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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

SHARRON WAREHIME,

Plaintiff and Respondent,

v.

FARMERS INSURANCE,

Defendant and Appellant.

F063510

(Super. Ct. No. 08CECG02976)

OPINION

APPEAL from an order of the Superior Court of Fresno County. Donald S. Black,
Judge.

Dowling, Aaron & Keeler, Dowling Aaron Incorporated and Steven M.
Vartabedian for Defendant and Appellant.

Wanger Jones Helsley, Patrick D. Toole and Christine J. Levin for Plaintiff and
Respondent.

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Appellant, Farmers Insurance (Farmers), challenges the trial court's order
disqualifying the law firm of Dowling, Aaron & Keeler (DAK) from further

representation of Farmers in an employment discrimination case brought by respondent, Sharron Warehime. The trial court concluded that a member of DAK, Steven McGee, had previously had an attorney-client relationship with Warehime when he was a partner at the law firm of Kimble, MacMichael & Upton (KMU) and thus was disqualified from representing Farmers. In making this ruling, the trial court applied the “substantial relationship” test. The court further found that McGee’s disqualification extended vicariously to DAK.

Farmers contends that the trial court erred in finding that McGee had a direct and personal relationship with Warehime in that his only contact with Warehime’s lawsuit was through another KMU attorney, Christine Levin. According to Farmers, McGee’s involvement in the former representation was peripheral and thus there is no presumption that confidential information passed to McGee. Therefore, Farmers argues, the trial court applied the incorrect test. Farmers contends the court should have applied the “modified substantial relationship” test.

The trial court did not abuse its discretion when it disqualified DAK. Substantial evidence supports the trial court’s finding that McGee had an attorney-client relationship with Warehime. Accordingly, the court correctly applied the “substantial relationship” test. Therefore, the order will be affirmed.

BACKGROUND

Levin began her employment with KMU on October 1, 2010. At that time, Warehime was one of Levin’s existing clients. McGee was a shareholder in KMU, having worked there since October 1976. In December 2010, KMU substituted in as Warehime’s attorney.

Several months after Levin started at KMU, she approached McGee concerning the Warehime case. According to McGee, Levin asked if he would try the case with her, he checked his schedule, and said he would be available. She said it was an employment related case pending in Fresno Superior Court. McGee stated Levin did not provide him

with her impressions on the case. McGee further stated he did not review any documents related to the case and did not calendar the trial date.

According to Levin, she told McGee her impressions of the case, her impressions of the client, and her impressions of the defendant, and McGee asked her to prepare a case memorandum for him. She said either McGee or her opposing counsel recommended a particular mediator for the case. She prepared the requested case memorandum and it included her impressions and evaluations of the case including witness evaluation, factual analysis, and summary of the claims. Either she or Alexander placed the memorandum on McGee's desk on January 24, 2011.

McGee stated he did not recall receiving a case memorandum from Levin nor have any documentation that he reviewed one. According to McGee, Levin told him the memorandum did not contain confidential information but was simply a summary of facts contained in the public court record.

According to Alexander, although she did format and transcribe a draft memorandum for Levin while at KMU, she returned it to Levin in draft form. Alexander stated she never received it back from Levin or delivered it to McGee.

This memorandum is six pages long and begins by stating "Thank you for agreeing to try this case." Although the body of the memorandum is redacted, the headings indicate its contents. Those headings are "Relevant Procedure," "Factual History," "Client," "History with Farmers," "Age Related Issues," "Disparate Treatment," and "Hostile Work Environment."

In February 2011, KMU dissolved. McGee and Alexander joined DAK effective March 1, 2011. As noted by the trial court, McGee and Alexander effectively switched sides from the firm that represented Warehime to the firm that represented Farmers. Believing that no conflict existed, no ethical wall was erected at DAK to shield McGee and Alexander from the Warehime matter.

In late May 2011, the issue of DAK having a conflict was raised and DAK set up an ethical wall. In June, Warehime moved to disqualify DAK on the ground that its representation of Farmers constituted a conflict of interest once McGee and Alexander began employment with DAK.

The trial court granted Warehime's motion. The court found that a direct personal attorney-client relationship was formed between McGee and Warehime and that there was a substantial relationship between McGee's representation of Warehime and DAK's representation of Farmers. Therefore, the court concluded that McGee was disqualified from the case and that this disqualification extended vicariously to DAK.

DISCUSSION

1. *Standard of review.*

“Generally, a trial court’s decision on a disqualification motion is reviewed for abuse of discretion.” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143 (*Speedee Oil*.) If the trial court resolved disputed factual issues, the appellate court’s role regarding those express or implied findings is simply to determine whether substantial evidence supports those findings of fact. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159.) Accordingly, this court must determine whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, that supports the trial court’s findings. (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822.) We must accept as true all evidence that tends to establish the correctness of the trial court’s findings and resolve every conflict in favor of the order. (*Id.* at p. 823.) We do not substitute our own judgment. (*Speedee Oil, supra*, 20 Cal.4th at p. 1143.)

When the trial court’s factual findings are supported by substantial evidence, the appellate court reviews the conclusions based on those findings for abuse of discretion. (*Speedee Oil, supra*, 20 Cal.4th at p. 1144.) This standard measures whether the trial court’s action falls within the permissible range of options set by the legal criteria.

(*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452.) “The trial court’s ‘application of the law to the facts is reversible only if arbitrary and capricious.’” (*In re Charlissee C.*, *supra*, 45 Cal.4th at p. 159.)

2. *The record supports the trial court’s use of the substantial relationship test.*

Disqualification motions involve a conflict between the client’s right to counsel of his choice and the need to maintain ethical standards of professional responsibility.

(*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1145.) “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.” (*Ibid.*)

“Conflicts of interest commonly arise in one of two factual contexts: (1) in cases of successive representation, where an attorney seeks to represent a client with interests that are potentially adverse to a former client of the attorney; and (2) in cases of simultaneous representation, where an attorney seeks to represent in a single action multiple parties with potentially adverse interests.” (*In re Charlissee C.*, *supra*, 45 Cal.4th at p. 159.)

Where, as here, the potential conflict arises from an attorney’s *successive* representation of clients with potentially adverse interests, the primary value at stake is client confidentiality. (*In re Charlissee C.*, *supra*, 45 Cal.4th at p. 161.) Under these circumstances, disqualification of the attorney is generally required if “ ‘the [former] client demonstrate[s] a “*substantial relationship*” between the subjects of the antecedent and current representations.’ ” (*Ibid.*) Disqualification of an attorney based on this “substantial relationship” standard does not require proof that the attorney *actually* possesses confidential information. (*Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1331 (*Adams*).) Rather, “ ‘ “[w]hen a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of

the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney or to subordinates for whose legal work he was responsible, the attorney's knowledge of confidential information is presumed. [Citation.]” ’ ” (*Ibid.*)

The question whether an attorney should be disqualified in a successive representation case turns on two variables. (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 709 (*Jessen*.) The first is the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation. (*Ibid.*) Here, McGee switched sides in the same action. Thus, the “two actions” are substantially related. (*Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70, 76 (*Pound*.)

The second variable in a successive representation case is the relationship between the attorney and the former client with respect to the legal problem involved in the former representation. (*Jessen, supra*, 111 Cal.App.4th at p. 709.) If the relationship between the attorney and the former client is shown to have been direct, i.e., where the lawyer was personally involved in providing legal advice and services to the former client, then it must be presumed that confidential information has passed to the attorney. In this situation there cannot be any delving into the specifics of the communications between the attorney and the former client in an effort to show that the attorney did or did not receive confidential information during the course of that relationship. (*Ibid.*) “This is so because a direct attorney-client relationship is inherently one during which confidential information ‘would normally have been imparted to the attorney by virtue of the nature of [that sort of] former representation,’ and therefore it will be conclusively presumed that the attorney acquired confidential information relevant to the current representation if it is congruent with the former representation.” (*Ibid.*)

However, where the former attorney-client relationship is attenuated or peripheral instead of direct, i.e., the attorney did not personally represent the former client, then the

presumption will not be applied in the absence of an adequate showing that the attorney was in a position vis-à-vis the client to have acquired confidential information material to the current representation. (*Jessen, supra*, 111 Cal.App.4th at p. 710.) Under these circumstances, the trial court's task is to determine whether such confidential information would normally have been imparted to the attorney during his or her tenure with the old firm. (*Adams, supra*, 86 Cal.App.4th at p. 1340.) Among other things, the court "should consider any time spent by the attorney working on behalf of the former client and 'the attorney's possible exposure to formulation of policy or strategy' in matters relating to the current dispute." (*Ibid.*) This analysis is known as the "modified substantial relationship test." (*Ochoa v. Fordel, Inc.* (2007) 146 Cal.App.4th 898, 908.) Where this test has been met, the last step is to determine whether the attorney whose disqualification was sought has carried "the burden of proving that he had no exposure to confidential information relevant to the current action while he was a member of the former firm." (*Adams, supra*, 86 Cal.App.4th at p. 1341.) That burden requires an affirmative showing. It is not satisfied by a cursory denial. (*Ibid.*)

Here, the trial court found that McGee had a direct attorney-client relationship with Warehime and thus McGee's disqualification was mandated under the substantial relationship test. Farmers argues that the trial court erred in that it should have applied the modified substantial relationship test. In other words, Farmers takes the position that substantial evidence does not support the trial court's finding that McGee had a direct attorney-client relationship with Warehime.

Contrary to Farmers's position, substantial evidence supports the trial court's finding of a direct attorney-client relationship. First, this court must resolve all evidentiary conflicts and draw all reasonable inferences in favor of disqualification. Applying this standard, the pertinent facts are as follows: Levin and McGee discussed Levin's impressions of the case. Thereafter, McGee agreed to try the case and requested that Levin prepare a memorandum outlining the case. Levin prepared a six page

description of the case that was delivered to McGee. Based on the length and context of this memorandum, i.e., drafted in anticipation of McGee trying the case, it can be reasonably inferred that the memorandum was detailed and contained Levin's evaluation of the merits and weaknesses of the Warehime case.

Under these circumstances, the trial court reasonably found that McGee had a direct attorney-client relationship with Warehime. It is not necessary for the attorney to actually meet with the client in order to form this relationship. Rather, Levin was acting as Warehime's agent when she recruited McGee to try the case and through this agency, McGee formed a direct attorney-client relationship with Warehime. (*Pound, supra*, 135 Cal.App.4th at p. 80.) Thus, it is presumed that confidential information was passed to McGee. Accordingly, the trial court applied the correct test, i.e., the substantial relationship test, and based on that test, acted within its discretion in disqualifying McGee.

3. *DAK is vicariously disqualified from representing Farmers.*

When a conflict of interest requires an attorney's disqualification, the disqualification normally extends vicariously to the attorney's entire law firm. (*In re Charlissee C., supra*, 45 Cal.4th at p. 161.) This rule is based on the doctrine of imputed knowledge which posits that the knowledge of one attorney in a law firm is the knowledge of all attorneys in the firm. (*Ibid.*) "The vicarious disqualification rule recognizes the everyday reality that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information." (*SpeeDee Oil, supra*, 20 Cal.4th at pp. 1153-1154, fn. omitted.)

Nevertheless, in proper circumstances, the vicarious disqualification presumption is rebuttable and can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 801.) However, such a screen must be timely imposed, i.e., when the conflict first arises. (*Id.* at p. 810.)

Here, DAK waited three months to impose an ethical screen after the conflict arose. Thus, this attempt did not rebut the vicarious disqualification presumption. DAK asserts that it delayed the ethical screen only because it was promised and was waiting for a written conflict waiver from Levin. However, Levin did not have the power to waive the conflict. That power belongs solely to the client and Warehime never waived the conflict. (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1146.) Therefore, the trial court correctly extended McGee's disqualification to DAK.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondent.

LEVY, Acting P.J.

WE CONCUR:

GOMES, J.

DETJEN, J.