administrative team. He asked each of them the same 10 questions, including Thulin. Thurbon accompanied Thulin to her meeting with Hubbell. After the interview, Hubbell concluded that Thulin was not a good fit for his administrative team and recommended to the board that she be reassigned to

another position. The intricacies of his rationale, while highly relevant to the pending appeal of the summary judgment granted the District, are not relevant to the instant appeal.¹ Suffice it to say, by a unanimous vote of the five board members, Thulin was reassigned to a classroom teaching position. She refused the reassignment and resigned at the end of June 2009.

At that time, Kendall Lynn was the director of information and technology for the District. Advised by Hubbell that layoffs in the technology department appeared likely, Lynn consulted with Thurbon. The layoff became a reality on August 17. Lynn then made a backup copy of all e-mail records on the system, including 39,312 e-mails and over 100,000 pages. Although he realized he needed authorization before he could access and copy the e-mails, he did so anyway without authorization or approval. Thurbon filed separate wrongful termination lawsuits on behalf of both Thulin and Lynn: Thulin for whistleblower retaliation and Lynn for racial discrimination.

In May 2010 Lynn informed Thurbon that he possessed e-mails he believed were relevant to his case. Thurbon told Lynn he could send the e-mails to his office and he would review them at a later date. Lynn sent the e-mails on a thumb drive, and

¹ We are reviewing the summary judgment in a separate appeal. (*Thulin v. Gateway Unified School Dist.* (C066535, notice of app. filed Nov. 1, 2010) (*Thulin I*).

Thurbon's staff copied them onto the law firm's computer system. He claims he researched whether Lynn properly acquired the e-mails and determined that because Lynn was director of information and technology, he was acting within the course and scope of his employment at the time he copied the e-mails.

On June 14 Lynn informed Thurbon there were e-mails from Strohmayer showing that "'what the District did to Jody was bad.'" At his deposition on June 23, Lynn admitted that all the e-mails were District property and he was not authorized to access them.

Nevertheless, four days later Thurbon instructed Thulin to search the e-mails on his office computer to determine if they were responsive to the District's request for production of documents. He did not inform the District or its lawyers that he possessed the e-mails. Thulin identified 147 e-mails she considered responsive to the District's request and gave Thurbon three e-mails she believed were relevant to her opposition to the motion for summary judgment. The opposition was due on June 28. According to Thurbon, his associate produced the 147 e-mails without reviewing them.

Thulin's deposition began the following day, which was June 29, 2010. Deadlines were looming. The hearing on the motion was scheduled for July 12. Discovery would be cut off on July 19, with the trial scheduled for August 17. Thurbon had no further depositions scheduled and no other discovery requests pending.

During the deposition, Thulin testified about e-mails between the District and its attorneys. Thurbon did not intervene to admonish his client not to disclose privileged information contained in the e-mails. The District learned, for the first time, that Thurbon was in possession of its e-mails.

On June 30, 2010, the District appeared ex parte to seek a temporary restraining order compelling Thurbon to return all copies of the e-mails and to refrain from using any of the information he acquired from their improper acquisition. Finding the e-mails were wrongfully obtained, the court granted the temporary restraining order and thereafter granted the District's request for a preliminary injunction. The trial date was continued and the discovery deadline was extended. The court entered a permanent injunction compelling Thurbon to return all copies of the 147 e-mails and ordering Thurbon and Thulin not to use, discuss, or disseminate the e-mails. Thurbon would not reveal how he acquired the e-mails.

At the conclusion of the hearing on the preliminary injunction, one of Thurbon's partners served the District with various discovery requests, including a request for admissions and for production of documents. The requests included specific language targeting the e-mails that had been wrongfully acquired.

Thurbon gave the e-mails to an independent lawyer to determine which documents were privileged. On August 23 Thurbon submitted all the e-mails to the court, identifying the documents the independent counsel determined were nonprivileged

public records as well as the sealed documents he determined were potentially privileged. The court refused to review any e-mails "unless they have been lawfully obtained through proper discovery." Thurbon insisted then, as he does now, that he did not read any of the e-mails other than the three "smoking guns" he attached to the opposition to the motion for summary judgment.

On September 9, 2010, the court denied the District's request to dismiss Thulin's lawsuit because Thulin herself was not guilty of any wrongdoing. The court granted the lesser evidentiary sanction preventing the use of the stolen e-mails at trial. Finally, the court granted the District's motion to disqualify Thurbon and his law firm from representing Thulin in the lawsuit.

The trial court explained: "Thurbon's conduct was deliberate and egregious. He made a deliberate decision to give the e-mails to Thulin despite the fact that the manner in which they were obtained was questionable. Thurbon insists that he is entitled to use them if they are not privileged, completely ignoring the fact that they were obtained wrongfully. Thurbon claims that he is entitled to use them because they were discoverable, although he has failed to show that a discovery request was pending that would have resulted in these documents being produced. Thurbon knew or should have known the documents were improperly obtained and deliberately gave them to his client. Thurbon has used and continues in his attempts to use these documents. The fact that these documents are now driving

the litigation is evidenced by the multiple discovery requests served by Thurbon after the time had initially passed for conducting discovery. There is a genuine likelihood that Thurbon's misconduct will affect the outcome of the proceedings before the court. Thurbon has, through improper means, obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation. Disqualification is proper under these circumstances." Thulin appeals the disqualification order.

DISCUSSION

In exercising its discretion, the trial court found that a lawyer's wrongful and egregious complicity in prohibited self-help discovery justifies disqualification. On appeal, the lawyer vehemently disagrees with the very essence of the trial court's reasoning. Rather, the lawyer would have us ignore the means of acquisition of the e-mails and focus instead on the District's failure to prove that the e-mails are privileged and are not public records. He accuses the District of stonewalling and concealing the facts he needs to prove Thulin's case. The legal issue thus presented is simply stated: Did the court abuse its discretion by disqualifying a lawyer for improperly using wrongfully obtained e-mails, even assuming they are unprivileged public records?

The law clearly prohibits the acquisition of an employer's property outside the procedures set forth in the Civil Discovery Act. (Code Civ. Proc., § 2016.010 et seq.) For example, *Conn v. Superior Court* (1987) 196 Cal.App.3d 774 (*Conn*) and

Pillsbury, Madison & Sutro v. Schectman (1997) 55 Cal.App.4th 1279 (*Pillsbury*) condemn self-help discovery. Before Michael Conn resigned as the head of the Farmers Group, Inc. (Farmers) investigation division, he took with him over 10,000 pages of notes, letters, memoranda, reports, and original communications to and from outside counsel relating to lawsuits against Farmers. (*Conn*, at pp. 777-778.) He claimed the boxes of documents were his personal files, even though he took them without the knowledge or consent of Farmers. (*Id.* at pp. 778-779.) Farmers sought and obtained an order compelling Conn to return the documents. The court found that "[r]egardless of whether some of the documents may be ultimately discoverable, defendants have, and have always had, the right to keep their own documents until met with proper discovery requests or ordered to disclose them by the Court." (*Id.* at p. 781.) When Conn did not comply with the order, the court held him in contempt. (*Id.* at p. 783.)

Conn argued the court's order exceeded the scope of the request and constituted an abuse of discretion. The Court of Appeal explained: "[T]he court has the inherent power to control the proceedings before it and to make orders which prevent the frustration, abuse, or disregard of the court's processes." (*Conn, supra*, 196 Cal.App.3d at p. 785.) Moreover, that power includes the ability to order the return of the "'fruits'" of the misappropriated documents. (*Ibid.*)

The lawyer in *Conn*, like Thurbon, claimed martyrdom in the defense of his client's interests. But the court pierced the

veil. The lawyer was not blameless, and although his position was untenable, "his attitude was uncompromising." (*Conn, supra*, 196 Cal.App.3d at p. 785.) The dilemma, however, was not how to sanction the lawyer, but "how best to repair the damage and deprive [the lawyer and his client] of an advantage which was wrongfully gained." (*Ibid.*) In *Conn*, rather than disqualifying the lawyer, as here, the court exercised its discretion to prevent *Conn* from profiting from his own wrong by compelling him to return the stolen documents as well as the "'fruits'" of those documents. (*Ibid.*)

Similarly, in *Pillsbury*, a lawyer from another law firm obtained personnel documents kept by Pillsbury about its employees. (*Pillsbury, supra*, 55 Cal.App.4th at pp. 1281-1282.) The trial court ordered the lawyer to return the documents wrongfully removed from Pillsbury. (*Id.* at pp. 1282-1283.) On appeal, the court once again condemned "self-help evidence gathering by employees for use in contemplated litigation against their soon-to-be former employers." (*Id.* at p. 1287.) In forceful terms, the court disposed of the issues appropriate to the matter before us as follows: "Accordingly, although it is enough to conclude there was no abuse of discretion in granting the injunction in this case, we will state clearly our agreement with those courts which have refused to permit 'self-help' discovery which is otherwise violative of ownership or privacy interests and unjustified by any exception to the jurisdiction of the courts to administer the orderly resolution of disputes. Any litigant or potential litigant who converts,

interdicts or otherwise purloins documents in the pursuit of litigation outside the legal process does so without the general protections afforded by the laws of discovery and risks being found to have violated protected rights. The least sanction cognizable in these circumstances would appear to be the one chosen by the trial court here: the return to the status quo existing at the time the documents were taken." (*Id.* at p. 1289.)

Thurbon asserts that the propriety of the disqualification order must be measured against the standards articulated by the California Supreme Court in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 (*Rico*). He contends that he too acquired the e-mails inadvertently. But, he insists, the documents in *Rico* were all absolutely privileged. In his view, a lawyer's responsibility turns exclusively on the nature of the contents of the documents. Thus, only if, as in *Rico*, the documents are privileged is the lawyer not at liberty to review or use them.

Thurbon contends he did not engage in any misconduct in obtaining the documents and never reviewed any privileged information. Instead, he points out that he took the prudent and ethical course in turning the e-mails over to an independent lawyer to determine which documents were privileged and which were not. Since, according to Thurbon, he did not obtain the documents through his personal misconduct and the documents are not privileged, *Rico* does not condone his disqualification and he was free to use the e-mails. We disagree for several reasons.

First, we reject the notion that *Rico* sets the standard for disqualification. On its facts, *Rico* dealt with a lawyer who had inadvertently obtained obviously privileged documents. Based on those facts, the court held the trial court justifiably disqualified the lawyer because he did not return them as soon as he realized the privileged nature of the material. (*Rico, supra*, 42 Cal.4th at p. 819.) That is not to say that the documents must be privileged, however, before a lawyer can be disqualified for utilizing wrongfully obtained documents.

Second, Thurbon's acquisition of the e-mails was not inadvertent. The trial court found, and there is more than substantial evidence to support its finding, that Thurbon's conduct was wrongful and egregious. After all, he knew his client had downloaded every e-mail from the District's system after he was given notice of his termination. In deposition, his client testified that he was not authorized to download the e-mails. Nevertheless, Thurbon gave Thulin unrestricted access to all of the District's e-mails and instructed her to identify any e-mails she thought would substantiate her claims. Apparently oblivious to the conflict of interest between his two clients, his ethical responsibility to return the documents to the District, the unauthorized copying of the e-mails, and his own complicity in utilizing wrongfully obtained e-mails, Thurbon unabashedly continues to insist he did nothing wrong. The overwhelming evidence is to the contrary.

Third, *Rico* does not hold that an attorney cannot be disqualified if the documents in his possession would have been

discoverable either because they were public records or because they are not privileged. *Rico* did not involve public records. Because the lawyer's acquisition of the documents in *Rico* was inadvertent, the court did not consider whether a lawyer could be disqualified if he wrongfully utilized them. Thurbon would have us excuse his conduct simply because he used his client to examine the e-mails he had reason to believe he should not. There is nothing in *Rico* to sanction such a transparent subterfuge.

Beyond the question of whether any of the e-mails were privileged is the more expansive claim that a lawyer and both of his clients had a fundamental right to possess and disseminate nonexempt public records for any purpose. No one disputes the strong public policy embodied in the California Public Records Act (Gov. Code, § 6250 et seq.) to advance transparency and accountability in government. But neither the act, nor the policy, is at stake here. Thurbon ignores the pertinent factual antecedents to the fundamental right he asserts and thereby draws sweeping, but unsubstantiated, legal conclusions.

There are at least three glaring deficiencies in the argument that Thurbon, Thulin, and Lynn had a fundamental right to possession of the e-mails. First, there is nothing in the record to demonstrate that they ever made a request for the e-mails under the Public Records Act. Pursuant to Government Code section 6253, subdivisions (b) and (c), once a request is made the public entity has 10 days to determine if the documents exist, if the records are privileged or otherwise exempt from

disclosure, and to provide an estimation as to how long it will take to retrieve and copy the records.

Second, neither Thurbon nor his clients received the so-called public records legally. They did not request them pursuant to the California Public Records Act; Lynn simply took them from his employer after he was given notice he would be laid off. Thurbon now makes the untenable claim that because citizens have a fundamental right to request access to public records, it does not matter that the records were taken from an employer without authorization or permission. He cites no authority for that proposition.

Finally, the District did not have the opportunity to determine which of the e-mails were exempt or privileged. Thurbon continues to insist that independent counsel segregated the privileged e-mails and none of them were exempt. He assumes that we will simply take his word for it. But the California Public Records Act gives the public entity the opportunity to review the documents requested and to make that determination. (Gov. Code, § 6253.) We certainly are not charged with the task of reviewing 39,312 e-mails to ascertain whether, as a matter of law, they are privileged or exempt. Quite simply, there is no fundamental right to take public records from one's employer without authorization or permission.

People v. Dolbeer (1963) 214 Cal.App.2d 619 provides a useful analogy. A printing company employee was paid to take confidential telephone company customer lists and turn them over to her coconspirator. (*Id.* at p. 622.) On appeal, the

coconspirator argued that the lists lacked market value because they were destined to become public property and "were virtually required to be released under section 451 of the Public Utilities Code, which requires, among other things, that every public utility furnish such instrumentalities as are necessary to promote the convenience of patrons, employees and the public." (*Dolbeer*, at p. 623.) The court rejected the notion that because the lists would have to be released, the thief, and those who received the fruits of the theft, should be exonerated. The court wrote, "It was for the telephone company, however, whether acting with specific direction of the Public Utilities Commission or not, to direct when and how the names of subscribers should be released, and not for appellant to do so by filching and for a price." (*Ibid.*)

Thurbon cites repeatedly to *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759 to support his entitlement to public records. But the case, in fact, stands for the very narrow principle that one public entity can request copies of public records from another public entity. (*Id.* at p. 772.) It certainly does not suggest that a public employee in the process of leaving public service can pilfer public records with impunity. While the case pays homage to the strong public policy to provide public records to persons on request, it simply does not aid or protect the thief.

Thurbon insists, however, that Lynn was not a thief and he is not a criminal. He is adamant that as an administrator in the technology department, Lynn was acting within the course and

scope of his employment when he made a copy of public records. Since in his view Lynn had the right to copy and take the records, they were not stolen and therefore he did not knowingly receive stolen property. He concludes, "Simply because Gateway says the documents are 'stolen', does not make it so."

It is not our role to play prosecutor, trial judge, or jury. Whether the lawyers or their client will be subjected to a criminal prosecution is not for us to determine. Whether crimes have been committed or not, there is ample evidence to support the trial court's factual finding that the taking was wrongful and counsel's complicity in soliciting his client to examine the e-mails, whether privileged or not, was an egregious breach of his ethical responsibilities. Thurbon has provided no authority for the proposition that a public employee has a fundamental right to take any and all public records without making a public records request and without securing a prior review for exemptions and privileges.

As we stated at the outset, the dispositive issue in this case is simple and straightforward. The parties attempt to litter it with red herrings about conflicts of interest and waivers. Those issues are immaterial. The only issue before us is whether the trial court abused its discretion by disqualifying counsel.

It is true that disqualification motions are designed to be prophylactic, not punitive. "The essential requirement is to calibrate the sanction to the wrong." (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 764.)

Thurbon contends that he should not have been disqualified because the e-mails were discoverable anyway. In any event, he asserts there is no genuine likelihood that his conduct will affect the outcome of the proceedings. Thus, the only goal to be achieved by removing him is to punish him. Not so.

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' . . . The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.)

The trial court steered a deliberate and fair course in navigating the competing interests involved. Having discovered that a departing employee had copied every e-mail from its system and delivered it to a lawyer to use in his case as well as another, the District sought to have Thulin's lawsuit dismissed. The trial court, recognizing there was nothing in the record to suggest any wrongdoing by Thulin, denied the motion to dismiss. Nevertheless, the court, sensitive to its duty "to preserve public trust in the scrupulous administration of justice and the integrity of the bar," imposed evidentiary

sanctions and disqualified counsel, a measured and balanced ruling in light of the misconduct the court found.

Moreover, the record supports the court's conclusion that the wrongfully obtained e-mails were driving the litigation. Before Thurbon received the e-mails from Lynn, he told the lawyer representing the District that he had completed his discovery. Yet by then he had not requested copies of any e-mails, and the discovery cutoff was a mere 12 days away. Once Lynn provided Thurbon the e-mails and Thulin diligently poured through them, however, discovery took a very different turn. The District requested, and was granted, a continuance of the trial and thus the discovery cutoff was postponed. Thurbon took full advantage of the delay and the newfound knowledge that the e-mails contained information potentially advantageous to Thulin's case, and made multiple requests for disclosure of the e-mails. In this sense, the court reasonably concluded that the e-mails were driving the litigation, and therefore, retaining Thurbon could affect the outcome of the case.

Ignoring the discovery statutes, Lynn took, and Thurbon received, the contents of the District's entire e-mail system. Neither Thurbon, Lynn, nor Thulin ever made a formal request pursuant to the Public Records Act for copies of the e-mails. Since a lawyer and his clients openly flaunted the statutory requirements, the District was not provided the opportunity to withhold either privileged documents or exempt public records. Thus, we have nothing but Thurbon's telling us over and over

again that he never read privileged documents and the records were not exempt.

The trial court did not abuse its discretion by protecting the litigation from such ongoing wrongdoing. If condoned, Thurbon's conduct threatens the integrity of the adversarial process and demeans the bar. We need not, and have not, determined whether any individual e-mails are privileged or exempt from disclosure. The tainted process, not the content of the e-mails, justifies the court's exercise of discretion in disqualifying the lawyer and the law firm that would take possession of a client's wrongfully obtained e-mails, allow another client to pilfer through them to enhance her own case, and attempt to utilize the content of the e-mails to fuel further discovery.

DISPOSITION

The judgment (order disqualifying plaintiff's counsel) is affirmed.

_____ RAYE _____, P. J.

We concur:

_____ MAURO _____, J.

_____ HOCH _____, J.