S280752

IN THE SUPREME COURT OF CALIFORNIA

NORTH AMERICAN TITLE COMPANY, FORMERLY KNOWN AS NORTH AMERICAN TITLE COMPANY, INC., AND CALATLANTIC TITLE, INC., AND NOW KNOWN AS LENNAR TITLE, INC.,
Petitioner,
v.
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF FRESNO,
Respondent,

CAROLYN CORTINA, *et al.,*
Real Parties in Interest.

REVIEW OF A DECISION BY THE COURT OF APPEAL
FIFTH APPELLATE DISTRICT, CASE NO. F084913
FRESNO SUPERIOR COURT CASE NO. 07CECG01169

REPLY TO ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

TABLE OF AUTHORITIES (continued)

Page(s)

State Cases (continued)

Statutes

TABLE OF AUTHORITIES (continued)

Page(s)

Other Authorities

I. INTRODUCTION

Respondent's Answer merely repeats the Court of Appeal's incorrect analysis of California's judicial disqualification statutes without offering valid reasons to deny the instant Petition for Review of the subject Opinion.

First, Respondent asserts that the Opinion merely builds upon and harmonizes with prior case law. (Answer, p. 6.) At the same time, the Answer concedes that "no prior case has substantively analyzed the issue of how Code of Civil Procedure section 170.3(b)(2) . . . interacts with sections 170.3(c)(1) . . . and 170.4(b)." It is true that no other case has reached the Opinion's erroneous conclusion there are exceptions to Section 170.3(c)'s requirement that a party who seeks to disqualify a judge must file a statement of disqualification at "the earliest practicable opportunity." The suggestion that the Opinion builds upon and harmonizes prior case law is flatly contradicted by the long line of authority (cited in the Petition) stating that a party's claim of bias is forfeited if not timely raised. The Answer offers nothing to make the Opinion harmonious with those cases.

Respondent next contends the Opinion is consistent with the policy that the public's perception of a fair and impartial judiciary be preserved. (Answer, pp. 6-7.) The opposite is true. The stated policy is only served when any suggestion of impropriety is swiftly identified and resolved. The statutes require immediate action in all cases. Section 170.3(a) requires a

judge who becomes aware of grounds for disqualification to respond immediately and refrain from further adjudication of the case unless a permissible waiver is given. Section 170.3(c) requires a party who becomes aware of such grounds to act at "the earliest practicable opportunity." It would only undermine public confidence in the judiciary if a reasonable person (not a member of the legal profession) were to observe an allegation of bias or inappropriate judicial conduct years or months old, to be retained by a party to use only when a ruling is not going in its favor. The policy of the law is, and always has been that no party is entitled to bank a disqualification claim, *regardless of the ground on which it is based,* to be used or not used at a later time according to that party's convenience. The Opinion is wrong in holding a party's claim of bias is never waived. For purposes of public perception, it is especially important that such claims be brought to light and resolved immediately, not withheld until the last minute to attempt to prevent the entry of judgment, as occurred here.

Respondent's third argument is that the instant Petition ignores the principle of liberal statutory construction, "sponsoring instead the idea that all accusations of personal bias can be waived unless the accused judge reports potential bias." (Answer, pp. 7-8.) This argument simply distorts and misrepresents the Petition, which establishes that, according to statute, policy, and case law, all accusations of bias must be addressed immediately. Petitioners do not advocate disparate treatment for self-

reporting judges. The law equally requires judges and parties to report immediately. A judge would have to violate judicial ethical standards to conceal bias. A party who delays a claim of bias would be in conflict with numerous cases prohibiting the strategic withholding of such claims. The law in this regard even-handedly requires prompt action in all cases.

Further, the principle of liberal construction does not entitle a court to rewrite statutes or combine portions of statutes (as was done here) to create rules not intended by the Legislature. Inconsistently, Respondent supports the Opinion's attempt to impose limits on the construction of Section 170.2(b), which prohibits disqualification of a judge because he or she "[h]as *in any capacity*, expressed a view on a legal or factual issue presented in the proceedings . . . ." (Emphasis added; discussed further, below). Certainly, a liberal construction of the plain language of this statute is appropriate.

Fourth, Respondent denies that an open-ended extension on party-originated bias claims would encourage dilatory tactics. (Answer, p. 8.) In support, Respondent cites only to the erroneous Opinion. As discussed extensively in the Petition, the policy of the law is to prevent dilatory tactics *by holding that claims are forfeited if not raised in a timely manner.* The irony in Respondent's contention is inescapable. This very case involves the dilatory tactics of a party that withheld a bias claim until it was

strategically valuable to file it to attempt to prevent entry of judgment. The law must not condone and encourage such tactics.

Fifth, Respondent gratuitously asserts the meritless contention that their statement of disqualification, filed some eighteen months after one alleged instance of bias, and more than a year after another, was in fact timely. (Answer, p. 8.) Although some decisional law indicates the time to file begins to run when an aggrieved party first becomes aware of grounds for disqualification, no case espouses Respondent's theory that alleged acts of bias become grounds that commence the running of time to file only when the aggrieved party finally realizes their significance. This argument is thoroughly disingenuous. Respondent happily quotes out-of-context statements made by the trial judge eighteen months before they finally filed a statement of disqualification, offering such quotes as manifest evidence of impropriety and bias. And yet, in the next breath, Respondent solemnly avers they had no idea such statements indicated bias until eighteen months later, when everything finally added up. This is not to be believed, and not relevant to the matter at hand.

As to the second issue for review, Respondent's Answer incorrectly asserts that Petitioners' claim is unripe. (Answer, p. 9.) The Answer posits that the Court of Appeal made no decision concerning the applicability of Section 170.2(b), and any such decision must be referred to a neutral judge for a determination on the merits. (See Answer at p. 9 [Assuming trial

judge files an Answer, "a neutral judicial officer" . . . "can consider the relevance, if any, of section 170.2(b), which provides that a judge may not be disqualified because he or she '[h]as in any capacity, expressed a view on a legal or factual issue presented in the proceedings . . .'"].)

This contention, is contradicted, both in the Answer and the Opinion. Respondent writes further: "Here, the personal bias allegations are sufficient to invoke disqualification because *the trial judge predetermined issues that were never presented to him where the available evidence belies his view that the real party in interest and a former defendant orchestrated a scheme to dissipate the assets available to pay a judgment. On its face, Section 170.2(b) does not protect a judge who forms unilateral opinions on subjects not presented to the court . . . .*" (Answer, pp. 9-10 (Emphasis added).)

Similarly, in reference to the applicability of Section 170.2 (b), the Opinion states: "It is not evident the comments relate to any legal or factual issues presented in the proceeding. The comments were made while ruling on a motion to quash due to lack of service of process *and were not relevant to the determination of the motion.*" (Opinion at p. 43 (Emphasis added).)

The original Opinion stated the same conclusion in its introductory remarks: "At the time of the (trial judge's) comments, no judgment had been entered, and issues of fraudulent transfer, alter ego, or successor

liability were never presented to the court, let alone ultimately decided." (Opinion at p. 2.) The Court of Appeal modified the foregoing statement following Petitioners' Petition for Rehearing, by inserting the word "properly" before "presented," but did not change its judgment as to Respondent's Petition for Writ of Mandate.

Thus, although the Court of Appeal took the position that it did not have the Trial Judge's answer before it and could make no ruling on the merits of the disqualification claim, the Opinion contains affirmative pronouncements that the Trial Judge's comments were not relevant to the matter before the court, essentially ruling on the applicability of section 170.2(b), a question Respondent concedes is reserved to a "neutral judicial officer." (See Opinion, p. 44, fn. 10; and p. 44 ["Without possessing an answer from the Trial Judge, we lack the record normally presented to a judge deciding questions of disqualification"].)

These inconsistencies in the Opinion raise serious concerns that are not, as Respondent contends, "case and fact specific." First, the Opinion suggests that an appellate court may, while purportedly considering only whether a statement of disqualification is facially sufficient to require the statutorily-prescribed hearing before a neutral judge, impose findings (in this case in a published opinion) that essentially dictate certain rulings to that neutral judge. Second, the Opinion imposes a judge-made condition to Section 170.2 by suggesting the statute may be found inapplicable upon a

determination that the issues on which a judge has commented were not "properly" before the court. Third, the Opinion (again without the benefit of the trial judge's answer and a complete record on the merits of the claim) takes the liberty of defining the issues before the court as "fraudulent transfer, alter ego, or successor liability," when, in fact the issues before the court were very different, and the judge's comments were directly relevant to those issues.

For example, Petitioners' Petition for Rehearing below highlighted evidence and pleadings demonstrating that the subject of Respondent's identity and relationship to the party moving to quash were indeed before the trial court at the time of the hearing on the subject Motion to Quash: (1) For two years, Respondent's counsel had concealed Respondent's name change and had defied the court's orders to produce a person most knowledgeable concerning the transaction by which Respondent was divested of assets; (2) Respondent's counsel had lied to the court about the effect of that transaction on Respondent's business and the employees who were plaintiffs in the suit; (3) A copy of a transaction agreement had been presented in evidence, plainly stating that the parents of Respondent and Doma Title of California (the party that moved to quash) had expressly agreed liability for the instant lawsuit was to be separated from a sale of Respondent's assets (such that Respondent would have depleted assets but full liability); (4) The trial court had taken judicial notice of public SEC

filings by Doma Title's parent revealing Respondent's parent's substantial ownership interest in Doma Title and its employment and control of counsel for Doma Title as well as Respondent; (5) Although judgment had not been entered by the trial court when Respondent filed its belated statement of disqualification, all issues had been decided, and only the formality of entry of judgment remained; and (6) Petitioners' complaint did not allege fraudulent transaction, alter ego, or successor liability, but did contain five paragraphs alleging that the defendants were multiple corporations, jointly controlled by common management with common ownership and or financial control, engaged in an integrated enterprise which, despite multiple corporate entities, operated as a single business enterprise which should respond as a whole for the acts alleged in the complaint. (Petitioners; (Real Parties below) Petition for Rehearing pp. 4-15; Real Parties' Appendix, Item 68, pp. 1707 *et seq.,* and 1839-1894.)

Thus, Petitioners' contentions in opposition to Doma's Motion to Quash did *not* rely on the law of fraudulent transfer, alter ego, or successor liability, but rather were based on Code of Civil Procedure sections 187 and 473, and Rules of Court, Rule 3.1342. Under those provisions, Petitioners asserted a right to correct their Complaint to reflect the changed names of the defendant that had first appeared in 2007 and had appeared in proceedings before, during, and after trial.

If not corrected, the errors in the Opinion will appear to authorize a reviewing court, without a complete record before it, to impose conditions and restrictions to disqualification proceedings before a neutral judge, by (1) defining the subject matter before the challenged judge based on its own subjective view of the case; and (2) indicating the applicability of Section 170.2(b) is conditioned upon a finding that issues were "properly" before the judge. This view thoroughly disregards the Legislature's enactment of a rule precluding disqualification of a judge who has "*in any capacity*, expressed a view on a legal or factual issue presented in the proceedings."

In sum, the Answer fails to provide any ground for denial of the instant Petition. This Petition challenges a published Opinion that would seriously disrupt California's statutory rules for judicial disqualification and conflict with established legislative and judicial policy. Review by this Court is warranted and is respectfully requested.

II. REPLY

A. The Opinion and Answer Do Not Address the Conflict Now Created Within CCP Sections 170.3 and 170.4

The conclusion in the Opinion that it sits "comfortably" within existing authority or does not "break new ground" ignores the requirements for publication contained in Rule of Court 8.1105. More directly, twelve of

the cases cited by the parties and the Court of Appeal now reflect negative treatment on Lexis specifically attributed to the published Opinion.[1]

This treatment confirms that neither 170.3(c)(1) nor 170.4(b) contains any exception to the requirement of timely application. The change in existing law is precisely why the Court of Appeal published the Opinion.

However, the concept that a claim of disqualification can *never* be deemed untimely is contrary to *every* published case on the subject. In fact:

> It is incumbent upon litigants seeking to disqualify a judge . . . to make their challenge . . . at the earliest practical opportunity after their appearance in the action and discovery of the facts constituting the grounds of disqualification.

(*People v. Johnson* (2015) 60 Cal.4th 966, 978; *People v. Guerra* (2006) 37 Cal.4th 1067, 1111 [overruled on other grounds]; *Scott, supra*, (1997) 15 Cal.4th at p. 1207; *Coble v. Ventura Cnty. Health Care Agency* (2021) 73 Cal.App.5th 417, 424, citing *Las Canoas Co. v. Kramer* (2013)

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[1] (The following are *superseded by statute*, California Code of Civil Procedure section 170.3, as stated in *North American Title Co., Inc. v. Superior Ct.* (2023) 91 Cal.App.5th 948: *People v. Scott* (1997) 15 Cal.4th 1188; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822; *Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 22 Cal.2d 386; *Jolie v. Superior Ct.* (2021) 66 Cal.App.5th 1025; *Magana v. Superior Ct.* (2018) 22 Cal.App.5th 840; *Tri Counties Bank v. Superior Ct.* (2008) 167 Cal.App.4th 1332; *In re Steven 0* (1991) 229 Cal.App.3d 46; *People v. Oaxaca* (1974) 39 Cal.App.3d 153; *Develop-Amatic Engineering v. Republic Mortg. Co.* (1970) 12 Cal.App.3d 143; *Shakin v. Board of Medical Examiners* (1967) 254 Cal.App.2d 102; *Muller v. Muller* (1965) 235 Cal.App.2d 341; *People v. Pratt* (1962) 205 Cal.App.2d 838; *Mayo v. Beber* (1960) 177 Cal.App.2d 544.)

216 Cal.App.4th 96, 101; *Magana, supra*, (2018) 22 Cal.App.5th at p. 855–56; *PBA, LLC v. KPOD, Ltd.* (2003) 112 Cal.App.4th 965, 972; *Urias v. Harris Farms* (1991) 234 Cal.App.3d 415, 420; *In re Steven O., supra*, 229 Cal.App.3d at p. 49.)

Moreover, it is widely observed the trial court has a duty to strike untimely applications for disqualification:

> Notwithstanding the options specified in section 170.3 listed above, if the statement is untimely filed. . . the judge against whom it is filed may strike it. This authority to strike the statement of disqualification derives from section 170.4, subdivisions (d) and (b). Section 170.4, subdivision (d) provides a judge against whom such a statement has been filed, has no power to act '[*e*]*xcept as provided in this section.*' (Italics added.) Section 170.4, subdivision (b) states 'notwithstanding paragraph (5) of subdivision (c) of section 170.3, if a statement of disqualification is untimely filed . . . the trial judge against who it was filed may order it stricken.' Thus, the authority to strike a declaration exists 'notwithstanding' section 170.3 subdivision (c)(5) which precludes judges from ruling on their own disqualifications.

(*PBA, LLC, supra,* 112 Cal.App.4th at p. 972; see, also, *Magana, supra*, (2018) 22 Cal.App.5th at p. 855–56, citing *Tri Counties Bank, supra*, 167 Cal.App.4th at p. 1337.)

Beyond the fact the Opinion creates a judicial exception to the express language of the operative statute that does not exist and is contrary to decades of case law, it is also contrary to public policy. As expressed in *People v. Scott,* the purpose of CCP section 170's timeliness requirement is to prevent perversion of the justice system. "It would seem . . . intolerable

to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not." (*Scott, supra,* 15 Cal.4th at p. 1207; referencing *In re Steven O., supra,* 229 Cal.App.3d at p. 53-55.)

Further, any delay in filing a disqualification application is observed to cast doubts on the merits. A "defendant's willingness to let the entire trial pass without another charge of bias against the judge not only forfeits his claims on appeal but also strongly suggests they are without merit." (*Guerra, supra,* 37 Cal.4th at p. 1112; see, e.g., *People v. Tappan* (1968) 266 Cal.App.2d 812, 816–817, 72 Cal.Rptr. 585 [following the trial judge's allegedly prejudicial pretrial comment, defendant's failure to complain of judge's bias during trial showed defendant's confidence in judge's impartiality].)

B. There Is a Distinction Between "Waiver" and "Forfeiture"

Review is also required to distinguish between the concept of waiver and forfeiture. In the context of disqualification, both terms have been used interchangeably. However, they are distinct concepts whose application may greatly differ as presented by the instant case.

For instance, the failure to comply with the 170.3(c)(1) requirement has been described as an "implied waiver of the disqualification." (*In re Steven O., supra,* 229 Cal.App.3d at p. 54.) In contrast, the failure to bring a timely challenge at all is considered a forfeiture. (*Guerra, supra,* 37 Cal.4th at p. 1111; see *Johnson, supra,* 60 Cal.4th, at p. 980, *Coble, supra,* 73 Cal.App.5th at p. 424; *Tri Counties Bank, supra,* 167 Cal.App.4th at p. 1337.)

As waiver and forfeiture are independent concepts, the question is whether the issue of waiver is relevant at all to the timeliness requirement contained in 170.4(b). There is no dispute that a judge may not, after self-reporting a ground for disqualification, request the parties waive certain grounds for disqualification specified in 170.3(b)(2), which is not the case here. Instead, the trial court struck the second claim for disqualification by Petitioner because the comments allegedly supporting bias were made over a year prior to the filing. Because the Opinion and Answer are totally devoid of any discussion concerning forfeiture, review is required to demonstrate the difference, if any, between the concepts in applying the 170 statute.

C. Jndicial Comments Cannot be "Facially Sufficient" to Support Disqualification if Expressed as a View of "A Legal or Factual Issue Presented in the Proceeding"

Section 170.4(b) allows a trial court to strike any challenge that "discloses no legal grounds for disqualification." In concert with this

provision, 170.2(b) states that "it shall not be grounds for disqualification" if the trial judge "in any capacity expressed a view on a legal or factual matter in the proceeding . . . ." [2] Here, the trial judge struck the Respondent's application for disqualification as both untimely and because there were no legal grounds for disqualification.

In response to the Petitioner's Request for Rehearing, the Opinion was amended to insert the word "properly" into the text. However, there is no such "test" described in case law and no such language appears in the operative statute. Instead, the phrase "properly before the court" appears to be wholly manufactured.

Review is required to provide uniform guidance as to the meaning and application of such a test to avoid confusion at all levels of California Courts. The language of the Opinion begs the question, what does it mean to be "properly" before a court? Also, how is that language interpreted in light of 170.2(b)? Perhaps most critical, at what point is the "legal ground for disqualification" determined in the 170.3 process and by whom? The Opinion does not address these questions, while the Answer compounds the

[2] Negative comments are not enough to determine bias. For instance, a judge stating disbelief of a party's testimony during trial does not qualify as bias. (*Keating v. Superior Ct. of the City & Cnty. of San Francisco* (1955) 45 Cal.2d 440, 443–44.)

confusion in arguing the issue is not yet "ripe."[3] Neither argument addresses or analyzes the authority of the trial court to strike the application under 170.4(b) if it discloses no legal grounds for disqualification.

III. CONCLUSION

Review and correction of the standard for timeliness and grounds for disqualification is urgently needed. Leaving the Opinion in tact will undoubtedly cause a new practice for every losing party: to "lie in wait" until the eve of judgment and then allege bias based on some comment made during the entire proceeding in order to derail the judgment. Such actions will cause delay, if not chaos, if clear guidance is not provided.

Dated: July 28, 2023.

WAGNER, JONES, KOPFMAN & ARTENIAN LLP

CORNWELL & SAMPLE, LLP

WANGER JONES HELSLEY PC

By: /s/ Patrick D. Toole
Patrick D. Toole
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[3] More confusing, Respondent argues the comments are both "facially valid" and that a reviewing judge may determine whether the comments of the trial court are within 170.2(b).

CERTIFICATE OF WORD COUNT
(California Rules of Court, rule 8.504(d)(1).)

The text of this Petition consists of 3,539 words, as counted by the Microsoft Word word-processing program used to generate the Petition.

Dated: July 28, 2023. /s/ Patrick D. Toole
Patrick D. Toole

PROOF OF SERVICE

I declare that I am a resident of the State of California. I am over the age of eighteen years and not a party to the within action. My business address is 265 E. River Park Circle, Suite 310, Fresno, California 93720.

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EXECUTED ON **July 28, 2023**, at Fresno, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Kimberly R. Noble
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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **NORTH AMERICAN TITLE COMPANY v. S.C. (CORTINA)**
Case Number: **S280752**
Lower Court Case Number: **F084913**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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Date

/s/Kimberly Noble

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Last Name, First Name (PNum)

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