2017 IL App (1st) 160014-U

FOURTH DIVISION
March 23, 2017

No. 1-16-0014

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VIOLETTA JASKULA, Individually, Derivatively as Shareholder of Discount Roofing Materials, Inc., as President of Savemax Construction, Inc., and as Trustee of the Violetta Jaskula Trust,	)	
Plaintiff-Counterdefendant-Appellee,	)	Appeal from the Circuit Court of Cook County
v.	)	
DEREK J. DYBKA, Discount Roofing Materials, Inc., and 2700 N. Pulaski, Inc.,	)	12-CH-20380, 12-L-051231, and 12-M1-731827, Consolidated
Defendants-Counterplaintiffs-Appellants,	)	
v.	)	Honorable Thomas R. Allen, Judge Presiding
SAVEMAX CONSTRUCTION, INC.,	)	
Counterdefendant.	)	

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: In consolidated civil cases seeking division of personal, residential, and commercial assets acquired during a 22-year unmarried relationship, the trial court abused its discretion by granting the plaintiff's motion to disqualify certain attorneys from representing the defendants due to prior representation when the prior representation was not substantially related to the current litigation.

¶ 2 Former domestic partners Violetta Jaskula and Derek J. Dybka are suing each other regarding their respective rights to a Chicago roofing supply business known as Discount Roofing Materials, Inc., a successor corporation known as 2700 N. Pulaski, Inc., which Dybka formed after the personal relationship broke down, the business's warehouse and four parking lots on North Pulaksi Road, a Chicago general construction company known as Savemax Construction, Inc., two residences in Lake Forest, Illinois, and personal property such as automobiles and artwork. The parties' three suits, which have been referred to as a quasi-divorce, are now consolidated in the trial court. At issue in this permissive interlocutory appeal is an order disqualifying defense counsel because the attorneys previously represented plaintiff Jaskula, as well as defendants Dybka, the roofing materials business, and the construction company in commercial litigation with third parties. We initially denied the defendants' Rule 306(a)(7) petition for leave to appeal the disqualification order (Ill. S. Ct. R. 306(a)(7) (eff. July 1, 2014)) and the defendants appealed to Illinois' supreme court. Pursuant to its supervisory authority, the Supreme Court directed us to vacate our denial, allow the petition, and hear the merits of the appeal in order to specifically "address whether, pursuant to Rule of Professional Conduct 1.9(a), the current litigation in which counsel (Juris Kins) represents [the] defendants is substantially related to prior litigation in which the same counsel represented plaintiff [Jaskula]." Ill. R. Prof. Conduct 1.9(a) (eff. Jan. 1, 2010). The parties have since briefed their positions and we proceed with our review.

¶ 3 Disqualification motions are subject to the trial court's sound discretion and will not be reversed on appeal absent an abuse of that discretion. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176, 685 N.E.2d 871, 876 (1997). An abuse of discretion occurs when the court's ruling is "so arbitrary, fanciful, or unreasonable that no reasonable person would take the view it adopted."

(Internal quotations omitted.) *Silverberg v. Haji*, 2015 IL App (1st) 141321, ¶ 34, 33 N.E.3d 957; *Schwartz*, 177 Ill. 2d at 176, 685 N.E.2d at 876. An abuse of discretion also occurs when the court employs the wrong legal standard. *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 23, 983 N.E.2d 1124; *Silverberg*, 2015 IL App (1st) 141321, ¶ 34, 33 N.E.3d 957 ("it is always an abuse of discretion to base a decision on an incorrect view of the law").

¶ 4 A lawyer's duty of loyalty to the client's interests does not end with the resolution of the dispute or transaction that brought the attorney and client together. *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (1953). Even after a lawyer-client relationship concludes, a qualified fiduciary duty continues. *Schwartz*, 177 Ill. 2d at 177, 685 N.E.2d at 877; Annotated Model Rules of Professional Conduct R. 1.9, at 55 (2016 ed.). Disqualification of an opposing party's lawyer due to prior representation is governed in Illinois by Rule 1.9 of the Rules of Professional Conduct. Ill. R. Prof. Conduct 1.9 (eff. Jan. 1, 2010). Rule 1.9(a) states that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." Ill. R. Prof. Conduct 1.9(a) (eff. Jan. 1, 2010).

¶ 5 The moving party bears a heavy burden of proving that the subject matter of the prior and current representations is "the same or substantially related." *Schwartz*, 177 Ill. 2d at 177-78, 685 N.E.2d at 877; *La Salle National Bank v. Lake County*, 703 F.2d 252, 255 (7th Cir. 1983). Furthermore, attorney disqualification is considered a drastic measure (*Schwartz*, 177 Ill. 2d at 178, 685 N.E.2d at 877) and motions to disqualify counsel are generally disfavored motions because they can be "misused as techniques of harassment" and can interfere with the prerogative of a party to proceed with counsel of their choosing. *Freeman v. Chicago Musical*

Instrument Co., 689 F.2d 715, 721-22 (7th Cir. 1982); *SK Handtool Corp. v. Dresser Industries, Inc.*, 246 Ill. App. 3d 979, 989, 619 N.E.2d 1282, 1289 (1993). "[T]here obviously are situations where they are both legitimate and necessary," yet courts should be extremely cautious and hesitant in granting motions to disqualify except when it is absolutely necessary. *Freeman*, 689 F.2d at 722; *Schwartz*, 177 Ill. 2d at 178, 685 N.E.2d at 877.

¶ 6 The protection of disqualification is limited to the former client's confidential information and thus, any "[i]nformation that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying." Illinois Rules of Professional Conduct. Ill. R. Prof. Conduct 1.9(a), comment 3 (eff. Jan. 1, 2010). Furthermore, "[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related." Illinois Rules of Professional Conduct. Ill. R. Prof. Conduct 1.9(a), comment 3 (eff. Jan. 1, 2010). Accordingly, the court's inquiry into the prior issues should be as specific as possible without requiring the revelation of either side's confidential information. Restatement (Third) of the Law Governing Lawyers § 132, comment *d(iii)* (2000, Oct. 2016 Update).

¶ 7 When determining whether two matters are substantially related, the court is to perform a three-part analysis: first factually reconstructing the scope of the former representation, then determining whether it is reasonable to infer that the confidential information allegedly given would have been given to the lawyer in that matter, and finally, considering whether the information is relevant to the issues raised in the litigation that is pending against the former client. *Schwartz*, 177 Ill. 2d at 177-78, 685 N.E.2d at 877.

¶ 8 One of the prior legal matters at issue here involved Discount Roofing Materials. Shortly after Discount Roofing Materials began doing retail business in 1999, a dispute arose between it

and one of its manufacturer-suppliers, Celotex Corporation, regarding the quality of Celotex products. In 2000, the retailer sued the supplier alleging receipt of defective asphalt shingles and breach of warranties (*Discount Roofing Materials, LLC v. Celotex Corp.*, No. 2000 L 9763) and in 2002, the supplier filed a separate suit alleging the retailer had not paid for the disputed shingles despite being invoiced a total of $121,243. The two *Celotex* suits were subsequently consolidated. In its complaint, Celotex had also named Jaskula and Dybka individually as the signators of a personal guaranty covering up to $100,000 of the retailer's debts (*see Celotex Corp. v. Discount Roofing Materials, LLC, Dariusz "Derek" J. Dybka, and Violetta Dybka a/k/a Violetta Jaskula*, No. 2002 L 08761). About four years into the roofing shingles dispute, Dybka sought out new counsel, was referred to attorney Kins, and then Dybka, as president of Discount Roofing and as an individual, and Jaskula as an individual signed a consent in 2004 acknowledging the withdrawal of the first attorney of record and substitution of Kins as counsel. At the time, Kins was associated with the Chicago law firm Abramson & Fox. The case progressed and in 2010 the parties signed a settlement agreement and partial release resolving the issue of Celotex's invoices, but not the supplemental issue of Celotex's rights to recover interest, costs, and attorney fees, which were subsequently adjudicated in December 2010. The adjudicated order was appealed by Celotex, but affirmed on appeal on March 30, 2012. *Celotex Corp. v. Discount Roofing Materials, LLC, an Illinois Limited Liability Company, Dariusz "Derek" J. Dybka, and Violetta Dybka a/k/a Violetta Jaskula*, 2012 IL App (1st) 110614-U. The appellate order concluded the *Celotex* dispute.

¶ 9 Meanwhile, in 2004, Wells Fargo Equipment Finance, Inc. had sued "Violetta Jaskula d/b/a Savemax Construction" alleging breach of a 1999 lease for a 2000 Sterling commercial truck with a crane. Count II was a claim against Jaskula individually alleging she was in breach

of a personal guaranty of the lease performance. Jaskula had signed the equipment lease as "owner" of Savemax and the personal guaranty as "individual," and Dybka had signed the lease as "witness." Kins filed a general appearance as defense counsel in the *Wells Fargo* case. Wells Fargo moved for summary judgment on both counts, however, the court denied the motion and Kins then helped resolve the suit by a settlement order entered on June 13, 2006.

¶ 10 The present case began on June 1, 2012, when Jaskula filed suit 12-CH-20480 in the circuit court's chancery division, primarily seeking assets from Dybka, Discount Roofing Materials, and 2700 N. Pulaski, based on the Illinois Business Corporation Act, 810 ILCS 5/1.01 *et seq*. (West 2010). Jaskula alleged in part that Dybka lacked unilateral authority in January 2012 to dissolve the roofing materials corporation, organize the entity named 2700 N. Pulaski, transfer all corporate assets to the new entity, and begin using "Discount Roofing Materials, Inc." as an assumed name. Jaskula sought a declaratory judgment of her 50% ownership of Discount Roofing Materials, an accounting and constructive trust over the corporate assets, damages for Dybka's breach of fiduciary duty in failing to deal honestly and in good faith with the assets, numerous remedies as an oppressed shareholder, and back rent on the five commercial properties. Kins had moved from Abramson & Fox to Davis McGrath, LLC. Kins appeared as defense counsel and filed an answer and counterclaim. In the counterclaim, Dybka contended he owned 100% of Discount Roofing Materials and was authorized to manage and dispose of its assets, Jaskula had no right to the commercial real estate, that it was Jaskula who had wrongfully withdrawn corporate funds and taken cash from him, and that she was being unjustly enriched through her ownership of a residence in Lake Forest. He alleged, for instance, that he had come home every day with $5,000 to $7,000 from doing business at Discount Roofing Materials, and, unbeknownst to him, Jaskula had emptied all the cash from his pockets, deposited it in her own

bank account, and eventually accumulated $250,000. Furthermore, she then took the "pocket" money, and $200,000 from a $800,000 business loan taken by Discount Roofing Materials, in order to make a down payment on a $1.2 million residence on Oak Knoll Drive in Lake Forest. Dybka then made all the mortgage loan payments on the Oak Knoll property while Jaskula collected and did not share rent from the property's tenants. Dybka contended that because Jaskula contributed nothing toward her ownership of the Oak Knoll property and was drawing income, she was being unjustly enriched at the expense of himself and the roofing corporation. Jaskula's fourth amended complaint and Dybka's second amended counterclaim and third amended count VIII are still pending in the circuit court.

¶ 11 On July 20, 2012, Dybka filed a replevin action in the circuit court's law division, 12-L-051231. His replevin suit concerned personal property he left in the parties' Lake Forest residence on Hanlan Lane when he ended the personal relationship on Christmas Eve of 2011; the passport, jewels, coins, and jewelry the couple stored in a Lake Forest safe deposit box; and the artwork and antiques they kept in a Lake Forest storage facility. The replevin claim was consolidated with the former couple's other pending claims. In late 2014, the replevin claim went to trial and early 2015 the trial judge granted Dybka possession of two automobiles, numerous pieces of artwork, a dozen handmade rugs, and silverware.

¶ 12 The third suit between the former couple is Jaskula's action filed on December 21, 2012, in the municipal division, 12-M1-731827, regarding possession rights to the five commercial properties where Discount Roofing Materials does business. On July 2, 1014, Jaskula's forcible entry and detainer action was consolidated into the pending chancery case.

¶ 13 After the conclusion of the replevin suit in early 2015, the parties turned their attention to the other matters and the court entered a schedule for discovery and the presentation of witness

lists and motions *in limine* prior to a trial set to begin on December 7, 2015. That trial date, however, was stricken after Jaskula filed an emergency motion on August 25, 2015, to disqualify the law firm Davis McGrath LLC and attorneys Kins, Jodi L. Flynn, and their associates from representing Dybka and the business corporations. In the motion seeking disqualification, Jaskula related that in preparation for trial, her attorney investigated the parties' litigation history and the possibility of prior admissions or statements against interest. Jaskula's attorney learned of the *Celotex* and *Wells Fargo* cases in which Kins had filed general appearances, represented the named parties on various court dates, and drafted numerous court orders. The record of the *Celotex* case indicated Jaskula and Dybka were ordered to appear for deposition on or before April 15, 2004, Kins had presented Dybka for deposition on April 14, 2004, and "Presumably, Violetta Jaskula was presented for her deposition by Juris Kins as well, since no contempt proceeding was initiated." Jaskula argued that while handling the *Celotex* and *Wells Fargo* cases, "Juris Kins was privy to personal, confidential material regarding Violetta." In addition, "Upon information and belief, she discussed confidential information directly related to her business protocols and methods, use of subcontractors, guarantees, personal banking and creditworthiness, her business and personal relationship to Derek Dybka and shared defense strategy directly derived from the relationship of the parties." Jaskula said she was still seeking or reviewing the public record of the "*Great Northern* Case" and the "*Union* Case." In a supporting document, Jaskula swore:

> "7. I remember years ago that Juris Kins and I met a few times for some business matters, but it was always when I had just given birth to our daughter Olivia in 2000, and later our son Vincent in 2003.
>
> 8. I do not recall exactly what we discussed, but I do recall it was over a case where

the Union sued us in Federal Court over Savemax, and later over a supplier dispute with a company called Celotex. I also remember he helped us with a crane dispute, but that was handled mainly by him and Derek Dybka.

9. I remember that I gave a deposition in the *Union* case sometime in 2000, as I brought Olivia as a newborn to the deposition because I was still nursing her.

10. I also believe Mr. Kins represented me during a deposition, possibly in the *Celotex* case, but I am not sure as I was home with our four children, whom in late 2003 were a newborn, a three year old, a middle school child and one in high school.

11. During the lawsuits, Mr. Kins did not keep me informed of the progress of the suits or anything related to them. All information was given to me by Derek Dybka, if at all.

12. In 2009 we settled part of the litigation with Celotex and paid a large judgment, which I believe was over $300,000. ***

***

14. I did not realize there was a conflict of interest until it was brought to my attention by [my attorney] on Friday, August 21, 2015."

¶ 14 In response to the motion, Dybka argued that Jaskula had waived any objection to Kins's representation by waiting for three years; that the statements in her supporting declaration were erroneous, equivocal, and not a factual basis for disqualification; and that there was no "substantial relationship" between the earlier and current matters so as to violate Rule 1.9. In an attached statement, Dybka swore that he founded Savemax Construction in 1985 and Discount Roofing Materials in 1999, and ran the companies' day-to-day operations. Dybka detailed how in 2004, he met Kins and then retained and communicated with Kins about the *Celotex* litigation

involving Discount Roofing Materials. Dybka specified that he obtained Jaskula's signatures on Kin's appearance and substitution as counsel and on the settlement agreement which partially ended the case, and that Jaskula never communicated with Kins and was never deposed. Discount Roofing Materials agreed to pay the invoices it owed to Celotex, received 700 additional squares of Celotex roofing shingles, and paid Kins's attorney fees. The *Wells Fargo* case was about a lease for equipment that was used by Savemax Construction and Discount Roofing Materials. Dybka asked Kins to defend Jaskula and Savemax Corporation, Jaskula "did not know the facts about the usage of the truck and crane," only Dybka communicated with Kins about the pleadings and discovery, Dybka obtained Jaskula's signature "where necessary," and when Jaskula was scheduled for a deposition on February 17, 2006, Jaskula and Dybka met with Kins to prepare her for questioning. Discount Roofing Materials was invoiced and paid the bill for Kins's services in the *Wells Fargo* matter.

¶ 15 In his supporting declaration, attorney Kins swore that he met Dybka in 2004 while working at Abramson & Fox and that he accepted Dybka's offer to represent Discount Roofing, Jaskula, and Dybka in the *Celotex* case. "All my communication regarding the prosecution of the 2000 Case and defense of the 2002 Case [was] with Derek." Kins did not communicate directly with Jaskula about the *Celotex* matter and she did not provide him with any information whatsoever. An order entered in the 2000 case indicated the depositions of "Derek & Violetta Dybka" would proceed by April 15, 2004, however, Jaskula was never deposed and Dybka was deposed three times. (Furthermore, the only time Kins represented her in a deposition was on February 17, 2006, in the *Wells Fargo* case.) In 2006, Abramson & Fox dissolved and Kins moved to Davis McGrath LLC. Discovery, motion practice, and pretrial conferences continued in the 2000 case until November 2009 when Kins negotiated a settlement. Discount Roofing

Materials, Dybka, and the successor to Celotex executed the release and settlement agreement. Jaskula was not a party to the 2000 case. When the 2002 case partially settled in June 2010 (the suit which included her personal guaranty), Kins faxed a settlement agreement and partial release to Dybka, Dybka obtained Jaskula's signature and signed on behalf of himself and Discount Roofing Materials. Discount Roofing Materials did not pay a "large judgment *** over $300,000" in order to settle the *Celotex* case as Jaskula claimed, and the case actually settled with Celotex paying Discount Roof Materials in kind with 700 squares of roofing shingles. Collateral issues of Celotex's right to interest, costs, and attorney fees were adjudicated and the *Celotex* case concluded when the decision was affirmed on appeal. Discount Roofing Materials and Dybka paid Kins's attorneys fees. Jaskula was never billed.

¶ 16 Kins gave a similar description of Jaskula's involvement in *Wells Fargo*. Dybka was the source of information for the pleadings and discovery responses that Kins prepared in *Wells Fargo*. Dybka provided all the information and obtained Jaskula's signature for the "Declaration of Violetta Jaskula" that was filed in opposition to Wells Fargo's motion for summary judgment. Jaskula's Declaration was filed in the public record. Kins met with Jaskula shortly before her scheduled deposition on February 17, 2006, and represented her during the deposition. The deposition was about the contents of the Declaration. (The Declaration indicates that Jaskula doing business as SaveMax Construction executed the equipment lease with Bank One Leasing Corporation in 1999, Jaskula did not independently calculate the amount due each month and believed the monthly invoices she received for two years from Bank One Leasing Corporation stated the correct amount, Bank One Leasing Corporation sold the lease agreement to Wells Fargo, Wells Fargo recalculated the amount due per month and demanded an additional $110.29 per month, and Jaskula then exercised her right to rescind the lease and tender possession of the

leased equipment to Wells Fargo on September 11, 2002.) Discovery closed after her deposition and the parties settled. Kins billed only Discount Roofing and Dybka, not Jaskula, and did not receive any payments from her.

¶ 17 Kins further swore, "During my representation in the above cases, I did not receive personal or confidential information regarding Violetta. She did not discuss with me confidential information related to 'her business protocols and methods, use of subcontractors, guarantees, personal banking and creditworthiness, her business and personal relationship to Derek Dybka and a shared defense strategy' as [she has] asserted on 'information and belief' in the [motion for disqualification]." Kins also denied any knowledge of or involvement in the *Great Northern* or *Union* cases and further specified, "I never discussed the above *Union* case with Violetta and her declaration stating I did is wrong."

¶ 18 With respect to the current litigation, Kins swore that Dybka asked Kins to represent the defendants named in Jaskula's chancery action and that Kins agreed to take the case believing that Jasklua "was a former client in unrelated matters." That is, the prior matters were business disputes that contrasted with the new claims between Jaskula and Dybka concerning their ownership and shareholder rights in Discount Roofing, ownership of the five commercial properties on Pulaski Road, and alleged violations of the Business Corporation Act. "The instant litigation is not the same or substantially related matter as my prior representation of Violetta. The information, if any, I received from Violetta in the prior representation is irrelevant to the instant litigation and will not be used."

¶ 19 Kins also stated that Jaskula's disqualification motion in 2015 was untimely because she knew or should have known that Kins was representing Dybka and Discount Roofing Materials

either when Kins signed and filed the appearance, answer, and counterclaim on July 31, 2012, or at least by the time that Kins deposed Jaskula in the replevin action on August 21, 2012.

¶ 20 In a supporting declaration, attorney Flynn swore that she assisted Kins with the *Celotex* case, spent approximately eight hours on the matter, communicated with opposing counsel and Dybka but not Jaskula, and "did not become privy to any personal confidential information regarding Violetta in the *Celotex* Case." Furthermore, the *Wells Fargo*, "*Great Northern*" and "*Union*" cases were all foreign to Flynn and she had not appeared or represented anyone in those matters. Flynn was assisting Kins with the claims that Jaskula and Dybka filed against each other, and Flynn did not believe any conflict was created by working on both the prior and present set of cases. The *Celotex* case was a collection action brought by third parties regarding unpaid invoices, and contrasted with the claims between Jaskula and Dybka concerning ownership and shareholder rights in certain assets.

¶ 21 In reply, Jaskula contended that any attorney investigation into the personal guaranty claims in the *Celotex* and *Wells Fargo* cases would have given Kins confidential information about Jaskula's net worth and assets, and that even if Kins and Flynn did not have direct contact with Jaskula, they both "gained access" to confidential information about "her assets, her homes, her business associates, her relationship with Dybka, her estate planning and her children." Jaskula, however, did not attach a counteraffidavit or otherwise attempt to factually refute Kins's sworn statement that during his work on the *Celotex* and *Wells Fargo* cases, he "did not receive personal or confidential information regarding Violetta." Jaskula argued that she did not waive the conflict because she had not been informed that Kins represented her in the prior suits and she "received no billing, communications, documents, or anything else associated with the prior representations."

¶ 22 The trial court heard oral arguments, and as we summarized above, granted the disqualification, and this appeal followed.

¶ 23 The defendants contend the ruling is flawed for two reasons. The defendants first argue Jaskula waived the right to seek disqualification by implausibly waiting more than three years into the suit that she started on June 1, 2012, to bring her motion on August 25, 2015. They point out that Kins's name was on the appearance, answer, and counterclaim filed on July 31, 2012; that Jaskula was present at numerous subsequent court dates when Kins was representing defendants; and that Kins sat face to face with Jaskula when he deposed her on August 21, 2012, in the replevin action. The defendants argue Jaskula knew or should have known in 2012, when the papers were filed or when Kins deposed Jaskula, that Kins was representing the defendants. The defendants point out that Jaskula's sworn statement includes the admission that she knew Kins represented her in the prior cases but also says that she was not aware that a "conflict" existed until 2015 when her current attorney investigated the prior suits. The defendants argue that a disqualification motion, however, turns on when the party, not the party's attorney, discovers facts which lead to the motion, and that in an effort to discourage tactical gamesmanship, motions to "disqualify should be made with reasonable promptness after a party discovers the facts which lead to the motion." *Central Milk Producers Cooperative v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir. 1978). In addition, courts have determined that a party waives any objection to an alleged attorney conflict by failing to promptly assert the issue. *International Insurance Co. v. City of Chicago Heights*, 268 Ill. App. 3d 289, 302-03, 643 N.E.2d 1305, 1313 (1994) (holding that a party waived an attorney conflict by delaying more than sixteen months before asserting it); *First National Bank v. St. Charles National Bank*, 152 Ill. App. 3d 923, 932-33, 504 N.E.2d 1257, 1264 (1987) (holding that a party waived an attorney

conflict by delaying fifteen months); *Tanner v. Board of Trustees*, 121 Ill.App.3d 139, 146-47, 459 N.E.2d 324, 329 (1984) (holding that a party waived an attorney conflict by delaying nine months). The defendants' second appellate contention is that the court failed to correctly apply the disqualification test set out in *Schwartz*, 177 Ill. 2d 166, 685 N.E.2d 871.

¶ 24 In our opinion, regardless of whether Jaskula's motion was timely, reversal is warranted because the trial court employed the incorrect standard in determining that the drastic measure of disqualification should be ordered. The trial court erred when it concluded there was a substantial relationship between the subject matter of the prior and current suits and by basing its decision primarily on an appearance of impropriety standard which the Supreme Court expressly rejected in *Schwartz*, 177 Ill. 2d at 180, 685 N.E.2d at 878. Although the trial court referred to the three-step substantial relationship test, it did not make all the findings necessary for this test. Instead of first making a factual reconstruction of the scope of Kins's prior legal representation, the court indicated it was significant that the subject matter of the past and present suits was "the construction business" and that the "issues that are before me are *** the construction businesses, [and] the properties." This was a general description, rather than "a careful examination of the factual context of the subject matter of both representations." *Schwartz*, 177 Ill. 2d at 180, 685 N.E.2d at 871. The court also focused on the fact that the same corporations and individuals were involved in the former and current disputes and remarked "We've got the same players. They are all the same." If commonality of the parties was a determinative fact under Rule 1.9, however, then most, if not all, disqualification motions would be granted.

¶ 25 The court also reasoned:

> "[A]ren't we all as officers of the court supposed to err on the side of caution?
>
> The appearance of impropriety, *** that's what judicial cannons [*(sic)*] are [about].

That's what ethical cannons [*(sic)*] are as a lawyer. *** You [have] always got to, you know, err on the side of caution."

¶ 26 Later in the hearing, the court said:

"I mean, there [are] a few sacred things that we as lawyers have to abide by, and one of the most critical is the attorney-client privilege and not compromising it even by the appearance.

But I'm thinking we went—we have compromised that here. I don't see how under these facts that these—that this precept wasn't stepped on a little bit."

¶ 27 The court then concluded:

"So here's the balancing act that exists here, in my judgment. Do we come down on the side of caution and standing strong and hard on the directive of the rules of professional responsibility or do we cast that aside and go with the waiver issue[.] ***

That's what this comes down to plain and simple. That's what I saw when I first addressed everyone and I still see it here. And faced with that choice, my choice is you come down on the side of sticking to the straight and narrow of the rule, and caution ***.

*** I'm coming out on the side of caution and I'm going to grant the motion to disqualify, even though that throws a monkey wrench into everything, *** so that's my ruling."

¶ 28 The court erred by incorrectly applying the three-part substantial relationship test, but also because in *Schwartz*, the Supreme Court considered and rejected an appearance of impropriety standard for attorney disqualification. The Supreme Court stated: "We adhere to the ABA's recommendation that an attorney should not be disqualified *** on the basis that the subsequent representation may create the appearance of impropriety. Such a standard is 'simply

too weak and slender a reed' upon which to order disqualification." *Schwartz*, 177 Ill. 2d at 179, 685 N.E.2d at 878 (quoting *Index Futures Group, Inc. v. Street*, 163 Ill. App. 3d 654, 659, 516 N.E.2d 890, 894 (1987)). The Supreme Court reasoned:

> "The appearance-of-impropriety test fails to adequately consider the interplay between the subject matter of the former and subsequent representation. [Citation.] In deciding whether a substantial relationship exists between two representations, a careful examination of the factual context of the subject matters of both representations is necessary in order to determine whether disqualification is required. [Citation.] We further conclude that the three-part [substantial relationship] inquiry *** provides the most practical framework for conducting a realistic comparison of the subject matters. [Citation.] " *Schwartz*, 177 Ill. 2d at 180, 685 N.E.2d at 878.

¶ 29 Thus, the controlling authority and the hearing transcript indicate the trial court in this instance relied on generalities and what the court perceived to be an appearance of impropriety as the basis for its ruling, which was the wrong standard and an abuse of the court's discretion. *Shulte*, 2013 IL App (4th) 120132, ¶ 23, 983 N.E.2d 1124 (an abuse of discretion occurs when the trial court employs the wrong legal standard); *Silverberg*, 2015 IL App (1st) 141321, ¶ 34, 33 N.E.3d 957 ("it is always an abuse of discretion to base a decision on an incorrect view of the law").

¶ 30 Furthermore, the authority and record on appeal do not warrant disqualification. The first step of the test called on the trial court to make a factual reconstruction of the former representation and determine the purpose of Kins's employment. The scope of the litigation and Kins's employment was described in his sworn declaration, which we detailed above. In the 2002 *Celotex* case, Kins was employed to defend against the manufacturer-supplier's allegations

of unpaid invoices for defective shingles, and in the *Wells Fargo* case, Kins was employed to defend against the truck/crane owner's allegations that monthly equipment lease installment payments were not properly calculated or fully paid. He stated, for instance, "Celotex sued Discount for $121,241.99 on invoices for asphalt roof shingles it sold to Discount in 2000 which Discount has failed to pay." Orders entered in the *Celotex* litigation confirm that it concerned "the sale of shingles, defendants' non-payment for the shingles, and defendants' potential set-off claim based on defective shingles" but the "simple collection matter" was handled inefficiently, dragged on for 10 years before settling for the amount claimed, and then further deteriorated into a dispute and appeal over the manufacturer-supplier's attorney fees that were 300% of the value of the purchased product. *Celotex*, 2012 IL App (1st) 110614-U, ¶ 25. Kins also specified in his declaration that all of his communication regarding *Celotex* was with Dybka, "I never had a direct communication with Violetta and she never provided me with any information, confidential or otherwise." Also, "Violetta was never deposed." Similarly, Kins described the subject matter of the commercial dispute in the *Wells Fargo* case and said, "My communications regarding the case were with Derek, and he was my contact for drafting pleadings and discovery responses. He obtained Violetta's signature where necessary." Kins also made clear that the primary issues in the *Celotex* and *Wells Fargo* cases were resolved through settlement negotiations, that the corporate parties performed their settlement obligations, and that the personal guaranties were pled but not litigated. Jaskula has agreed with the defendants' description of the earlier lawsuits as commercial business disputes and she did not provide any facts in opposition to Kins's description of the purpose of his engagement in those matters.

¶ 31 The second step in the test required the court to determine whether it was reasonable to infer that the confidential information allegedly given would have been given to a lawyer

representing a client in those earlier matters. The trial court suggested that Jaskula must have conveyed confidential information because the *Celotex* case lasted eight years–but length of time is not an appropriate standard for evaluating a disqualification argument. It is not reasonable to infer from the record on appeal that Jaskula ever disclosed any confidential information to Kins. The sworn statements make clear that Dybka, not Jaskula, sought out and retained Kins and that Kins's communications were almost exclusively with Dybka, not Jaskula. Jaskula's own sworn declaration confirms that she met with Kins only "a few times for some business matters;" that "[she did not] recall exactly what [they] discussed ," other than that Kins was handling "a supplier dispute with a company called Celotex" and "a crane dispute;" and that "Kins did not keep [Jaskula] informed of the progress of the suits or anything related to them. All information was given by Derek Dybka, if at all." Jaskula also conceded in her sworn statement that the *Wells Fargo* dispute over the leased crane "was handled mainly by [Kins] and Derek Dybka." Thus, the parties essentially agreed that Jaskula had no material involvement in the *Celotex* and *Wells Fargo* suits and had minimal to no interaction with Kins, and thus no opportunity or reason to give Kins any confidential information. Furthermore, it is also reasonable to infer from Jaskula's statements that she was not involved in the *Celotex* or *Wells Fargo* cases because she was home taking care of four children, including a newborn and a three-year-old. Jaskula's recollection that Kins was counsel in the *Union* case was simply wrong and she abandoned her reliance on that case as grounds for his disqualification. Moreover, Jaskula's statement "on information and belief" asserted, without any factual support, that she personally "discussed confidential information [with Kins] directly related to her business protocols and methods, use of subcontractors, guarantees, personal banking and creditworthiness, her business and personal relationship to Derek Dybka and a shared defense strategy." This statement was unsupported

speculation and contradicted her other statements such as "I do not recall exactly what we discussed" and "[a]ll information was given to me by Derek Dybka, if at all." Furthermore, statements made "on information and belief" are insufficient when opposed by positive, detailed averments of fact such as the statements that Kins included in his declaration. See *Fooden v. Bd. of Governors of State Colleges & Universities*, 48 Ill. 2d 580, 587, 272 N.E.2d 497, 501 (1971) (indicating statements made on information and belief are "not equivalent to averments of relevant facts but rather put in issue only the pleader's information and belief and not the truth or falsity of the 'facts' referred to.") Kins affirmatively denied receiving the information and his statements stood unopposed by a counter-affidavit. *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248, 421 N.E.2d 231, 235 (1981) (indicating where well alleged facts within an affidavit are not contradicted by counter-affidavit, they must be taken as true notwithstanding the adverse party's contrary but nonfactual averment). In addition, whatever information Jaskula arguably conveyed to Kins was also known by and conveyed by Dybka, and not the proper basis of a disqualification argument. Given this record, it was not reasonable to infer that Jaskula ever gave Kins any confidential information.

¶ 32 The third part of the substantial relationship test required the court to consider whether the information "is relevant to the issues raised in the litigation pending against the former client." *Schwartz*, 177 Ill. 2d at 178, 785 N.E.2d at 877. There is no reason to believe that information gained in the prior litigation with third parties regarding payment of invoices for asphalt roofing shingles and construction equipment lease payments is relevant to the present case. Whether the *Celotex* shingles were defective or the *Wells Fargo* crane lease payments were improperly calculated and underpaid is not relevant to the current claims between Jaskula and Dybka about the ownership of the roofing supply business, the construction company, the

warehouse and parking lots, and the Lake Forest residences. In short, any information that was arguably given by Jaskula in the prior litigation is irrelevant to the current dispute and cannot be used to Jaskula's detriment.

¶ 33 For these reasons, we find that the current litigation in which attorney Kins represents the defendants is not substantially related, within the meaning of Rule of Professional Conduct 1.9(a), to the prior litigation in which Kins represented Jaskula (and others). Ill. R. Prof. Conduct (2010) 1.9(a) (eff. Jan. 1, 2010). We hold that granting Jaskula's motion to disqualify Kins was not based on the relevant facts or law.

¶ 34 Having concluded that there was no legal or substantive basis for disqualifying Kins, we further find that Jaskula waived her disqualification argument by failing to bring the motion on a timely basis. Although the length of time is obviously significant in determining whether a party has waived its right to object to an attorney's representation of an adverse party on conflict of interest grounds, courts have considered factors such as when the moving party learned of the conflict; whether the moving party was represented by counsel during the delay; why the delay occurred; and whether disqualification would result in prejudice to the nonmoving party. *Chemical Waste Management, Inc. v. Sims*, 875 F. Supp. 501, 505 (N.D. Ill. 1995). All of these factors weigh against Jaskula. In the *Celotex* matter, she consented in writing in 2004 to the withdrawal of the first attorney of record and substitution of Kins as counsel, and she subsequently knew or should have known by 2012 that Kins was representing Dybka in the current matters either when Kins's name appeared on the defendants' appearance, answer, and counterclaim or when Kins deposed her in the replevin suit. Given that Jaskula learned of the potential conflict by 2012, there was no valid reason for her to have waited until 2015 to make her objection. She has been represented by counsel throughout the current proceedings and her

only explanation for the delay in bringing the "emergency" motion for disqualification was that her current attorney was not aware until 2015 of Kins's prior representation. Attorney disqualification should be sought at the earliest opportunity, otherwise it could be misused for the purpose of harassment. See *e.g.*, *International Insurance Co.*, 268 Ill. App. 3d at 302-33, 643 N.E.2d at 1313 (affirming waiver where plaintiff was "alerted" to the potential grounds for disqualification more than sixteen months before objecting to an alleged attorney conflict). In addition, disqualifying Kins and the other attorneys at his firm three years into the suit and three months prior to the scheduled trial date would unfairly prejudice the defendants because it would deprive the defendants of attorneys they chose and who have become well versed with the relevant facts and issues in these proceedings. Substitute counsel would be required to duplicate the substantial preparation already undertaken by the defense attorneys, which would further delay the proceedings and unfairly increase the defendants' litigation costs. Jaskula waived the disqualification argument.

¶ 35 In short, Jaskula's disqualification motion should not have been granted. Given our findings, we reverse the order on appeal.

¶ 36 Reversed.