

CERTIFIED FOR PARTIAL PUBLICATION\*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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LEON SCHIMMEL,

Plaintiff and Respondent,

v.

HARRIS LEVIN et al.,

Defendants and Appellants.

C063214

(Super. Ct. No.  
CVCV090000617)

APPEAL from a judgment of the Superior Court of Yolo County, Samuel T. McAdam, Judge. Affirmed.

Wilke, Fleury, Hoffelt, Gould & Birney, Daniel L. Baxter and Kelli M. Kennaday for Defendants and Appellants.

Bohm Law Group and Lawrance A. Bohm for Plaintiff and Respondent.

After the trial court found attorney Kelli M. Kennaday possessed plaintiff Leon Schimmel's confidential material information in a prior action, the court disqualified Kennaday

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\* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of parts II, III, IV, and V of the Discussion.

and her firm, Wilke, Fleury, Hoffelt, Gould & Birney (Wilke Fleury), from its representation of Harris Levin, Community Health Associates Multispecialty Medical Group, Inc., and various other defendants (collectively, Community Health). The court struck Community Health's petition to compel arbitration, filed by Kennaday, and granted it 60 days to refile the petition. Community Health appeals, arguing the trial court erred in disqualifying Wilke Fleury, and rather than striking the petition, the trial court should have ruled on the petition prior to the later-filed disqualification motion. We shall affirm the judgment.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

##### **The Parties**

Community Health is a professional corporation of medical doctors who provide medical services to patients of Sutter Health, Inc. Schimmel, a physician, began working for Community Health in 1993. Schimmel was responsible for providing medical services in the obstetrics and gynecology department. Levin was the president and chairman of the board of Community Health; the other individually named defendants were members of the board of directors.

In 1995 Schimmel was elected to the position of medical director. For the next 11 years, Schimmel managed the healthcare services provided by physicians in his medical group. Part of his responsibilities included administering internal investigations regarding possible misconduct and other potential legal actions.

### **Prior Litigation and Prior Representation**

In October 2002 Dr. Diane Cabana filed a civil suit naming Community Health, Levin, and Schimmel as defendants. Cabana alleged nine causes of action arising from her past employment with Community Health, including sex discrimination, harassment, retaliation, wrongful termination, breach of contract, and defamation.

According to Cabana's complaint, Schimmel lied about her professional competency. Cabana claimed Levin was notified of Schimmel's inappropriate employee management but retaliated against her and defamed her.

Kennaday and Wilke Fleury were appointed by SCIPIE Indemnity Company to represent Schimmel's interest in the litigation. Community Health and Levin were represented by other counsel. Over time, Schimmel had numerous conversations with Kennaday regarding arbitration, possible defenses, litigation strategies, concerns about his reputation, financial information, job performance, litigation risk, settlement, and criticism of management, among other issues. In her defense of Schimmel, Kennaday argued he properly managed Cabana's performance.

The parties went to mediation. During mediation, Schimmel and Kennaday discussed settlement negotiation strategies, litigation strategies, and other areas of concern. Mediation proved unsuccessful and the matter continued in litigation.

Schimmel attended Levin's deposition, taken by Cabana's counsel. Kennaday represented Schimmel at the deposition.

Schimmel made comments to Kennaday regarding Levin's attributes as a witness, including his credibility and his management of the medical group.

Kennaday contacted Schimmel in January 2004, informing him that she would seek to compel arbitration of the litigation. Schimmel and Kennaday discussed various aspects of arbitration, including how the arbitration agreement was developed, the pros and cons of enforcing arbitration agreements, and Schimmel's personal views on arbitration.

Schimmel conferred with Kennaday about the factual and legal issues of the litigation, the possibility of settlement, and other litigation issues. The case subsequently settled in April 2004.

After the Cabana case settled, Schimmel learned Levin retained Kennaday in place of Levin's former counsel. Kennaday was hired to provide counsel on revising Community Health's arbitration and employment agreements.

### **The Current Litigation and Representation**

In February 2006 Levin raised questions regarding Schimmel's job performance. A month or so later, Schimmel was contacted by Community Health regarding communication issues brought to the attention of the board by other physicians. In March and November 2007 Schimmel was criticized and disciplined. More complaints regarding Schimmel's job performance followed, and in January 2008 Schimmel was summoned to appear before the board of directors.

Subsequently, Schimmel was placed on administrative leave pending an informal hearing. At the March 2008 hearing, Schimmel claimed the personnel action was retaliation for his efforts to ensure high quality patient care.

In May 2009 Schimmel filed an amended complaint against Community Health alleging improper suspension and termination from his employment with Community Health. In connection with his employment with Community Health, Schimmel had previously entered into a written arbitration agreement.

Kennaday filed a petition to compel arbitration on behalf of Community Health on June 12, 2009. The court set the petition for hearing on August 27, 2009, the earliest available court date.

On August 3, 2009, Schimmel filed a motion to disqualify Kennaday and Wilke Fleury as counsel for Community Health. Schimmel alleged Kennaday possessed confidential information in the context of her successive representation of adverse clients. Schimmel also requested the pleadings prepared by Kennaday be stricken.

Wilke Fleury opposed the motion to disqualify and filed a reply regarding the petition to compel arbitration. Kennaday submitted a declaration in support of the opposition. Wilke Fleury argued no substantial relationship existed between the successive representations, and Schimmel had waived the conflict.

In opposing the petition to compel arbitration, Schimmel argued the motion to disqualify should be heard first among the motions pending at the August 27, 2009, hearing.

Prior to oral argument, the trial court issued a tentative ruling granting Schimmel's motion to disqualify. The court determined: "The evidence submitted supports a finding that Ms. Kennaday actually possesses confidential information adverse to the plaintiff. Ms. Kennaday had a direct role in representing the plaintiff in Cabana v. Community Health . . . , and information material to the evaluation, prosecution, settlement or accomplishment of the plaintiff's defense in the Cabana lawsuit is also material to the evaluation, prosecution, settlement or accomplishment of the prosecution and defense of the current lawsuit."

The trial court also found, "[i]t has not been established that the plaintiff agreed to Ms. Kennaday or Wilke Fleury's representation of the defendants in matters adverse to the plaintiff's interests." In addition, the trial court struck all papers filed by disqualified counsel and allowed Community Health 60 days to file new papers.

At oral argument, Community Health argued the order striking the petition for arbitration was improper. Community Health noted Schimmel had not filed a motion to strike. In addition, according to Community Health, a disqualification order operates prospectively, and there is no authority for striking prior pleadings based on a later finding of disqualification. On the issue of consent, Community Health

argued consent operates as an equitable principle. Community Health described Schimmel's objection to Kennaday's representation of Community Health as inequitable.

The trial court acknowledged Community Health's desire to use their general counsel, but concluded "it would also be reasonable to expect that that law firm would have to disqualify itself. That it's not . . . out of the ordinary." The trial court observed that Kennaday had a "very close working relationship" with Schimmel. Given that relationship, Schimmel "would have reason to expect that the lawyer that defended him would not . . . be defending the company against his lawsuit now." The court took the matter of striking the prior pleadings under submission.

The trial court issued a final order affirming its tentative ruling disqualifying Kennaday and Wilke Fleury. The court also struck the motion to compel arbitration without prejudice, allowing 60 days for Community Health's new counsel to file the new papers. Following entry of judgment, Community Health filed a timely notice of appeal.

## **DISCUSSION**

### **I.**

Community Health argues the trial court erred in striking its petition to compel arbitration. Instead, according to Community Health, the court should have heard and ruled upon the petition. According to Community Health, the proper course would have been to grant the petition and then stay the action

and allow the arbitrator to hear the remaining motions, including Schimmel's disqualification motion.

Schimmel argues the trial court's stay of the petition for arbitration is not an appealable order. However, an order staying arbitration is the "functional equivalent of an order refusing to compel arbitration." (*Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 99.) An order denying a petition to compel is immediately appealable. (Code Civ. Proc., § 1294.) Therefore, an order staying an arbitration is immediately appealable. (*Henry, supra*, 233 Cal.App.3d at p. 99; *Sanders v. Kinko's, Inc.* (2002) 99 Cal.App.4th 1106, 1108-1109.)

Community Health challenges the court's order staying arbitration on a variety of grounds. Community Health contends Schimmel failed to timely oppose its petition to compel arbitration. Therefore, the trial court should have ordered the case to arbitration. Community Health also argues its petition was entitled to statutory priority. In addition, Community Health claims Schimmel failed to properly move for an order striking Community Health's pleadings, and the order was based on an improper retroactive application of the trial court's disqualification order. Finally, Community Health claims Schimmel failed to present any evidence as to why the underlying arbitration agreement would not apply.

All of these contentions thrive only if Community Health completely separates the trial court's disqualification of Kennaday from the petition for arbitration she drafted for Community Health. However, despite Community Health's strenuous



efforts to sunder these two issues, they are neither separable nor unrelated.

The trial court found Kennaday "actually possesses confidential information adverse" to Schimmel, and that Schimmel had not agreed to Kennaday's representation of Community Health. After finding Kennaday disqualified from representing Community Health, the trial court struck all papers filed by Kennaday and her law firm and allowed Community Health 60 days to file new motions.

The trial court possesses the power to control judicial proceedings in the furtherance of justice. (Code Civ. Proc., § 128, subd. (a)(5).) Here, after finding Kennaday disqualified from representing Community Health, the trial court sought to minimize any possible injustice to Schimmel by striking any pleadings Kennaday had filed on Community Health's behalf.

"Every court has the inherent power, in furtherance of justice, to regulate the proceedings of a trial before it; to effect an orderly disposition of the issues presented; and to control the conduct of all persons in any manner connected therewith. [Citations.] The exercise of this power is a matter vested in the sound legal discretion of the trial court, subject to reversal on appeal only in those instances where there has been an abuse of that discretion." (*People v. Miller* (1960) 185 Cal.App.2d 59, 77.)

However, Community Health argues the abuse of discretion standard does not apply to the trial court's action. Instead, Community Health contends, the only salient evidence before the

trial court was the language of the arbitration agreement, which presented a question of law subject to de novo review. Again, Community Health's argument depends utterly on divorcing the arbitration agreement from the court's disqualification of Kennaday. While the language of the arbitration agreement might be undisputed, the parties vigorously disputed the question of disqualification, a question of fact which ultimately led the court to strike the pleadings filed by Kennaday.

Given the court's finding that Kennaday possessed confidential information adverse to Schimmel, its striking of pleadings filed by her arose from its concern about any unfairness to Schimmel in having counsel take an adverse position while possessing such information. We find no abuse of discretion in the trial court's action.<sup>1</sup>

## **II.**

Community Health argues Schimmel failed to meet his burden of establishing grounds for disqualifying Kennaday and Wilke Fleury. According to Community Health, Schimmel failed to show a substantial relationship between Kennaday's earlier representation and the later petition for arbitration.

In conjunction with the motion for disqualification, Community Health once again argues the abuse of discretion

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<sup>1</sup> Community Health argues the general authority of the trial court to "manage judicial proceedings" is not a "panacea" and does not "trump" the mandatory notice requirements with which Schimmel failed to comply. Tellingly, Community Health provides no statutory or legal support for its claims.

standard does not apply. Instead, according to Community Health, we are concerned only with "the 'legal significance of the undisputed facts in the record'" (*Faughn v. Perez* (2006) 145 Cal.App.4th 592, 601 (*Faughn*)) and review the court's determination under a de novo standard of review.

This gloss on the record ignores the conflicting positions of the parties: Kennaday argued no confidential information was transmitted during her prior representation of Schimmel; in contra point, Schimmel argued Kennaday's representation of him during the Cabana litigation made her privy to confidential information bearing on Kennaday's subsequent filing of the petition to compel arbitration. Since the parties vehemently dispute the facts, the abuse of discretion standard applies.

### **III.**

A court may disqualify counsel from representing a client with interests adverse to a former client. Counsel may not do anything that will adversely affect a former client in any matter in which counsel formerly represented the client, nor may counsel use against the former client knowledge or information acquired by virtue of the previous relationship. (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1451; *Med-Trans Corp., Inc. v. City of California City* (2007) 156 Cal.App.4th 655, 664.)

"In successive representation cases, a party may obtain the disqualification of an attorney by establishing that the targeted attorney (1) has actual knowledge of material confidential information or (2) is presumed to have acquired

confidential information because of the relationship between the prior representation and the current representation.” (*Faughn*, *supra*, 145 Cal.App.4th at p. 603.) The information acquired during the first representation must be found to be directly at issue in or have some critical importance to the second representation. (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 711.)

#### IV.

Community Health argues Schimmel fails to establish that Kennaday acquired actual knowledge of any material confidential information during the prior representation. Instead, Community Health contends, Schimmel merely relied on the “playbook” approach to confidential information, in which a former client argues that counsel’s knowledge of the client’s general business philosophies and litigation strategies is sufficient to justify disqualification. Such general information does not merit disqualification.

The record refutes Community Health’s claim. Schimmel submitted a declaration listing the substance of numerous conversations he had with Kennaday regarding the Cabana case. Among the 19 topics Schimmel discusses are: “My personal liability exposure, including a discussion of my attitudes toward litigation as it relates to my reputation in the community”; “A candid assessment of my job performance as a practicing physician and as a Medical Director”; “A candid assessment of Dr. Levin’s job performance”; and “Specific unlawful actions taken by Dr. Levin.”

In addition, Schimmel discussed with Kennaday the identities of his supporters and detractors within Community Health, and identified witnesses of both his performance as medical director and his management style. Schimmel also discussed with Kennaday enforcement of Community Health's arbitration agreement and the need for revision of the agreement.

In response, Community Health filed a declaration by Kennaday. Kennaday states: "Little substantive work was undertaken in the course of the *Cabana* lawsuit." Kennaday also notes the case was mediated and the depositions of Cabana and Levin were taken. However, Kennaday does not dispute either the conversations, or the conversation topics, Schimmel describes in his declaration.

On appeal, Community Health argues Schimmel's declaration "provided *no additional specificity* as to the nature or content of the conversations described, and Dr. Schimmel did not explain how those conversations, which were specific to his status as a defendant in the prior case, revealed confidential information that is material to this case . . . ." Or, as Community Health succinctly puts it: "[W]here's the beef?"

Here, the beef is actually quite apparent. During the Cabana litigation, Schimmel states he discussed with counsel numerous topics that touched on confidential information. Schimmel's attitudes toward litigation and its bearing on his professional reputation, his evaluation of both his and Dr. Levin's professional performance with Community Health, and

his statements concerning specific unlawful actions taken by Levin are not "playbook" or general information, but specific information of the type Schimmel would share with an attorney representing him in litigation. Moreover, Schimmel's identification of allies and enemies within Community Health and the names of witnesses who might provide information on his professional ability also were not "playbook" information, but confidences shared with counsel to aid in his defense.

The topics Schimmel describes reveal that he shared confidential information ""directly in issue or of unusual value in"" the present case. (*Fremont Indemnity Co. v. Fremont General Corp.* (2006) 143 Cal.App.4th 50, 69, quoting Wolfram, *Former Client Conflicts*, (1998) 10 Geo. J. Legal Ethics 677, 724, as quoted in *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671, 680.) Given the type of information Schimmel imparted to Kennaday during the Cabana litigation, which Kennaday does not dispute, the trial court did not abuse its discretion in concluding Kennaday actually possessed confidential information adverse to Schimmel.

#### **v.**

Community Health claims that even if Schimmel can show grounds for disqualification, he consented to Kennaday and Wilke Fleury's representation of Community Health and is thus precluded from objecting to their representation in this case. According to Community Health, the surrounding facts and circumstances demonstrate Schimmel consented to Kennaday's

adverse representation and constitute a waiver of the right to object.

If the facts of a case demonstrate that a former client has consented to an attorney's acceptance of adverse representation, such consent constitutes a waiver of the right to object.

Consent may be implied by conduct. (*Health Maintenance Network v. Blue Cross of So. California* (1988) 202 Cal.App.3d 1043, 1064.)

Community Health argues Schimmel was a member of its three-member executive committee and was involved in the discussions regarding the company's decision to retain Kennaday on employment matters. Schimmel never objected to Kennaday's retention and participated in meetings in which Kennaday advised the company on employment matters. Based on these facts, Community Health contends, Schimmel cannot claim ignorance of Kennaday's status as counsel for Community Health, and therefore waives any objections to her adverse representation.

The trial court disagreed with Community Health's gloss on the evidence, finding: "It has not been established that the plaintiff agreed to Ms. Kennaday or Wilke Fleury's representation of the defendants in matters adverse to the plaintiff's interests." At oral argument the court expressed its confusion as to how Schimmel could be prescient enough to know that by acquiescing to Kennaday's retention by Community Health, he was agreeing to an adverse future representation. As the trial court put it, "it would just seem to me that the last

thing that [Schimmel] would expect is to find [Kennaday] working against him in another subsequent case if he had a problem."

Community Health rejects this interpretation, echoed by Schimmel, arguing it "amounts to nothing more than the plaint that because he was not specifically walked through every possible corollary of Ms. Kennaday's representation, including the prospect that she may be called upon to represent Community Health in an action by Dr. Schimmel, one of its employees, he cannot be deemed to have consented."

However, as Community Health notes, motions to disqualify counsel from adverse representation are governed by *equitable principles* such as waiver. Equity cannot provide relief in a case where simply failing to object to the hiring of counsel for general company matters, including employment, transmutes into a waiver of adverse representation by counsel privy to confidential, material information from a prior representation. Any other result would be the epitome of inequity.

#### **DISPOSITION**

The judgment is affirmed. Schimmel shall recover costs on appeal.

\_\_\_\_\_, RAYE, P. J.

We concur:

\_\_\_\_\_, BLEASE, J.

\_\_\_\_\_, HULL, J.