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Supreme Court of Texas.
In re Columbia Valley Healthcare System, L.P. D/B/A Valley Regional Medical Center, relator.
No. 08-0995.
February 18, 2010.

Oral Argument

Appearances:Mike A. Hatchell, Locke Lord Bissell & Liddell LLP, Austin, TX, for relator, for petitioner.

Carlos Escobar, Brownsville, TX, for real parties in interest: Yvonne T. Leal, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in the first case, 08-0995, In re Columbia Valley Healthcare system.

MARSHALL: May it please the Court. Mr. Hatchell will present argument for the Relator. The Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE PETITIONER

ATTORNEY MIKE A. HATCHELL: May it please the Court, this original mandamus proceeding seeks to compel the disqualification of a law firm, because it hired a legal assistant employed by the defense who had worked directly on the file and then she worked directly on the file in her new employment. The facts are simple enough. Margarita Rodriguez was a legal assistant who worked directly on the underlying file for the defense law firm. She was hired by the plaintiffs' law firm, and although she was initially instructed not to touch any files from her former employment, she ended up working on the file in several ways.

JUSTICE DAVID M. MEDINA: Mr. Hatchell, was there anything more that could have been done to rebut

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the presumption that Ms. Rodriguez shared confidences?

ATTORNEY MIKE A. HATCHELL: The oral instructions at the beginning of her employment are all that is in the record. And when she violated those instructions, by her own admission she violated them, she was reinstructed again. But there was nothing more than an oral admonition at the beginning of her employment not to, quote, touch the files or reveal confidences.

JUSTICE DAVID M. MEDINA: What more could have been done or should have been done?

ATTORNEY MIKE A. HATCHELL: Considerably more could have been done. This Court has said in Phoenix Founders, that in addition to the types of oral warnings that she was given, that the hiring law firm must employ formal, and I believe the Court uses the word "institutional" measures to effectively screen the paralegal from any contact with the suit. That brings into play what are traditionally known as the formal screening methods, which in this case could have taken a number of different forms and should have taken a number of different forms, such as --

JUSTICE DAVID M. MEDINA: Well, what happens in a situation where you have a small law firm?

ATTORNEY MIKE A. HATCHELL: It's even more critical in the small law firm, because the ability to have, quote, "contact" with the file is so much greater in this case. And the things that can be done are as follows: A memo can go out to all, what we call in our firm, "the hot pink memo," can go out to everybody within the firm advising that this employee must be screened from this particular file; you can isolate the files under lock and key; you can put warnings on the files that this particular employee cannot be involved in that particular file. Those are institutional measures which go firm wide, and which I think can accomplish the formal screening that's done, and this is traditional through law firms, I think throughout the United States.

JUSTICE DALE WAINWRIGHT: Should there need to be some proof that the screening measures and precautions would have been effective? For example, if there's an employee who is not a lawyer, who is hired by the subject firm, and they just, notwithstanding precautions not to work on the prior files, files from the prior employment, they still do, even when they're threatened with dismissal, even if there are institutional measures? Should there need to be some at least argument or basis for concluding that those measures would have been effective?

ATTORNEY MIKE A. HATCHELL: Well, of course, the Court knows that it has promulgated a six-factor test by which the screening process should be analyzed. But the situation that you have posed, Your Honor, which is a good one, imposes the ultimate conundrum, and that is, assuming that you do employ formal screening methods and the employee violates those screening procedures, as was done in this case, and bearing in mind that the screening procedures must be effective to prevent any contact with the file, on whose shoulders should the employee's violation fall? Should it fall on the defendants' shoulders, the former law firm, or should it fall upon the firm that employed the employee who violated the rules?

JUSTICE EVA GUZMAN: Once,-

ATTORNEY MIKE A. HATCHELL: I...

JUSTICE EVA GUZMAN: Excuse me. You alluded to some contact that she had. It seems somewhat minimal, placing the correspondence on top of a cabinet, rescheduling a docket control conference, and making a phone call, I suppose. Once you have that contact, is there no going back? In other words, after that she was threatened with dismissal and what-have-you. Is that then not sufficient to ensure that there is no contact that would reveal a confidence?

ATTORNEY MIKE A. HATCHELL: Your Honor, I think the fact that she had the contact and violated the rules by her own admission means that there is no going back. At the end of my argument today, I'm going

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to suggest, in fact, in response to the questions such as yours, that the test employed by this Court in Phoenix Founders, Grant and American Home needs to be modified in some respects. But the ultimate answer to your question, I think, is that once the contact occurs, it has been demonstrated that the screening procedures are simply not effective.

JUSTICE EVA GUZMAN: And so in the context of a small firm then, what do you suggest is appropriate? What measures would be sufficient?

ATTORNEY MIKE A. HATCHELL: I think the measures that I just suggested. There has to be a warning, which is given, not to reveal any confidences. There must be a warning not to work on the files.

JUSTICE EVA GUZMAN: And there was here, correct?

ATTORNEY MIKE A. HATCHELL: There was here. And the most important one, and the one which has been involved principally in the three cases that you have decided, formal screening methods that are effective to prevent any contact, which include firm-wide admonitions, not just to the employee, but to the entire firm so that the entire firm can be involved in policing the contact with the file. The real problem, and I say with all due respect to opposing counsel, the real problem with what happened in this particular case is the fact that these particular policies that were implemented were self-policed or had to be self-policed by the employee herself. Here's what she said was the situation after the warning was received, “If the case sounded familiar to me or the style of the case sounded familiar, and then I was to tell him about it or notify him about it, so that he could have someone else work on that case.”

JUSTICE HARRIET O'NEILL: Well, now that was the general policy, but in terms of the Leal case specifically, how much weight should we give the confidentiality agreement? Because the new firm could look at that and determine she has signed a binding document to keep everything about the Leal file confidential, and why can they not take that into account in terms of how many further measures they need to implement?

ATTORNEY MIKE A. HATCHELL: Well, first of all, she violated it and she admitted that she violated both that policy and the policies that were implemented when she came. The problem I have with their being able to look at that -- and first of all, there's no evidence that they knew about that.

CHIEF JUSTICE WALLACE B. JEFFERSON: You said she violated it by revealing a confidence or by touching --

ATTORNEY MIKE A. HATCHELL: No, no, no. She admitted --

CHIEF JUSTICE WALLACE B. JEFFERSON: -- the file and making a phone call to schedule a docket?

ATTORNEY MIKE A. HATCHELL: No. She did not, as far as this record shows, she did not reveal confidences. She said, she was asked a direct question, “Did you violate the policies that were imposed both at the former firm and this firm?”

CHIEF JUSTICE WALLACE B. JEFFERSON: If she did not reveal confidences, then why go to the extraordinary measure of disqualifying the firm?

ATTORNEY MIKE A. HATCHELL: Well, because the -- that actually has been the issue in all of the cases that you have decided.

CHIEF JUSTICE WALLACE B. JEFFERSON: Sure.

ATTORNEY MIKE A. HATCHELL: And the Court has said, you know, the battle should not be fought

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out over whether she reveals confidences or not, the battle is fought out over whether formal screening procedures are instituted --

CHIEF JUSTICE WALLACE B. JEFFERSON: But I'm interested in the policy rationale. Let's assume that it is settled. It's established that no confidences were revealed, nothing from the former, from her work in the former case was revealed to the plaintiffs' lawyers here. Why would we then disqualify that firm? This is a firm that hired -- the client hired that firm to do work, no confidences were revealed, so what's the policy rationale?

ATTORNEY MIKE A. HATCHELL: The policy reason is -- there are two policy reasons, I think for that. Number one, there has to be in order to guide the bench and the bar to avoid disqualifications, there has to be a bright-line test rather than an ad hoc test that looks at each particular case. And somewhat in the similar vein, disqualification motions are a snapshot in time, and the fact that confidences may not have been revealed at the time of the motion for disqualification, does not alleviate what this Court has called the threat, the potential threat of disclosure as opposed to actual disclosure. It's that threat of disclosure that continues through the ability of the employee to have contact with the file that has motivated this Court and, frankly, has motivated courts nationwide.

JUSTICE DAVID M. MEDINA: Does the appearance of impropriety have any effect on this [inaudible]?

ATTORNEY MIKE A. HATCHELL: Certainly one does not like to be in Mr. Nye's situation, and start-- and have to pass on to your client, letters from the former legal assistant working on your file who is now working for the -- to me, that puts the legal profession in a very, very bad light, and certainly just as much as lawyers do --

JUSTICE DALE WAINWRIGHT: We have to be a little careful, so that the end doesn't consume the test for the means that we've set up. At some point, “reasonable steps” could be interpreted to mean insure that absolutely no confidences were passed on. And as we know, that's not the test. And there's a line that we need to draw there, and I'm not sure we can draw a bright-line rule, hopefully a rule that's clear and can be followed. But there's always going to be some discretion there, isn't there? There's a continuum, it seems.

ATTORNEY MIKE A. HATCHELL: Your Honor, I would say that you've got to come as close to a bright-line rule as you possibly can, otherwise we just simply revert back to a case-by-case situation. And bear in mind, as I said earlier, the goal seems to me to be to give the bench and the bar enough guidance to avoid these problems.

JUSTICE DALE WAINWRIGHT: Well, let's assume that all the precautions you suggest and are required in our case law are followed, and yet a paralegal still discloses confidences. Well, under the existing law, the subsequent law firm gets disqualified -- or does not get disqualified because the precautions were followed. But the ultimate objective, precluding the disclosure of confidences, wasn't complied with. So we haven't really served the ultimate purpose in that case, have we?

ATTORNEY MIKE A. HATCHELL: I agree with that, Your Honor, and I think that that is what impels me to suggest to the Court that there are two, one of two modifications need to be made to the existing case law. The first, I would urge the Court to adopt the Comment to Section 123 of the Restatement of the Law Governing Lawyers. That Comment suggests that the irrebuttable presumption, which applies to attorneys, should also apply to paralegal personnel in situations in which the nonlawyer employee is assigned at the new firm to work directly on the same matter on which the employee had worked at a prior firm. I think that is an easily -- I think that is a very appropriate test, and one that is easily applied. If the Court --

JUSTICE DALE WAINWRIGHT: But isn't that the law in Phoenix?

ATTORNEY MIKE A. HATCHELL: No, not insofar as --

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JUSTICE DALE WAINWRIGHT: “A paralegal that actually works on the same case in the rehiring firm is subject to the conclusive presumption that confidences and secrets were imparted during the course of the paralegal's work on the case.”

ATTORNEY MIKE A. HATCHELL: No, that's confidences were acquired at the former firm. I am speaking now of an irrebuttable presumption that confidences were shared.

JUSTICE EVA GUZMAN: In Grant, we suggested that the presumption could be rebutted on showing --

ATTORNEY MIKE A. HATCHELL: Yes, absolutely.

JUSTICE EVA GUZMAN: -- that there were no confidences, and so --

ATTORNEY MIKE A. HATCHELL: There's no question that as of today --

JUSTICE EVA GUZMAN: So you're asking us to --

ATTORNEY MIKE A. HATCHELL: -- it is a rebuttable presumption. I'm suggesting that once we know that the employee has been assigned to work directly on the file, that the presumption should then become irrebuttable, as it is for lawyers. The second thing I would --

JUSTICE HARRIET O'NEILL: Let me make sure I understand. That's not going to happen. I mean when someone has an irrebuttable presumption that they have worked on a file at the firm they left, they're not going to be assigned to that same file with the new firm they go to.

ATTORNEY MIKE A. HATCHELL: Oh, but they were in this case.

JUSTICE HARRIET O'NEILL: No, they were not assigned to this case. They happened to have some contact with the file, minimal, but they weren't assigned to this case.

JUSTICE DON R. WILLETT: That's a question I have too. You say there's no going back once she had contact, that is, game over at that point. But of the contact she had, how much of it was self-prompted versus directed by others at the firm?

ATTORNEY MIKE A. HATCHELL: Well, in at least once instance we know it was directed by the attorney. She made copies from the file. Here's the list of the things that she did: she receives all correspondence in the file and she places it for filing; she rescheduled a docket control conference; prepared an order; advised opposing counsel by letter, under her own signature; copied a birth certificate and a Social Security card; and she is generally assigned to handle the calendar for the Leal case, according to her own testimony. And according to her own testimony, she violated the very admonitions that were given to her. And, Your Honor, I have one more --

JUSTICE DALE WAINWRIGHT: I'd like to hear that second suggestion, please, Counsel.

ATTORNEY MIKE A. HATCHELL: The Supreme Court of Nevada in Liebowitz vs. Eighth District Court has suggested, and it in fact looked to the Texas principles for the rules that it applied as to nonlegals, but it went one step further, saying that, “The hiring law firm must inform the adversarial party or their counsel regarding the hiring of the nonlawyer and the screening mechanisms utilized.” At which the point, the firm so notified and filed a consent, a conditional consent, unconditional consent, or a motion for disqualification. I think that's a step forward too. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is now ready to hear argument from the real parties in interest.

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MARSHALL: May it please the Court, Mr. Escobar will present argument for the respondent.

ORAL ARGUMENT OF CARLOS ESCOBAR ON BEHALF OF THE RESPONDENT

ATTORNEY CARLOS ESCOBAR: May it please the Court, Counsel. Your Honors, I think I'd like to revisit some of the facts in this case, just so that we have a -- I think based upon what Mr. Hatchell was talking about, I think we need to have a clear understanding about what happened and how we were situated in this litigation. The first thing I need the Court to take under consideration is that the active litigant -- the prosecuting file, if you will, the file that's being actively worked on was not at our office during the time that Mrs. Rodriguez was there. As the record reveals, Mr. Magallanes, who is the partner of the law firm, he suffered an aneurysm, and as a result of that and his prolonged hospitalization, the firm had to consult with other lawyers, and the file was transferred to Houston. So the active litigation file wasn't in our office. A lot of the, and I know there's evidence that there's correspondence that we still received, but a lot of that was the carbon copy, because we were listed as counsel.

JUSTICE EVA GUZMAN: Did she have any specific assignments, though, with respect to calendaring the dates? Like specifically did someone ask her to do that?

ATTORNEY CARLOS ESCOBAR: Well, Your Honor, I think in a sense, yes, and in a sense, no. Yes, because -- well, obviously she's working for Mr. Magallanes, if this is a case that's he's on, listed as counsel, then obviously she needs to know where he's at on the calendar, but -- and I want to go back to the Grant case, where the ultimate issue is is there a threat that confidences will be revealed? And I think keeping -- on May 14th, for example, he's going to be in the Leal case somewhere. I don't see how if she keeps that information on his calendar that even comes near to making a threat that disclosure, confidential disclosure will occur.

JUSTICE HARRIET O'NEILL: But it strikes me that this is a very rigid test. I mean none of it is based on what actually happens. It's based on presumptions. So when you've got imputed knowledge of the former firm that is irrebuttable, and you go to the new firm, the presumption is that those confidences are shared unless it's rebutted. And what level should we require for rebutting? My understanding, the controversy here is whether additional measures were taken. And you agree that that's a requirement?

ATTORNEY CARLOS ESCOBAR: Well, obviously, Your Honor, this Court -- it's the second prong of the test in Phoenix Founders, which is taking other reasonable steps to ensure that the person tainted with the confidential knowledge does not work in connection with the matters. And in this case, we told her explicitly not to work on the file, not to touch the file, and we also --

JUSTICE NATHAN L. HECHT: Well, but you also told her to make a copy?

ATTORNEY CARLOS ESCOBAR: Well, that's correct, Your Honor.

JUSTICE NATHAN L. HECHT: It seems to me that that's the most troubling thing is that by the lawyer asking the paralegal to do something with respect to the file, shows to the paralegal that the lawyer is not serious about the screening.

ATTORNEY CARLOS ESCOBAR: Well, Your Honor, but what the law says is, if there's a genuine threat to disclosure of confidential information, then disqualification is what the remedy is. Handing someone a piece of paper, “Can you make a copy of this?” and handing it straight back while the supervising lawyer is there to see what she's doing --

JUSTICE NATHAN L. HECHT: Yes, but you've already told the paralegal, “Do not touch this file. Don't go near this file; don't have anything to do with it. And if anything comes up, ask somebody else in the

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office to work on it instead, unless I ask you directly." It seems to me that the paralegal takes away from that, "This is not that serious."

ATTORNEY CARLOS ESCOBAR: Well, respectfully, Your Honor, I disagree, because that level of conduct doesn't come anywhere near to a genuine threat that confidences will be revealed. It just doesn't. And that's, I think that's the threshold issue here. In terms of, for example, the definition of "work" in Phoenix Founders...

JUSTICE DAVID M. MEDINA: So you're implying that a legal assistant like Ms. Rodriguez could make copies, do administrative work, as long as there's not an analysis on what the legal issues are in the file or happen to be at that time, then that's okay?

ATTORNEY CARLOS ESCOBAR: Well, Your Honor, no. Mr. Magallanes told her, "Don't touch this file." That is what the record indicates. We also had the file assigned to someone else, where she was isolated from the file because she wasn't actively working on the file.

JUSTICE NATHAN L. HECHT: But then you told her to touch it?

ATTORNEY CARLOS ESCOBAR: That's correct, Your Honor, but what I'm saying --

JUSTICE NATHAN L. HECHT: So which way did he mean? That's the problem, it seems to me.

ATTORNEY CARLOS ESCOBAR: Well, Your Honor --

JUSTICE NATHAN L. HECHT: "Don't touch it, except touch it"?

ATTORNEY CARLOS ESCOBAR: What I'm saying is that level of conduct -- she touched it. I'm not backing away from that.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY CARLOS ESCOBAR: Those are the facts. What I'm saying is that it's a ministerial act. It's an act that doesn't require any substantive knowledge about any confidences or anything about the case. I'm handing you something to make a copy --

JUSTICE HARRIET O'NEILL: But isn't that just the dialogue we don't want to have to get into? What if what she had copied had been deposition testimony? What if it was… and isn't this just the debate we don't want to have to get into with these presumptions that apply? You had a rebuttable presumption, and if there's been a contact with the file, then why shouldn't it be that the burden to rebut the presumption just wasn't met?

ATTORNEY CARLOS ESCOBAR: Well, Your Honor, because we have another level of protection involved in this case, and that's the confidentiality agreement. There is a binding contract between her and the prior firm, you know, wherein she explicitly and expressly agreed that she would not reveal any confidences with respect to her prior employment.

JUSTICE HARRIET O'NEILL: But again, it's presumptions. And don't we have a more difficult problem when the prior -- you know, so often you have a former employee where the knowledge is imputed to them, even though they never worked on the file, it may have been in another department. Here she worked on this file and had actually confidences. Don't we have to apply a stricter test on the back end when she goes to another firm?

ATTORNEY CARLOS ESCOBAR: Your Honor, two responses. The first one is, yes, we want to respect

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what the law requires and we feel that we did that. We assigned it to somebody else, we told her not to do it. And I understand, as Justice Hecht has made light of, I mean, obviously, that was something that I guess would be regrettable, but it just doesn't rise to that level. But the other thing I want to talk about in terms of presumption, Your Honor, is that there's a binding contract, and I would argue that the contract -- you can rely, you can presume on the contract. And in this case, we have evidence where she was asked direct questions under cross-examination and she said she complied with the terms of the contract with respect to the not revealing any confidences. I think the testimony that Mr. Hatchell was talking about was whether or not she quote-unquote worked on the file. Now, obviously, she had contact with it, and initially what I wanted to do was is talk about that issue, because what happened in the facts of the case was that --

JUSTICE HARRIET O'NEILL: I'll let you go on.

ATTORNEY CARLOS ESCOBAR: Sure.

JUSTICE HARRIET O'NEILL: But the problem I have is, it strikes me that the jurisprudence is such that it doesn't really matter what happened, and it doesn't really matter that someone says, “Yeah, but I really didn't know anything or I didn't say anything.” The reason for these presumptions and the test for these presumptions is so we don't even go there.

ATTORNEY CARLOS ESCOBAR: Correct. I understand that, Your Honor, but I'm saying -- I would argue that there's another presumption involved which is the contract. So you can presume that there's another -- the contract is the firewall, the ”Chinese wall”, the level of protection between her and the revealing of confidences. And you can rely on a contract. I mean this Court --

JUSTICE NATHAN L. HECHT: But if you can't rely on her to follow the instruction that is, “Don't work on this file,” how can you rely on her to honor the contract? It seems to me that once you break one thing, the presumption is torn down.

ATTORNEY CARLOS ESCOBAR: Well, Your Honor, I understand. I mean she did disregard our express instructions.

JUSTICE NATHAN L. HECHT: So why wouldn't she disregard the contract too?

ATTORNEY CARLOS ESCOBAR: Well, because the evidence --

JUSTICE NATHAN L. HECHT: You're her employer. This was just her former employer.

ATTORNEY CARLOS ESCOBAR: Right. But the evidence is, Your Honor, there's no evidence at all whatsoever that any confidences were revealed. And obviously we're going to try to do everything we can to isolate her from the file, exclude her from activities on the file. But I mean unfortunately, we're -- those are what the facts are, and I just -- my argument is that those ministerial acts that she performed don't rise to the level where you would have a genuine threat that confidences would be revealed. That's the Grant case.

JUSTICE PHIL JOHNSON: Well, Counsel, it seems like if you have the people on the other side, the Columbia Valley Medical Center, who have lawyers that have been exchanging work product and expert witness information, if you asked them if there's a threat of disclosure, they're probably going to be pretty upset about this. So it seems like we have a systemic problem here. Your law firm hired someone that apparently you knew had been working on a file and had had these confidences. You did not get permission from the other side, you did not go and ask, “Can we hire -- is there a problem here?” So it seems like that the general threat depends on who you ask. If you ask someone who is being sued if the other side can have a paralegal who has worked on that file, they might probably legitimately think there's a general threat of disclosure at some point.

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ATTORNEY CARLOS ESCOBAR: Yes, Your Honor, but you're making light of a subjective standard.

JUSTICE PHIL JOHNSON: I'm not making light at all. It's a pretty serious business. If you've been sued or if you are suing them and one of your paralegals went over, if you told your client that that paralegal had been working on the file, getting your expert witnesses ready and all that, is now working for the other side, they might be pretty upset about it. They might think there's a real threat about it, because this is their only lawsuit. So it depends on who you're talking about, is there a threat.

ATTORNEY CARLOS ESCOBAR: No, I understand that, Your Honor, and I agree with you that, of course, that they would have reason to think that. But we're dealing with what the record says on an objective standard as to whether or not confidences were revealed or not. And you measure the record by what --

JUSTICE HARRIET O'NEILL: No. We're not talking about whether confidences are revealed or not, we're talking about whether you rebutted the presumption. And it sounds like you're saying, “I can rebut the presumption by having a swearing match over whether confidences were revealed or how substantive the contact was.

ATTORNEY CARLOS ESCOBAR: No, Your Honor. What I'm saying is that we fulfilled both steps under Phoenix Founders, which is we instructed her not to work on the file. And the other steps that we took is that we had this whole scenario where another secretary in the office that was working on the Leal file --

JUSTICE EVA GUZMAN: As to the reasonable steps, though, it does seem to be somewhat troubling that after you instituted additional steps, you continued to instruct her to have some contact with the file and allowed her to do so. So even on this record, how can we find that you took reasonable steps when persons at the law firm directed activity?

ATTORNEY CARLOS ESCOBAR: Your Honor, that was one instance. That was to make a copy of the birth certificate and Social Security card I think is what it was.

JUSTICE DAVID M. MEDINA: So it seems like you're asking for a carve-out.

ATTORNEY CARLOS ESCOBAR: I'm sorry?

JUSTICE DAVID M. MEDINA: You're asking for a carve-out. If you had a bright-line test through your discussion here, that you would carve out administrative type of functions that aren't significant?

ATTORNEY CARLOS ESCOBAR: Your Honor, I don't think the test has to be modified at all. The test is, is there a genuine threat that confidences will be revealed. And what I'm saying is that conduct that she had in this case doesn't rise to that level.

JUSTICE EVA GUZMAN: Well, there's always a threat. You're sort of putting it on the paralegal, and she may reveal them no matter what steps you took. I guess the issue is did you take steps that were reasonable to prevent her from doing so? The threat, I think will always be there, any time you hire someone that's worked on both sides.

ATTORNEY CARLOS ESCOBAR: The answer is, yes, Your Honor, I believe we took reasonable steps, because we told her not to work on the file, we isolated her from the file by assigning it to a completely different secretary in the office. And the facts that I wanted to get initially was that, this docket control situation, the other secretary, Mrs. Gossler [Ph.], who was in charge of the Leal file, was already on the phone doing another DCC. She was unable to take that call, so she had asked Mrs. Rodriguez, “Well, don't do the docket control conference, just reset it.” And that was how that contact occurred. She wasn't going to

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do the docket control conference, she was just trying to reset it. And I know we're maybe splitting hairs about it, and, yes, if, you know, rescheduling that she -- and she did all the ancillary tasks related to that.

JUSTICE DAVID M. MEDINA: So it seems to me that perhaps the firm did take reasonable steps to preclude her from being involved in the file, with the exception of make this copy and maybe a few other things, but it takes me back to the same question I asked Mr. Hatchell. What about the appearance to the other side? Well, here's someone sitting at counsel's table perhaps, maybe not, but was involved. And just like Justice Johnson said, you get the appearance that we're getting hosed here at trial, because there's somebody that knows the facts of this case for the other side, your side.

ATTORNEY CARLOS ESCOBAR: Well, I respectfully disagree, Your Honor, because the law requires that we rebut the presumption, and the trial court had the evidence not only of what we did, but also in reliance on the contract that they've got. And I just think that, you know, this Court has enforced all sorts of contracts with respect to, like arbitration agreements, and for example, in the In re Prudential Insurance case, that was a waiver of a jury trial. I mean that's a constitutional right that someone is waiving by contract in a lease agreement. Well, we're not talking about a constitutional right, we're talking about whether or not someone, by virtue of a contract, can keep confidential things that they agree to keep confidential. And I'm saying --

JUSTICE DAVID M. MEDINA: What's the standard of review here that we should talk about?

ATTORNEY CARLOS ESCOBAR: It's an abuse of discretion with respect to whether the trial court either properly applied the law or not, Your Honor. That's what the standard is here. And in the In Re Barber case that I cite, in the brief says, “The Court can have conflicting evidence before it, but as long as there's some evidence to support its decision, then that's enough.”

JUSTICE DALE WAINWRIGHT: Counsel, we appreciate your candor with regard to the facts in the record. Sometimes there are difficult facts and folks don't address them head on. We appreciate that. There's a question that comes up, and I know we're not dealing with children here, but any parent, when you tell one of your children, “Don't do this,” verbally and then they do it, you know if you just tell them the same thing again, that may not be too effective. Why weren't there steps beyond just a verbal warning after the first infraction, or were there?

ATTORNEY CARLOS ESCOBAR: Well, there was, Your Honor. The evidence in the record reveals that after Mr. Magallanes was informed that the secretarial staff had done what they did, he had a meeting with both of them and he told them that, under threat of termination, that you cannot engage in this conduct again.

JUSTICE DALE WAINWRIGHT: Well, that's another verbal warning, right?

ATTORNEY CARLOS ESCOBAR: Under the ultimate sanction, which is you're going to lose your job if you do this again.

JUSTICE DALE WAINWRIGHT: So it's a stricter verbal warning, but still a verbal warning.

ATTORNEY CARLOS ESCOBAR: It is a verbal warning, Your Honor. But let me talk about that. I know Mr. Hatchell is saying you need to have, like, for example, the confidentiality agreed in the memorandum that's attached to my brief. And those are written policies, and for whatever reason, Mr. Hatchell says, “Because you have a written policy, that's going to make a difference.” I don't see what the difference is. It's not really whether it's in writing or not, it's the knowledge that the policy has. And she, we spoke to her face-to-face, Mr. Magallanes did. He talked to her about it, so he's able to look at her to see whether or not she's comprehending what he's telling her. That's what happened here. Not only at the beginning, but the second time.

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JUSTICE EVA GUZMAN: How about some other procedures to isolate the file? There was some suggestion of color-coding the file or some other mechanism for letting everyone around this particular legal assistant know that that's not a file she should be anywhere near. Was anything else like that done?

ATTORNEY CARLOS ESCOBAR: Your Honor, other than what we directed her to do and then by diverting the files. And remember, this wasn't just about the Leal file. We told her, any file, any file that she worked on, any file that she, for whatever reason, thinks that she's familiar with because of her prior employment, she has to punt that out of her purview. She's got to get that away from her. And in a general sense, that's what we said, and we also addressed it in a very specific sense, because they talked about the Leal file. But, again, Your Honors, I feel that because we did demonstrate at the trial court that we complied with the two-prong test under Phoenix Founders, and then we have that other -- the contract provides another layer of insulation in this case.

JUSTICE HARRIET O'NEILL: So let me make sure I understand the analysis. Let's say that there had been a lock on that file cabinet and everything was color-coded and everybody had written instructions to keep her from the file, but then the same things happened here. Your argument in terms of the legal analysis would be, by having the procedures in place, the presumption of shared confidences was rebutted, and the de minimis nature of the contact isn't sufficient to defeat the overcoming of the presumption. Is that what your argument would be? I mean I think what Mr. Hatchell is going to say is, if you've got the measures in place and there's any evidence they were breached, then the presumption goes away. I mean the fact that you've overcome the presumption goes away.

ATTORNEY CARLOS ESCOBAR: Right, and I know that's what he's arguing, Your Honor, but what I'm saying is we've got something else that no other case has, which is before she even came to work at Magallanes & Hinojosa --

JUSTICE HARRIET O'NEILL: But that doesn't matter, because if you've got the -- it's in a lock box, even with the confidentiality agreement, all the lock box around it, if it's still breached, then all of the lock box and the confidentiality agreement and everything that was attempted is irrelevant.

ATTORNEY CARLOS ESCOBAR: Well, Your Honor, but the ultimate issue there, and I keep harking back to it, because I think that's what the law is, is there a genuine threat that she would reveal any confidences? And in this case, you don't have any evidence of any confidences ever being revealed. And that is the ultimate test. That's the Grant case, that's what everything was measured by. And what I'm saying is, although it is regrettable that she had contact, as the facts reveal, we met what the law required of us in terms of isolating her from the file, instructing her not to work on the file, and so forth.

JUSTICE PAUL W. GREEN: If the shoe were on the other foot, you would be perfectly comfortable under the same circumstances but reversed, that one of your former employees was over there at the other firm making photocopies of the files, and even so, and that sort of thing, that would be okay with your client?

ATTORNEY CARLOS ESCOBAR: Your Honor, I don't know if it would be okay with my client, and I would suspect that it wouldn't be okay with my client, but we're governed by what the evidence and what the law requires. In this case --

JUSTICE PAUL W. GREEN: But your client would be satisfied with the fact that you can say, “Well, but there's no genuine threat of confidentialities being breached.” Would that satisfy your client?

ATTORNEY CARLOS ESCOBAR: I understand that, Your Honor, but, you know, my clients' feelings don't have anything to do with what is required in the law, and although they may disagree with it, although they may feel upset about it, the record in this case doesn't get us to the point where I think disqualification is appropriate, because we're --

JUSTICE PHIL JOHNSON: But, you know, we're here about protecting clients. I mean it's not your law

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firm, it's not the other law firm, it is the clients. And in that regard, let me ask, do you have any comment on Mr. Hatchell's suggestion that one way to kind of reduce some of these problems is to, when you hire someone, have a disclosure to opposing counsel, the opposing party, that you hired and what your screening processes are, those suggestions that he made. Would that somehow be a problem insofar as implementing something like that?

ATTORNEY CARLOS ESCOBAR: Well, Your Honor, I think that the Phoenix Founder case speaks to that issue, which is the Court -- one of the public policy issues that the Court relied upon in making the decision was, you don't want to limit or confine the ability for these people, the secretaries, for example, to be mobile in terms of where they're going to apply for a job. Brownsville, Texas is not Houston, it's not Austin, it's a lot smaller.

JUSTICE PHIL JOHNSON: That's why I'm asking you. You have a small firm and you have maybe a small community of legal assistants and paralegals. What kind of a problem do you see if that were to be implemented?

ATTORNEY CARLOS ESCOBAR: Well, because I think it would have that effect, Your Honor. If were to pick up the phone and call the opposing counsel and say, “Hey, we know so and so used to work with you, we're thinking about hiring her, is it okay?” to get the client consent, basically.

JUSTICE PHIL JOHNSON: “Here, we're putting these procedures in effect, and here's the firewall, and here's what we're going to do.”

ATTORNEY CARLOS ESCOBAR: Well, I just don't see a way that the opposing firm would ever agree it, because obviously their interest is, “Well, I don't want that to happen.” I mean obviously I think that's where you're going, Your Honor. But what I'm saying is, the way that I can address it is to say that this Court has already said you don't want to limit the ability for the secretarial pool, in whatever economy, be limited because of this rule. For example, Mr. Nye's firm or Mr. Gault's firm --

JUSTICE PHIL JOHNSON: You've answered the question. I think I understand your position.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there further questions? Thank you very much, Counsel.

ATTORNEY CARLOS ESCOBAR: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will hear rebuttal.

REBUTTAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF PETITIONER

ATTORNEY MIKE A. HATCHELL: May it please the Court, and --

JUSTICE PHIL JOHNSON: Mr. Hatchell, is that going to be the practical effect in a smaller community, a small number of paralegals and assistants, that you're going to simply put them out of work if we institute some of these procedures that you've suggested?

ATTORNEY MIKE A. HATCHELL: No, I think -- quite frankly, I think that it fosters confidence and collegiality if the Court were to adopt the --

JUSTICE DAVID M. MEDINA: You're presuming that exists?

ATTORNEY MIKE A. HATCHELL: It's one of the things that I certainly decry about the profession, but I'm an optimist. And, no, Mr. Justice Johnson, I really think, the smaller the community, the more upfront

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you are. You know, we've had -- I think your practice was a smaller community, and mine was from Tyler for many years. We got to see people every day and over and over again throughout the year, and so I think that the adjustments that I'm talking about actually will foster collegiality and certainly will not put people out of business. It will instill much more confidence in the system.

CHIEF JUSTICE WALLACE B. JEFFERSON: Assume you have a screening process in place like you discussed. If the legal assistant at the second firm received -- you know, how you have global email writing, the email to every employee in the law firm.

ATTORNEY MIKE A. HATCHELL: Right. But I think --

CHIEF JUSTICE WALLACE B. JEFFERSON: If the legal assistant passively received an email pertaining to that case, would that disqualify the firm? In other words, how technical are we to get on these standards?

ATTORNEY MIKE A. HATCHELL: Well, that's an interesting question. When you say “passively receives,” I like to go back to this Court's ultimate test, and that is screen the paralegal from any contact with the suit. I don't know how you start judging the questions of contact.

CHIEF JUSTICE WALLACE B. JEFFERSON: So the receipt of the email pertaining to that file would disqualify the law firm, right?

ATTORNEY MIKE A. HATCHELL: If it were not intended for that particular employee, but was something that was read -- I guess it depends on the substance. Here's the problem that I have with things like this. We then start getting back into a fact-specific case-by-case ad hoc --

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, maybe it should be just an irrebuttable presumption instead.

ATTORNEY MIKE A. HATCHELL: That's what I'm suggesting should be the case when it is proved that, at least when it is proved that the employee actually worked on that file.

CHIEF JUSTICE WALLACE B. JEFFERSON: And then you wouldn't have to worry about screening?

ATTORNEY MIKE A. HATCHELL: That's correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: Would you think that's the best policy for lawyers as well? Do away with screening, and just have an irrebuttable presumption?

ATTORNEY MIKE A. HATCHELL: Well, of course, I think that is the rule with lawyers today. There's the double irrebuttable presumption.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, we've got -- you know, we're in the process of looking at disciplinary rules. There is a project from the ABA.

ATTORNEY MIKE A. HATCHELL: Yes, absolutely. Correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: And part of that is a very intricate kind of screening mechanism, --

ATTORNEY MIKE A. HATCHELL: Yes, it is.

CHIEF JUSTICE WALLACE B. JEFFERSON: -- at least in that proposal and in some states. But you

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think the better policy would be if you have received confidential information, then if you go to the next firm, that firm would be disqualified from representing?

ATTORNEY MIKE A. HATCHELL: Yes, yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: And legal assistants?

ATTORNEY MIKE A. HATCHELL: I'm a firm believer in the double imputation --

CHIEF JUSTICE WALLACE B. JEFFERSON: And secretaries?

ATTORNEY MIKE A. HATCHELL: As to, well, with the -- I would have no problem with the double imputation as to legal assistants, because the only --

CHIEF JUSTICE WALLACE B. JEFFERSON: How far down does it go? Legal assistants, secretaries, janitorial staff, runners?

JUSTICE DALE WAINWRIGHT: Copy staff.

ATTORNEY MIKE A. HATCHELL: Well, maybe so.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay.

ATTORNEY MIKE A. HATCHELL: Because the only articulated policy from this Court is we are concerned about the mobility of legal assistants and nonlegal employees. Well, in my observation, the mobility among lawyers is equally as great [inaudible], and perhaps even more so, than it is upon nonlegal personnel.

JUSTICE EVA GUZMAN: But what about smaller communities? There are a limited number of jobs and there are a limited number of legal assistants, so you really are sort of hampering their ability get a raise at another firm if you implement such a rigid rule.

ATTORNEY MIKE A. HATCHELL: I disagree with that, and I think you are actually, as I said earlier, fostering confidence and collegiality if you are very upfront, as was the case in the Liebowitz case.

JUSTICE EVA GUZMAN: In a litigation setting, do you really foresee law firms sort of agreeing that the former employee can now come to this firm, and we're all going to agree to get along?

ATTORNEY MIKE A. HATCHELL: I do see that, Your Honor, because I've experienced it myself. I transferred from my own firm to a 700-person law firm and encountered many of the same situations, all of which were worked out quite amicably. And I think that that's -- the Liebowitz case is a road map for being very upfront, very transparent, and working these things out at the beginning, so that the threat of disclosure can be eliminated.

JUSTICE DALE WAINWRIGHT: If we changed the law to adopt the irrebuttable presumption that you're suggesting, then your second suggestion to inform opposing counsel of the hiring, that letter in its second paragraph would say, “And we're disqualified from this case”?

ATTORNEY MIKE A. HATCHELL: Yes.

JUSTICE DALE WAINWRIGHT: In every instance?

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ATTORNEY MIKE A. HATCHELL: Yes.

JUSTICE HARRIET O'NEILL: And how could this have been worked out, as you say, if this paralegal had wanted to go work at the firm, but they knew about this case, then what would be the work-out for this?

ATTORNEY MIKE A. HATCHELL: Yes. The way that is done is pretty much as it said in the Liebowitz case. First of all, you put your screening things in place, and then you call the --

JUSTICE HARRIET O'NEILL: No, but I'm saying --

ATTORNEY MIKE A. HATCHELL: -- then you call the lawyers when you identified --

JUSTICE HARRIET O'NEILL: Well, wait. I understand. There's going to be no screening, it's automatic. So let's presume that's the world we're talking about. Tell me what could be worked out in that sense?

ATTORNEY MIKE A. HATCHELL: Well, then what you do is, I mean if you are facing an automatic disqualification, you can always seek from opposing counsel either an unconditional waiver of all screening or a conditional waiver, which would be to implement screening processes. And in the Liebowitz case, they say you need to be advised of what those are.

JUSTICE DALE WAINWRIGHT: Have you signed any of those in your career?

ATTORNEY MIKE A. HATCHELL: Yes.

JUSTICE DALE WAINWRIGHT: Limited or?

ATTORNEY MIKE A. HATCHELL: I'm subject, I'm subject to those now, as we speak.

JUSTICE DALE WAINWRIGHT: Do you think that's a realistic option?

ATTORNEY MIKE A. HATCHELL: Yes.

JUSTICE HARRIET O'NEILL: And all those are by agreement with opposing counsel?

ATTORNEY MIKE A. HATCHELL: Well, yes. Well, first of all, there's formal screening of me of some cases, and there are --

JUSTICE HARRIET O'NEILL: But again, I'm --

ATTORNEY MIKE A. HATCHELL: -- and there are also agreements that were worked out as to particular cases, yes.

JUSTICE PHIL JOHNSON: So even with an irrebuttable presumption, with agreement by the other side --

ATTORNEY MIKE A. HATCHELL: Yes.

JUSTICE PHIL JOHNSON: -- that presumption would not preclude?

ATTORNEY MIKE A. HATCHELL: That's correct. I mean this happens to lawyers now, because we have the double imputation of irrebuttable presumptions, and yet lawyers work out these matters altogether by agreeing to specific screening techniques. And that's done very collegially and amicably. I recognize that in some cases, it may not be, but I would say that the good faith of lawyers probably carries through and most

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of those are worked out quite well.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there further questions? Thank you, Mr. Hatchell. The cause is submitted, and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.]

In re Columbia Valley Healthcare System, L.P. D/B/A Valley Regional Medical Center, Relator.
2010 WL 709999 (Tex.) (Oral Argument)

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