

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THIRD WAVE TECHNOLOGY
SERVICES, INC.,

Plaintiff and Appellant,

v.

JOHN MARCATO,

Defendant and Respondent.

B275866

(c/w B278310)

(Los Angeles County
Super. Ct. Nos. BC566701,
BC567284)

APPEAL from orders of the Superior Court of Los Angeles
County. Michael P. Linfield, Judge. Affirmed.

Richland & Associates and Felipa R. Richland for Plaintiff
and Appellant.

No appearance for Defendant and Respondent.

Third Wave Technology Services, Inc. (Third Wave) filed two appeals. In one appeal, it challenges an order disqualifying its counsel, Haney & Young. In the other appeal, Third Wave challenges an order denying Haney & Young's motion to be reinstated as counsel.

We find no error and affirm.

FACTS

Third Wave and David Wroan (Wroan) filed an action against TWE Solutions, Inc. (TWE),¹ John Marcato (Marcato), Michelle Kiely (Kiely), Christopher Biancotti (Biancotti), Gerald Matthews (Matthews), and Ricardo Macias (Macias). Third Wave and Wroan eventually filed a third amended complaint (TAC) alleging numerous claims.²

Marcato and Biancotti filed a derivative action cross-complaint on behalf of Third Wave and against Wroan.³ The claims were for breach of fiduciary duty, tortious interference with business contract, intentional interference with prospective

¹ Third Wave obtained summary judgment against TWE and Kiely. An appeal was filed on behalf of "TWE Solutions, Inc., et al." and treated as a cross-appeal in case No. B275866. We dismissed that "cross-appeal" because the cross-appellants did not file an opening brief.

² According to Third Wave, it settled with Biancotti, Matthews, and Macias after these appeals were filed and they are no longer parties to the case.

³ The cross-complaint asserted individual claims by Marcato and Biancotti against Wroan and Cal Net Enterprises, LLC, a company that allegedly purchased Third Wave's assets in a secret deal. These individual claims are not implicated by Third Wave's two appeals. (1 of 3 CT, pp. 38-73)

economic advantage, and conversion. Due to the derivative claims, Third Wave was named as a nominal defendant. As alleged, Wroan damaged Third Wave by (1) improperly drawing down on Third Wave's credit facility, (2) preventing Marcato and Biancotti from exercising their duties as directors, (3) paying himself exorbitant salaries and bonuses even though he did little work, (4) interfering with Third Wave's contracts with clients, (5) interfering with Third Wave's business relationships, and (6) converting Third Wave's property.

Marcato and Biancotti filed a motion to disqualify Third Wave's counsel, Haney & Young. According to the motion, Marcato and Biancotti were minority shareholders of Third Wave, and Wroan was the controlling shareholder and only board member. Marcato and Biancotti argued that Haney & Young could not ethically represent both Third Wave and Wroan because they had adverse interests. In particular, Third Wave stood to benefit if Marcato and Biancotti recovered against Wroan on the derivative claims asserted in the cross-complaint because any damages award would be payable to Third Wave.

In opposition, Third Wave and Wroan argued that the motion to disqualify was a sham filed by Marcato and Biancotti for the tactical purposes of depriving Third Wave of its counsel and driving up the costs of litigation. Further according to Third Wave and Wroan, Marcato and Biancotti had left Third Wave, Third Wave was worthless, and only Wroan stood to make a net gain if Third Wave was successful in connection with the claims asserted in the TAC. Wroan submitted a declaration denying all the claims alleged against him in the cross-complaint.

On June 10, 2016, the trial court granted the motion to disqualify Haney & Young. In doing so, the trial court analyzed

the allegations in the cross-complaint and concluded that Third Wave and Wroan had adverse interests. The trial court rejected the argument that the motion to disqualify was filed solely for tactical purposes.

Third Wave appealed.⁴

Subsequently, Haney & Young filed a motion to allow it to represent Third Wave based on the changed circumstances of Marcato and Biancotti no longer being shareholders. The motion was denied.

In the minute order, the trial court stated, *inter alia*, that Haney & Young argued that their motion was not seeking reconsideration of the order disqualifying Haney & Young. The trial court disagreed, stating that the motion was based on events that occurred in 2015, and further stating, “To the extent these facts were brought before the court in Haney & Young’s opposition to the Motion to Disqualify . . . , they have already been considered; to the extent that these facts were not previously brought before the [trial court], it is now too late to do so.” The trial court questioned whether Haney & Young had standing to bring the motion given that it was not brought on behalf of either Third Wave or Wroan. The trial court stated that even if Haney & Young had standing, the motion would be denied.

The trial court commented that Haney & Young cited no authority providing for a motion to allow representation following

⁴ Haney & Young had standing to appeal (*A.I. Credit Corp., Inc. v. Aguilar Sebastinelli* (2003) 113 Cal.App.4th 1072, 1077) but apparently elected to allow Third Wave to appeal instead. Because Third Wave lost its counsel, it is an aggrieved party. Any aggrieved party may appeal from an adverse order. (Code of Civ. Proc., § 902.)

disqualification. Also, in the trial court's view, "Haney & Young is essentially requesting a determination of the merits of [cross-defendants'] derivative claims. Haney & Young argues that [Third Wave] has ceased business operations and terminated the shareholders' agreements, and therefore [cross-defendants] are no longer shareholders and thus may not maintain a derivative action on [Third Wave's] behalf. Haney & Young also argues that [cross-defendants'] derivative claims are 'dubious' and 'ill-motivated.' . . . To the extent that Haney & Young is seeking a determination of the merits [of the derivative claims] . . . , this is not well taken.

Regardless of the foregoing, the trial court went on to conclude that Haney & Young failed to establish that the derivative claims lacked merit. According to the trial court, there was no evidence that termination of the shareholder agreement "stripped [cross-defendants] of their shares in [Third Wave]. . . . [T]he plain language of the shareholder agreement suggests that shareholders will retain their shares after termination of the agreement." According to the trial court, "Whether [cross-defendants] are properly asserting their derivative claims will be determined by the trier of fact at trial."

Third Wave appealed.⁵

⁵ Third Wave was aggrieved by the denial of Haney & Young's motion to be reinstated as counsel and therefore has appellate standing. (Code of Civ. Proc., § 902.)

The two appeals were consolidated.⁶

DISCUSSION

I. First Appeal: Motion to Disqualify Haney & Young.

An order granting a motion to disqualify counsel is generally reviewed for an abuse of discretion. (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 728.) If the material facts are undisputed, a reviewing court makes a de novo determination. (*Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 485 (*Blue Water*).)

“A motion to disqualify a party’s counsel may implicate several important interests. Consequently, judges must examine these motions carefully to ensure that literalism does not deny the parties substantial justice. [Citation.] Depending on the circumstances, a disqualification motion may involve such considerations as a client’s right to chosen counsel, an attorney’s interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. [Citations.]” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144–1145, 1148.) “Ultimately, disqualification motions involve a conflict between the clients’ right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar.

⁶ Because the motion to disqualify was filed by Marcato and Biancotti, and because we have been informed that Biancotti settled, Marcato appears to be the only party who could have filed a respondent’s brief. He did not. Under California Rules of Court, rule 8.220(a)(2), we may decide the appeal on the record, the opening brief and oral argument.

The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]” (*Id.* at pp. 1145–1146.)

Despite the foregoing, and absent a rare exception, disqualification is automatic when an attorney simultaneously represents two clients with adverse interests. (*Blue Water, supra*, 192 Cal.App.4th at p. 487.)

The question presented is whether Third Wave and Wroan had adverse interests. If so, Haney & Young had to be disqualified in the absence of a rare exception. (*Blue Water, supra*, 192 Cal.App.4th at p. 487.) We conclude the trial court properly disqualified Haney & Young. While Third Wave was nominally named as a defendant in the cross-complaint, it was a plaintiff “in the eyes of the law. [Citation.]” (*Id.* at p. 489.) The cross-complaint alleged, inter alia, that Wroan damaged Third Wave by breaching his fiduciary duties and committing multiple other torts. Consequently, Third Wave—on a derivative basis—was asserting claims against Wroan. No matter what happened, one had to lose and one had to prevail. Ethical considerations prohibited Haney & Young from representing both parties because it could not represent Third Wave's interests without breaching a duty of loyalty to Wroan, and vice versa. (*Id.* at p. 487.) The allegations in the cross-complaint were sufficient to support the trial court's ruling. (*Forrest v. Baeza* (1997) 58 Cal.App.4th 65, 75 (*Forrest*) [“Here, under the allegations of the cross-complaint, it is clear that the interests of the corporations and the Forrests are adverse”].)

Third Wave argues that the disqualification motion should have been denied because Marcato failed to provide evidence that Third Wave and Wroan had adverse interests. The assumption is

that Marcato in his motion, and the trial court when ruling, could not rely on the allegations in the cross-complaint. What Third Wave fails to realize is that the allegations stand as that evidence. By their very existence, they created adverse interests because Third Wave had an interest in prevailing on the cross-complaint while Wroan had an interest in defeating the cross-complaint.⁷

The cases cited by Third Wave do not persuade us to reach a contrary conclusion.

In *Natomas Gardens Inv. Group LLC v. Sinadinis* (E.D. Cal. 2009) 2009 U.S. Dist. Lexis 83391 (*Natomas*), the court stated that there was no authority for the proposition that the court had to analyze the substantive merits of the plaintiff's claims in connection with a disqualification motion. (*Id.* at p. *17.) Moreover, it noted that under California cases, “the law clearly forbids dual representation of a corporation and directors in a shareholder derivative suit, at least where . . . the directors are alleged to have committed fraud.” [Citations.]” (*Id.* at p. *21.) In *Natomas*, a shareholder asserted a derivative claim against Solorio on behalf of the corporation. It was alleged that Solorio breached his fiduciary duty by obstructing the sale of real property, defaming the corporation's shareholders, and abusing his position as majority shareholder. Based on case law, the court stated that “under these circumstances, it is impossible for

⁷ In its opening brief, Third Wave complains that the motion to disqualify was supported only by a declaration from the authoring attorney. This is simply another way for Third Wave to contend that the motion should have been denied because it did not provide sufficient evidence.

[counsel] to represent Solorio in [a state court action] and simultaneously maintain an unbiased posture on behalf of Natomas' interests in this action because Natomas' interests in the shareholder derivative action are adverse and actually conflicting with Solorio. Because [the plaintiff] alleges wrongdoing against Solorio on behalf of Natomas, the two parties are diametrically opposed. Therefore, the court rejects the notion that the conflict of interest is merely hypothetical or potential and concludes that disqualification is required based on the allegations of [the plaintiff's] counter- and third-party claim which creates an actual conflict of interest between Natomas and Solorio." (*Id.* at p. *25.) The holding in *Natomas* supports the trial court's ruling here.

Hetos Investments, Ltd. v. Kurtin (2003) 110 Cal.App.4th 36 (*Hetos*) also does not aid Third Wave. It cites *Hetos* for the proposition that an appearance of impropriety does not by itself support an attorney's disqualification. (*Id.* at p. 47.) But Haney & Young were disqualified based on an actual conflict, not an appearance of impropriety.

Sharp v. Next Entertainment Inc. (2008) 163 Cal.App.4th 410, 434 (*Sharp*) involved a class action by writers against production companies and networks. The litigation was funded by the Writers Guild of America (WGA), and the class was represented by a law firm that represented WGA in other matters. All the class representatives signed conflict waivers. Thereafter, the defendants moved to disqualify class counsel, and the motion was denied. (*Id.* at pp. 415–418.) The reviewing court affirmed because the class members had filed waivers, and based on a variety of policy considerations, including: the moving parties were not affected by any conflict, there was no basis to

reject the waivers, and the class representatives were entitled to their counsel of choice. (*Id.* at pp. 435–436.) *Sharp* has no impact on our analysis of situation where the rule of automatic disqualification applies.

Finally, Third Wave suggests that the trial court failed to examine whether the motion to disqualify was filed for an improper tactical purpose. But the trial court ruled against Third Wave on this issue. Further, Third Wave has not cited any cases creating an improper tactical purpose exception to the rule of automatic disqualification when an attorney simultaneously represents clients with adverse interests. Nor has Third Wave analyzed this specific issue. Consequently, Third Wave has failed to demonstrate error.⁸

⁸ In connection with the appeal and arguments pertaining to the denial of Haney & Young’s motion to be reinstated, Third Wave advances various arguments designed to challenge the standing of Marcato and Biancotti to maintain derivative claims, and to move to disqualify Haney & Young. Those arguments have not been advanced in connection with the appeal and arguments pertaining to the initial motion to disqualify that was filed by Marcato and Biancotti. A brief must “[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation to authority[.]” (Cal. Rules of Court, rule 8.204(a)(1)(B).) We will not consider arguments not properly briefed under a proper heading. (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1345, fn. 17.) Thus, we will not consider the arguments raised in the second appeal as being asserted in the first appeal. Moreover, Third Wave did not raise standing in opposition to the motion to disqualify. And in its opposition, it did not submit any of the evidence to which it adverts on appeal. Perhaps even more important, Haney & Young’s motion and its supporting evidence are not in the

Conceivably, Third Wave is trying to advance a nonfrivolous argument for reversing or modifying existing law, or for establishing new law, to carve out an exception to the rule of automatic disqualification. (See Code Civ. Proc., § 128.7, subd. (b).) The problem for Third Wave is that it did not sufficiently analyze the cases and competing policies and then argue on behalf of such an exception. While we recognize that it is conceivable that a party could file a cross-complaint with a derivative action simply to set up a motion to disqualify corporate counsel, we will not entertain creating an exception to the rule of automatic disqualification unless and until we are provided with a well-developed argument.

II. Second Appeal: Motion to Reinstate Haney & Young and Allow it to Represent Third Wave.

Third Wave argues that the evidence supporting Haney & Young's motion to be reinstated established that Marcato and Biancotti were divested of their Third Wave shares as of April 1, 2015, and they lacked standing to assert derivative claims at the time the cross-complaint was filed. In other words, Third Wave posits the derivative claims were not viable and therefore could not support a finding that they created adverse interests for Third Wave and Wroan. As a result, Third Wave contends that Haney & Young's motion to be reinstated should have been granted.

But Haney & Young's motion, the opposition, the reply and the supporting documents are not in the appellate record. The court docket indicates that Third Wave successfully moved to augment the record to include the October 3, 2016, reporter's

appellate record. Thus, the record is inadequate for review of these issues.

transcript for the hearing on Haney & Young's motion. While the motion to augment listed, inter alia, the motion, the opposition, the reply and supporting papers, those documents were not included in the exhibits to the motion to augment. Further, the docket contains a note that counsel for Third Wave intended to file an amended motion to augment because the record on appeal was insufficient in that it did not contain certain documents that were referenced in the first motion. Third Wave never filed an amended motion to augment. Nonetheless, the portion of Third Wave's opening brief that pertains to the second appeal cites to exhibits not included in the original motion to augment. To the degree Third Wave cites to documents missing from the appellate record to establish its contention that Marcato and Biancotti lacked standing to file derivative claims and therefore Haney & Young should have been reinstated, we do not have an adequate record for review. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

Additionally, Third Wave has not cited law permitting Haney & Young to request, based on changed circumstances, reinstatement after it had been disqualified. This is a separate ground on which to deny Third Wave appellate relief. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].)

To be complete, we point out the following.

Third Wave contends that in its motion to be reinstated, Haney & Young was entitled to raise a jurisdictional challenge to the derivative action. It relies on *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90 (*McKinny*) and *Horn v. County of Ventura*

(1979) 24 Cal.3d 605, 619 (*Horn*). But these cases merely state that a plaintiff who lacks standing cannot state a cause of action, and therefore a plaintiff's lack of standing can be raised at any time, even on appeal. The *McKinny* and *Horn* courts did not decide the issue presented here, i.e., whether a law firm can relitigate a motion to disqualify it by subsequently filing a motion that does not fall under the reconsideration statute, Code of Civil Procedure section 1008. Cases are authority only for propositions that were considered. (*California Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 604, 640.) Beyond the foregoing, there is an insurmountable problem for Third Wave. The proceeding for the motion to disqualify Haney & Young was completed and on appeal at the time Haney & Young filed its motion to be reinstated. Even if Marcato and Biancotti's standing could be raised in an appeal from the disqualification order, we are not aware of any law permitting Haney & Young to collaterally attack that order in the trial court while the appeal was pending, or permitting Third Wave to collaterally attack it in the appellate court by arguing Marcato and Biancotti's standing in connection with the appeal from the denial of Haney & Young's motion to be reinstated.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT