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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CENTRAL CALIFORNIA MEDICAL
IMAGING INC. et al.,

Plaintiffs and Appellants,

v.

FRESNO IMAGING CENTER et al.,

Defendants and Respondents.

F064767

(Super. Ct. No. 08CECG03208)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Wild, Carter & Tipton and Steven E. Paganetti for Plaintiffs and Appellants.

McCormick, Barstow, Sheppard, Wayte & Carruth, Marshall C. Whitney and Timothy J. Buchanan for Defendants and Respondents.

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In the same underlying action as *Central California Medical Imaging Inc. et al. v. Fresno Imaging Center et al.* (Sept. 24, 2013, F064746) [nonpub. opn.], plaintiff radiologists moved to disqualify defendants Fresno Imaging Center Inc.'s (FIC) and Professional Office Corporation's (POC) counsel on the ground that another attorney with defense counsels' law firm had represented Dr. Teresa Chan in a medical malpractice action three years earlier. Chan asserted she provided confidential information regarding this lawsuit to her malpractice attorney. The malpractice attorney categorically denied such discussions. The trial court denied plaintiffs' motion. Plaintiffs appeal contending the trial court abused its discretion in denying the motion. We affirm.

FACTS AND PROCEDURAL HISTORY

The Malpractice Case

In January 2007, Teresa Chan M.D. was named as a Doe defendant in a medical malpractice wrongful death action entitled, *Jeryl Techman et al. v. William B. Holmes, M.D. et al.* (Super. Ct. Fresno County) 2005, No. 05CECG02215 (*Techman*), that had been filed in 2005. The complaint alleged that defendants had failed to timely diagnose the plaintiffs' mother's lung cancer. Chan's alleged malpractice was a failure to recognize a carcinoma when interpreting lung X-rays in 2001.

Chan's insurer, Norcal Mutual Insurance Company, contacted attorney Mario Beltramo of the McCormick, Barstow, Sheppard, Wayte & Carruth LLP firm (McCormick Barstow) regarding Chan's defense in the *Techman* case. Beltramo contacted Chan and, over the next few months, had several conversations with her about her defense. Most conversations were by telephone; there was one face-to-face meeting on March 1, 2007.

Beltramo filed an answer to the *Techman* complaint for Chan in March 2007. Less than a year later, the court granted her motion for summary judgment after the plaintiffs offered no evidence to rebut her expert's evidence that the care she provided was within the applicable standard of care. In April 2008, the *Techman* case was dismissed as to the remaining defendants.

The Business Litigation

In 2008, plaintiffs Chan and Central California Medical Imaging Inc. (CCMI) filed this action against defendants FIC and POC. The complaint alleged breach of contract and related tort claims stemming from defendants' early termination of plaintiffs' contract to provide outpatient radiology services. Plaintiffs alleged that defendants induced Chan to leave her practice to work for them without any intention of performing their promises under the contract, and defendants competed with and interfered with her attempts to recruit additional radiologists to join the CCMI practice to provide the contracted services.

Defendants initially retained out-of-town counsel to represent them in the lawsuits. In September 2011, they retained Marshall C. Whitney and Timothy J. Buchanan of the McCormick Barstow firm to act as lead counsel in the case to complete pretrial discovery work and to try the case, if necessary. Plaintiffs objected to McCormick Barstow's representation of defendants because of Beltramo's representation of Chan in the malpractice action, which plaintiffs' counsel believed was ongoing. Whitney replied that the *Techman* case had been dismissed in 2008, so there was no simultaneous representation of adverse parties. Plaintiffs then filed their motion to disqualify counsel.

Motion to Disqualify Counsel

Plaintiffs moved to disqualify the McCormick Barstow law firm as legal counsel for defendants on the ground that Chan had discussed the disputes and potential claims and counterclaims of this lawsuit with Beltramo while he defended her in the *Techman* case. The discussions included "the strategy for prosecuting her claims and strategy for settlement of these claims as stated by her counsel Donald R. Glasrud and his associate Peter Fashing, [who were then representing her in this action]." Chan also discussed with Beltramo the possible impact of the claims and counterclaims in the disputes with FIC and POC with the pending *Techman* case and the impact of the *Techman* case on claims and counterclaims in the FIC and POC dispute. Based on these conversations with Beltramo and the information he obtained about her claims, her damages, and her attorney's strategy for pursuing the claims and for settlement, she believed she would be

prejudiced if any member of the McCormick Barstow firm was allowed to represent defendants in this action. She would not waive her attorney-client privilege as to her statements to Beltramo.

Defendants opposed the motion. They contended there was no relationship, let alone a “substantial relationship,” between the *Techman* malpractice action and this contract dispute. In addition, Beltramo, who supplied a declaration and testified at the hearing on the motion, denied that he had ever discussed Chan’s contract disputes with her. Beltramo testified that he invariably wrote notes of telephone conversations to document the calls. His notes in the *Techman* file showed that he had a telephone conversation with Chan on February 12, 2007, about certain issues in the *Techman* case. The notes stated that during that conversation, Chan asked him if he could recommend a good commercial litigator to pursue unspecified claims she had. Beltramo asked if the dispute involved Saint Agnes Medical Center (SAMC), and she said it did. He told her he represented SAMC in medical malpractice cases and therefore could not make a recommendation for her. Chan did not then, or ever, disclose to Beltramo anything regarding her claims against SAMC. His notes reflected no such communications.¹ During the February 12 conversation, Chan asked if his representation of SAMC posed any conflict with his representation of her in the malpractice case. Beltramo responded that he did not think so but, if she preferred a different attorney, he would notify her insurer and the insurer would hire other counsel for her. Chan said she would think about whether she wanted Beltramo to represent her in the *Techman* case.

Beltramo’s notes document a follow-up telephone call he made to Chan on February 21, 2007, during which she agreed to have him defend her in the *Techman* action. Beltramo met with Chan on March 1, 2007, and discussed the *Techman* case. At the time, he was aware that Chan was no longer in a relationship with SAMC. They did not discuss her claims against SAMC in any respect. Beltramo recalled that at some time

¹ Beltramo brought the *Techman* case file and offered it to the court for in camera review. The court declined to review the file.

he learned she had retained Donald Glasrud on the SAMC matter but she did not at any time discuss strategies or what she was being told by Glasrud. Beltramo would not have allowed her to discuss those matters with him as he was then representing SAMC in medical malpractice matters and had done so for more than 30 years. Beltramo could state unequivocally that had Chan ever attempted to have such discussion with him, he would have immediately shut off the discussion because of his longstanding representation of SAMC. His notes do not mention any such discussion because it never occurred. He would not have permitted it.

In reply, Chan declared that Beltramo did not advise her that he and McCormick Barstow had represented SAMC. Had she known, she would not have agreed to have him represent her in the *Techman* lawsuit. In addition, she did not ask Beltramo to recommend legal counsel for her contract disputes in February 2007 as he reported, because she had retained the law firm of Dietrich, Glasrud, Mallek & Aune on January 11, 2007, to represent her in the pending litigation with SAMC. She specifically recalled a conversation with Beltramo in which she expressed her concern that SAMC may have been involved in the decision to name her as a Doe defendant in the *Techman* case two years after it was filed and shortly before the lawyers threatened litigation regarding her disputes with SAMC, FIC and POC.

The trial court denied plaintiffs' motion to disqualify defendants' counsel without explanation.

DISCUSSION

Standard of Review

We review a trial court's decision on a disqualification motion 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, we determine whether substantial evidence supports the trial court's findings of fact. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822.) When the factual findings are supported by substantial evidence,

we review the conclusions based on those findings for abuse of discretion. (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1144.) The abuse of discretion 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.)

In this case, the parties' declarations conflict regarding whether Chan discussed this lawsuit and provided related confidential information to Beltramo. In ruling for defendants, the trial court, by implication, resolved the credibility issue in defendants' favor. On review, we determine whether substantial evidence supports the trial court's implied findings that Chan disclosed no material confidences either actually or presumptively to Beltramo that would be jeopardized by the current representation.

Attorney Disqualification in Successive Representation Cases

Attorney disqualification motions involve a conflict between the client's right to counsel of choice and the need to maintain ethical standards of professional responsibility. (*SpeeDee Oil, supra*, 20 Cal.4th at p. 1145.) Where the potential conflict arises from an attorney's successive representation of clients with adverse interests, the primary fiduciary value jeopardized is client confidentiality. (*In re Charlisse C., supra*, 45 Cal.4th at p. 161.) The disqualification standard focuses on the former client's interest in preserving the confidential matters disclosed to the attorney in the course of the prior representation. (*Ibid.*) Therefore, when disqualification is sought because of a law firm's successive representation of clients with adverse interests, the trial court must balance the current client's right to counsel of its choosing against the former client's right to ensure that its confidential information will not be used by its former counsel to the advantage of the former client's adversary. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846.)

This court has set forth the legal principles that govern successive representation cases. First, the court determines whether the former representation of the prior client was direct and personal as opposed to peripheral or attenuated. (*Farris v. Fireman's*

Fund Ins. Co. (2004) 119 Cal.App.4th 671, 678-679 (*Farris*); *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 710 (*Jessen*.) If the relationship between the attorney and the former client is shown to have been personal and direct—as it was in this case—then it is presumed that confidential information was passed to the attorney and disqualification will depend on the similarities between the former representation and the current representation. (*Jessen, supra*, 111 Cal.App.4th at pp. 710-711.)

Second, the court determines whether a “substantial relationship” exists between the two successive representations. (*Farris, supra*, 119 Cal.App.4th at pp. 678-679; *Jessen, supra*, 111 Cal.App.4th at p. 710.) “[T]he substantial relationship test is ‘intended to protect the confidences of former clients when an attorney has been in a position to learn them.’” (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1455, quoting *Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp.* (2d Cir. 1975) 518 F.2d 751, 757.) Where a substantial relationship is demonstrated, the court presumes the attorney had access to confidential information in the former representation and will disqualify the attorney’s representation of the second client. (*Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1331.) And, as a general rule, where an attorney is disqualified from representation, the entire law firm is vicariously disqualified as well. (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 114.)

Substantial Relationship Test

Many courts have addressed the concept of “substantial relationship.” This court has stated that successive representations are substantially related when “‘information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues.’” (*Farris, supra*, 119 Cal.App.4th at p. 679.) Further, confidential

information is “material” if it is directly at issue in, or has some critical importance to, the second representation. (*Id.* at pp. 680-681.)

Another court has stated the test a little differently. To determine whether a substantial relationship exists, the court examines the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney’s involvement with the cases. (*Knight v. Ferguson* (2007) 149 Cal.App.4th 1207, 1213.) The test is broad and is not limited to the “strict facts, claims, and issues involved in a particular action.” (*Ibid.*, citing *Jessen, supra*, 111 Cal.App.4th at p. 711.) Rather, a substantial relationship exists when the subject matter of the prior and the current representations are linked in some rational manner. (*Knight v. Ferguson, supra*, 149 Cal.App.4th at p. 1213.)

In *Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, the court noted the evolution of a pragmatic approach. Under this approach, the attorney’s possession of confidential information is presumed when a substantial relationship is shown to exist and when it appears by virtue of the nature of the former representation that confidential information material to the current dispute would normally have been provided to the attorney. (*Id.* at p. 603.)

A. Analysis

Plaintiffs moved to disqualify defense counsel on two grounds. They contended disqualification was warranted because (1) Chan actually provided confidential information regarding the FIC and POC lawsuits to Beltramo while he represented her in the medical malpractice case, and (2) the two matters are substantially related because Chan discussed with Beltramo the possible impact of the claims and counterclaims in the disputes with FIC and POC on the pending *Techman* case and vice versa.

Plaintiffs’ first ground fails because the court did not credit plaintiffs’ evidence that would have supported that ground. Rather, by ruling for defendants, the court found defendants’ evidence, which was based on written records, more credible than plaintiffs’

evidence, which was based on memory of occurrences five years earlier. (*City and County of San Francisco v. Cobra Solutions, Inc.*, *supra*, 38 Cal.4th at p. 848.) On review, the record demonstrates substantial evidence to support the trial court's implied finding. Beltramo's declaration, his testimony, and the *Techman* file notes admitted as exhibits all establish that no confidential information relevant to this case was disclosed in the prior representation. Accordingly, the trial court did not abuse its discretion in rejecting plaintiffs' claim that defense counsel must be disqualified because Chan had actually revealed confidential information to Beltramo.

We next consider whether there is a substantial relationship between the work Beltramo did for Chan and the work Beltramo's law partners will do for FIC and POC. We apply the various formulations of the substantial relationship test in turn.

The trial court credited defendants' facts, which, as set forth above, are supported by substantial evidence. Thus, on appeal, we accept defendants' facts as true—that Beltramo never discussed any aspect of the current lawsuit with Chan—and apply the relevant legal principles to those facts. (*Sabbah v. Sabbah*, *supra*, 151 Cal.App.4th at p. 823.)

The record demonstrates the *Techman* lawsuit involved a medical malpractice negligence claim against Chan and another physician and his practice group. The pertinent legal issue was whether the medical care Chan provided breached the duty of care Chan owed to the decedent. The case was resolved on summary judgment when the *Techman* plaintiffs failed to raise a triable issue of fact in response to Chan's evidence that the care she provided met the applicable standard of care. In contrast, the business lawsuit involves contract, unfair business practice, and related tort claims—fraud in the inducement and interference with prospective economic relations—stemming from a professional services agreement defendants FIC and POC negotiated with plaintiffs Chan and CCMI. Chan is the only party common to both cases and there is no allegation that the contract dispute stemmed from any criticism of Chan's competence as a physician.

Thus, there are no similarities between the two factual situations or the legal issues posed, and Beltramo, who represented Chan in the malpractice case, has no role in the current representation.

Under the test set forth in *Farris*, plaintiffs did not establish that information material to the evaluation, prosecution, settlement or accomplishment of the malpractice representation was material to the evaluation, prosecution, settlement or accomplishment of the current representation. (*Farris, supra*, 119 Cal.App.4th at p. 679.) Nor did they demonstrate that confidential information provided during the *Techman* malpractice representation is directly at issue in or has some critical importance to the current business lawsuit. (*Farris*, at pp. 679-681.) Under the test set forth in *Knight v. Ferguson*, plaintiffs failed to establish similarities between the factual situations and the legal issues posed, or that the subject matter of the prior and the current representations are linked in some rational manner. (*Knight v. Ferguson, supra*, 149 Cal.App.4th at p. 1213.) Finally, under the pragmatic approach, plaintiffs failed to establish that the nature of the medical malpractice representation demonstrated that confidential information material to the current business dispute would normally have been provided to Beltramo. (*Brand v. 20th Century Ins. Co./21st Century Ins. Co., supra*, 124 Cal.App.4th at p. 603.) In fact, given that Beltramo had disclosed his long-term and ongoing representation of SAMC, and memorialized that disclosure in the *Techman* file, it is unlikely that Chan would divulge confidential information that could be used to SAMC's advantage and to plaintiffs' harm.

Accordingly, plaintiffs failed to demonstrate that Beltramo's representation of Chan in the medical malpractice lawsuit in 2007 and 2008 could reasonably have resulted in McCormick Barstow's acquisition of confidential information relating to this lawsuit. The trial court did not abuse its discretion by denying plaintiffs' motion to disqualify defendants' counsel.

Plaintiffs rely on two cases that are distinguishable on their facts. In *Knight v.*

Ferguson, supra, 149 Cal.App.4th 1207, the plaintiff had met with attorney Wideman to discuss a lease and potential partnership arrangement for a restaurant. The potential partner chose not to participate, and the defendants took his place. A dispute arose regarding the defendants' decision to remove the plaintiff as manager at the restaurant. The plaintiff filed suit against defendants and they cross-complained against her. When the defendants hired Wideman to represent them, the plaintiff moved to disqualify him. (*Id.* at p. 1211.) Despite Wideman's declaration that he did not obtain confidential information from the plaintiff during his consultations with her, the trial court properly disqualified him. The nature of the former representation was such that confidential information material to the current dispute normally would have been imparted to the attorney. (*Id.* at p. 1212.) And, because the subject of both representations was the same—the lease and partnership relating to the restaurant—the representations were rationally related. (*Id.* at pp. 1213-1215.) In contrast in this case, the subjects of the two representations are completely dissimilar and plaintiffs failed to show the representations were rationally related.

In *Brand v. 20th Century Ins. Co./21st Century Ins. Co.*, *supra*, 124 Cal.App.4th 594, attorney Zalma had defended 21st Century and provided coverage opinions for three years. As a result, he acquired knowledge of the company's claim handling practices, policies and procedures. (*Id.* at pp. 599-600.) Twelve years after Zalma ceased representing 21st Century, Brand sued the company for breach of contract and bad faith. She hired Zalma as an expert on the issue of 21st Century's handling of her claim. (*Id.* at p. 600.) Zalma's professed failure to recall any confidential information from his earlier representation and the passage of 12 years were immaterial. (*Id.* at p. 607.) Zalma was disqualified because his representation of 21st Century concerned matters substantially related to the issues in the Brand case. (*Id.* at p. 605.) Both factually and legally, the two engagements presented a substantial risk that Zalma's work for Brand would involve the use of information acquired while representing 21st Century. (*Id.* at p. 606.) Thus,

Zalma was disqualified from testifying against his former client in the lawsuit. (*Id.* at p. 607.) In contrast in this case, plaintiffs failed to show any risk, let alone a substantial risk that McCormick Barstow's representation of defendants would involve information acquired when Beltramo represented Chan in the malpractice action.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondents.

DETJEN, J.

WE CONCUR:

WISEMAN, Acting P.J.

LEVY, J.