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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

GSV-2 RESORT DEVELOPERS et al.,

Cross-complainants and  
Respondents.

v.

THE RETREAT PARTNERS, LLC, et al.,

Cross-defendants and Appellants,

E055714

(Super.Ct.No. INC069420)

**OPINION**

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge.

Affirmed.

Gotfredson & Associates and E. Jay Gotfredson for Cross-defendants and  
Appellants.

No appearance for Cross-complainants and Respondents.

Cross-defendants and appellants, The Retreat Partners, LLC, Scott Zacky, Lillian  
Zacky, and Robert and Lillian Zacky Family Trust, appeal from the trial court's denial of  
their motion to disqualify the law firm of Christman, Kelley & Clarke from  
representation of opponents in the underlying litigation. The trial court's order is

appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(6).<sup>1</sup>  
(*McMillan v. Shadow Ridge at Oak Park Homeowner's Assn.* (2008) 165 Cal.App.4th  
960, 964.)

## I

### THE UNDERLYING LITIGATION

Two cases form the basis for the disqualification motion. The first is an action filed in Indio Superior Court in 2007. Unfortunately, only the fourth amended cross-complaint is in our record. It was filed on August 29, 2011. It lists the plaintiffs as The Retreat Partners LLC (Retreat Partners) and the defendants as GSV-2 Resort Developers LLC (GSV).

The cross-complaint was brought by GSV against Retreat Partners; MTC Financial, Inc. dba Trustee Corps; MKA Real Estate Opportunity Fund I, LLC; MKA Capital Group Advisors, LLC; The Robert and Lillian Zacky Trust; Robert Zacky; Lillian Zacky; Scott Zacky; Jason Sugarman; and Michael Abraham.

The cross-complaint was filed on behalf of GSV by the Santa Barbara law firm of Christman, Kelley & Clarke. Apparently, this law firm has been representing GSV in this litigation since it was filed in 2007.

The cross-complaint alleges 12 causes of action, including fraud, breach of contract and wrongful foreclosure. Based on the general allegations of the cross-

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

complaint, it appears that the action concerns a real estate development of 417 acres in Rancho Mirage, known as “The Retreat at Rancho Mirage.” The cross-complaint alleges that Retreat Partners, a “‘hard money’ lender,” is a sham entity, allegedly consisting of members MBA and the Zacky Trust.

Cross-complainants seek to disregard the corporate entity and hold cross-defendants “Lillian, Scott, Zacky Trust, MKA, Abraham and Sugarman” liable for its losses on the real estate transaction. It alleges that Retreat, MKA, and the Zacky Trust have been represented throughout the litigation by The Law Offices of Daniel D. White and Gotfredson & Associates.<sup>2</sup>

The second underlying action is a complaint for legal malpractice, breach of fiduciary duty, and breach of contract. The complaint was filed on September 15, 2011, by the firm of Christman, Kelley & Clarke on behalf of Troy Hoidal. Defendants are Gotfredson and Associates, E. Jay Gotfredson, Don C. Burns, and Kelley Pate. It alleges malpractice by the Gotfredson firm in connection with its representation of Hoidal in litigation concerning the ownership of a corporation named Ecopod. In the litigation, a man named William Dorfman sued Hoidal for breach of contract and open book account as an alleged result of corporate transactions and disputes.

Hoidal employed the Gotfredson firm to defend his interests and to file a cross-complaint. The firm’s allegedly negligent activities in the litigation led to the dismissal

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<sup>2</sup> According to appellants, “[t]he dispute arises from a \$19,965,000 loan by Retreat to GSV-2. Retreat declared GSV-2 in default and filed this action to foreclose its deed of trust securing the loan.” There is no record reference to support this assertion. (Cal. Rules of Court, rule 8.204(a)(1)(C).)

of Ecopod corporation as a cross-defendant and the dismissal of the cross-complaint. In addition, it is alleged that defendant Burns was suspended from the practice of law for 30 days but continued to represent Hoidal in the underlying litigation. Damages are alleged to be at least \$287,000.

## II

### THE MOTION TO DISQUALIFY

On October 21, 2011, the Gotfredson firm notified the Christman firm that it had previously represented both Scott Zacky and Troy Hoidal in the Ecopod litigation, and it asked the Christman firm to recuse itself from the Retreat Partners case based on an alleged conflict of interest.

When the Christman firm refused to withdraw, Gotfredson filed a motion to disqualify it. The grounds of the motion were that “Christman Kelley has undertaken representation of a new client, Troy Hoidal, who was represented by undersigned counsel along with Zacky and owes duties of confidentiality to Zacky; while Christman Kelley is also suing Zacky herein; thus Christman Kelley’s representation of Hoidal threatens Zacky’s confidential information and creates a conflict of interest.”

In support of the motion, the firm submitted the declarations of E. Jay Gotfredson and Scott Zacky.

Gotfredson declared that, although Zacky was not a party to the Ecopod litigation, Zacky “participated in numerous attorney-client confidential communications furthering Zacky’s and Hoidal’s common interests.” He also alleged that there were numerous

similarities between the two underlying cases and that he shared attorney work product with both Zacky and Hoidal on matters applicable to both cases.

In his declaration, Zacky stated: “I am a business associate of Troy Hoidal. I was interested in a project of Hoidal’s promoting and developing a product called the ‘Ecopod,’ together with a man named Gary Dorfman. I was interested (as an authorized representative of the family trust) in having the trust invest in Hoidal’s company, Ecopod. However, Hoidal’s company became embroiled in an internal dispute.”

With regard to the Gotfredson firm, Scott Zacky stated: “Troy Hoidal and I decided to have a consultation with the offices of Jay Gotfredson on the Ecopod matter. Mr. Gotfredson was already the Zacky family’s attorney in the Retreat vs. GSV-2 case. Troy and I visited Mr. Gotfredson’s offices together in order to further and protect both my family’s interests and Hoidal’s, the first of many such communications in the course of the next months and years. Hoidal and I together sought to engage Gotfredson’s law firm, and in due course Mr. Gotfredson undertook such representation regarding Ecopod.”

Scott Zacky’s declaration goes on to describe the confidential discussions he and Hoidal had with the Gotfredson firm on many occasions and the work product they received from the firm. He expected that such information and knowledge about his family and the Ecopod litigation would remain confidential and would not be used against him.

### III

#### OPPOSITION TO MOTION TO DISQUALIFY THE CHRISTMAN FIRM

The Christman firm responded to the motion to disqualify it from the Retreat Partners litigation by arguing that (1) there was no fiduciary or confidential relationship between Scott Zacky, Retreat Partners, and Hoidal; (2) there was no substantial relationship between Gotfredson's malpractice and GSV's claims against Retreat; (3) the Christman firm and Hoidal did not possess any confidential information; and (4) Christman did not have a conflict of interest.

The Christman firm filed the declaration of Dugan Kelley, a partner, which stated: "Mr. Hoidal has never divulged any confidential information regarding Scott Zacky or Jay Gotfredson in our representation of Mr. Hoidal. To my knowledge, Mr. Hoidal's relationship is only a friendship and he has never been business partners or associates with Mr. Zacky."

The firm also presented the declaration of Hoidal. Hoidal stated that he had never been a business partner, or even a business associate, of Scott Zacky. However, they were friends, and Hoidal tried to get Zacky to invest in the Ecopod project. He declined to do so.

Hoidal admitted going to Gotfredson's office with Zacky to discuss an issue involving Ecopod, but he did not retain the firm at that time. He did retain the firm a year later, when William Dorfman (brother of Gary Dorfman) sued Hoidal over Ecopod issues. Hoidal asserted that the Gotfredson firm never represented him and Zacky jointly and was never involved in any discussions about the possibility of Zacky investing in

Ecopod. He further stated that he never received or disclosed any confidential information about Zacky concerning the Retreat Partners litigation, and he concluded that he had never even heard of GSV or Retreat Partners until the Christman firm told him about the litigation.

#### IV

#### THE HEARING

The motion to disqualify the Christman firm was heard on December 5, 2011. Gotfredson's counsel clarified that there was a period of joint representation of Hoidal and Zacky, albeit in different matters. Counsel's argument was that Hoidal learned information about the Zacky defendants in the course of joint meetings and that the information could have been useful to the Christman firm in connection with the Retreat Partners litigation. In other words, Gotfredson and Zacky discussed financial business advice and "the formation, the structure, the character, and the litigation strategy of the Zacky family interest." It was the threat of the disclosure of that information by Hoidal to the Christman firm, he argued, that warranted disqualification. Accordingly, the Christman firm should not have agreed to represent Hoidal in the malpractice action, and it should be disqualified from the Retreat Partners litigation.

The Christman attorney argued that, since Gotfredson represented Zacky and Hoidal in different matters, there was no fiduciary or confidential relationship between Zacky and Hoidal. In addition, he argued that Zacky had no involvement in the underlying Ecopod litigation, although this point was disputed by Gotfredson's attorney.

A further hearing was held on December 13, 2011. Counsel for Gotfredson emphasized that Hoidal, as a disgruntled former client, potentially threatened to disclose “the confidences, the strategy, and the financial information of my client [Zacky].”

After hearing further argument, the trial court denied the motion. It said: “I find there is not a confidential relationship between—or has not been shown there was a confidential relationship between Hoidal and Zacky, not a substantial relationship between the Hoidal transaction, and the Gotfredson’s firm, and this action, and no showing that Hoidal or Christman, Kelley and Clarke firm possessed confidential information, and therefore CKC has no conflict.”

## V

### STANDARD OF REVIEW

“The denial of a motion to disqualify counsel is an appealable order. [Citation.] A trial court’s decision on a disqualification motion is reviewed for abuse of discretion. [Citation.] The judgment of the trial court is presumed correct, all intendments and presumptions are indulged to support the judgment, conflicts in the declarations must be resolved in favor of the prevailing party, and the trial court’s resolution of any factual disputes arising from the evidence is conclusive. [Citation.]” (*McMillan v. Shadow Ridge at Oak Park Homeowner’s Assn.*, *supra*, 165 Cal.App.4th at pp. 964-965.)

“The trial court’s exercise of this discretion is limited by the applicable legal principles and is subject to reversal when there is no reasonable basis for the action. [Citations.]’ [Citation.]” (*DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 832.) We therefore apply the abuse of discretion standard of review.

## VI

### DISCUSSION

The factual basis for the disqualification motion may be summarized as follows: Hoidal and Zacky were friends and, for a period of time, both were clients of the Gotfredson firm. During that time, they allege that they jointly consulted with the Gotfredson firm and, as a result, Hoidal learned privileged and confidential information regarding Zacky and his family's affairs and interests and received advice and work product from the firm. When Hoidal employed the Christman firm to file a malpractice action against the Gotfredson firm, Hoidal could have disclosed the privileged information to the Christman firm for use against Zacky in the Retreat Partners litigation. Disqualification of the Christman firm from representing GSV is the remedy to prevent a threatened disclosure.

“A motion to disqualify a party's counsel may implicate several important interests. Consequently, judges must examine these motions carefully to ensure that literalism does not deny the parties substantial justice. [Citation.] Depending on the circumstances, a disqualification motion may involve such considerations as a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. [Citations.] Nevertheless, determining whether a conflict of interest requires disqualification involves more than just the interests of the parties.” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144-1145.)

Appellants rely on a very thorough opinion in *Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210 (*Roush*). In that case, two employees, Roush and Kilgore, separately sued their employer. Kilgore settled his case. A provision in the settlement agreement required him to disclose information related to Roush's suit and to waive any attorney-client privilege he could assert with regard to conversations with Roush's attorneys. (*Id.* at pp. 214-215, 217-218.) "Accordingly to Roush, she had shared confidential information with Kilgore at a time when the two were both clients of Roush's present counsel." (*Id.* at p. 215.) Roush sought to disqualify counsel for the employer. The trial court denied the motion. The appellate court affirmed on grounds that "Roush did not meet her initial burden of proving that Kilgore possessed any information that Roush could claim was confidential." (*Id.* at p. 215.)

The *Roush* case thus has numerous similarities to the factual situation here: "The gist of Roush's disqualification motion was that Roush and Kilgore enjoyed a joint privilege that could not be waived absent consent from both of them and, that in extracting the quoted promise from Kilgore, Morrison improperly obtained Roush's confidential information." (*Roush, supra*, 150 Cal.App.4th at p. 217.) One difference is that, in *Roush*, the information received was arguably factual and not confidential information. Here, appellants argue that the information was confidential, that it was subject to a joint privilege, and that Zacky did not waive his privilege.

The *Roush* opinion discusses other cases in which counsel "obtained the secrets of an adverse party in some other manner . . . ." (*Roush, supra*, 150 Cal.App.4th at p. 219.) It finds that "[d]isqualification is warranted in these cases, not because the attorney has a

direct duty to protect the adverse party's confidences, but because the situation implicates the attorney's ethical duty to maintain the integrity of the judicial process. [Citation.]”  
(*Ibid.*)

Turning to the other side of the argument, *Roush* points out that “mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. . . . Thus, where the attorney's client is the attorney's source of privileged information relating to the litigation, courts typically refuse to allow the disqualification, concluding that clients do not act inappropriately in providing information to their own attorney.”  
(*Roush, supra*, 150 Cal.App.4th at p. 219.)

The *Roush* opinion finds that the case is similar to certain expert witness and prior employee cases: “[T]he common thread running through those cases is that the attorney obtained confidential information from a source who could not ethically disclose the information without consent from the adversary.” (*Roush, supra*, 150 Cal.App.4th at p. 220.)

Applying this principle, the court finds “that Roush had the initial burden to show that Kilgore possessed Roush's confidential information materially related to these proceedings.” (*Roush, supra*, 150 Cal.App.4th at p. 220.)

The court's ensuing discussion of waiver, nonwaiver by joint clients, and the common interest doctrine is dispositive here.

Essentially, appellants rely on Evidence Code section 954, the attorney-client privilege, and Evidence Code section 952.<sup>3</sup> The latter section defines “confidential communication between client and lawyer” to mean disclosures that are not made to third persons “other than those who are present to further the interest of the client in the consultation . . . .” (Evid. Code, § 952.)

Accordingly, appellants argue that the discussions between Hoidal, Zacky, and any Gotfredson attorney were privileged. Since they find the privilege is a joint one, they argue that the matters discussed could not be disclosed to others without the consent of *both* Zacky and Hoidal. (Evid. Code, § 912, subd. (b); *Roush, supra*, 150 Cal.App.4th at p. 222.)

*Roush* addresses the joint client argument: “Case law has established that joint clients are two or more persons who have retained one attorney on a matter of common interest to all of them, such as where the attorney represents both an insurer and its insureds. [Citation.]” (*Roush, supra*, 150 Cal.App.4th at p. 223.) If the parties are not joint clients, the common interest doctrine applies. (*Id.* at pp. 223-224.) The court finds that Roush and Kilgore were not joint clients, “and the evidence is insufficient to show that disclosure of Roush’s protected information to Kilgore was necessary to her case.” (*Id.* at p. 225.)

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<sup>3</sup> Appellants also cite Code of Civil Procedure section 128, subdivision (a)(5), which allows courts to disqualify an attorney in the interests of justice. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846.)

The same is true in the present case: Although Hoidal and Zacky were, at one time, clients of the same firm, the two cases in the underlying litigation were completely different. They each retained the Gotfredson firm at different times to pursue very different claims in separate legal actions with very different theories of liability. At most, they merely had overlapping interests, but sharing of privileged information “destroys the privilege where the parties simply have ‘overlapping interests.’ [Citation.]” (*Roush, supra*, 150 Cal.App.4th at p. 224.)

We therefore agree with *Roush* that there was no joint attorney-client privilege here and that the common interest doctrine is inapplicable. (*Roush, supra*, 150 Cal.App.4th at p. 225.) Hoidal could therefore waive his own privilege and discuss his relationship with the Gotfredson firm in preparation of his malpractice claim against it. In other words, if appellant’s position were correct, Zacky could block Hoidal from disclosing any information discussed in the alleged joint meetings. If Hoidal was not able to discuss the substance of his meetings with the Gotfredson attorneys because Zacky was also present, it would be practically impossible to pursue a malpractice claim.

In addition, appellants have not shown that Hoidal possessed any confidential information. The information claimed to be confidential includes litigation and settlement strategies, issues and circumstances regarding lending and investment, future plans, and business affiliates. The relevancy of this information to the Retreat Partners litigation has not been demonstrated.

The description of the allegedly privileged material is necessarily general, but appellants do not show its material relationship to the Retreat Partners litigation. (See

*Roush, supra*, 150 Cal.App.4th at p. 220.) It is interesting to note that the description of the confidential information in the *Roush* case, which is equally general, was also found lacking. The declaration there stated that the law firm and its attorneys “share[d] information obtained from each client, and discussed with each client potential strategies, potential evidence, and potential witnesses relevant to both client’s cases.” (*Id.* at p. 221.)

Appellants have failed to show that the information here was materially related to the Retreat Partners case.<sup>4</sup> (*Roush, supra*, 150 Cal.App.4th at p. 220.)

We agree with the thorough discussion of the issues in *Roush* and the applicability of that discussion to the facts in this case. We therefore find it dispositive here.

In addition, as noted *ante*, the trial court, in deciding a disqualification motion, must cautiously balance competing interests by weighing ““the combined effect of a party’s right to counsel of choice, an attorney’s interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel . . . .” [Citation.]” (*McMillan v. Shadow Ridge at Oak Park Homeowner’s Assn., supra*, 165 Cal.App.4th at p. 965.)

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<sup>4</sup> Appellants also discuss an attorney’s work product separately, but waiver of work product protection is governed by the same principles as waiver of the attorney client privilege. (*Roush, supra*, 150 Cal.App.4th at p. 222.) In any event, there is no evidence here that Christman received any of Gotfredson’s work product.

In this case, appellants seek to disqualify a firm that has apparently defended GSV in the Retreat Partners litigation since 2007, including representation on the cross-complaint. According to appellants, the loan at issue was nearly \$20 million dollars. New counsel would have to start over in the litigation, and there is no guarantee that Hoidal would not disclose confidential information to the new firm. “[I]n such situations, disqualification would do nothing to protect the attorney-client privilege because the client still has the information and may pass it on to new counsel, leaving the adversary in the same position. [Citations.]” (*Roush, supra*, 150 Cal.App.4th at p. 220.)

Weighed against this is the threat of disclosure of allegedly confidential information by Hoidal to the Christman firm. The only evidence on this subject is the declaration of a firm attorney, which states: “Mr. Hoidal has never divulged any confidential information regarding Scott Zacky or Jay Gotfredson in our representation of Mr. Hoidal.”

In this comparison, the scales of justice are unbalanced in favor of the Christman firm, and it cannot be said that the trial court abused its discretion in denying the disqualification motion. “It must be remembered . . . that disqualification is a drastic course of action that should not be taken simply out of hypersensitivity to ethical nuances or the appearance of impropriety. [Citation.]” (*Roush, supra*, 150 Cal.App.4th at p. 219.)

VII  
DISPOSITION

The order denying appellants' motion to disqualify the Christman firm is affirmed.  
Respondents shall recover their costs on appeal.

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RICHLI  
J.

We concur:

RAMIREZ  
P. J.

CODRINGTON  
J.