IN THE SUPREME COURT OF TEXAS

NO. 04-0269

TESCO AMERICAN, INC. D/B/A TESCO/WILLIAMSEN, PETITIONER,

v.

STRONG INDUSTRIES, INC. AND BROOKS STRONG, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Argued February 17, 2005

JUSTICE BRISTER delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT joined

JUSTICE HECHT filed a dissenting opinion.

Since Texas became a state in 1845, judicial disqualification has always been a matter of constitutional dimension. Every Texas Constitution has provided that

> No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case.[1]

[1] TEX. CONST. art. V, § 11; *see* TEX. CONST. of 1876, art. V, § 11; TEX. CONST. of 1869, art. V, § 11; TEX. CONST. of 1866, art. IV, § 12; TEX. CONST. of 1861, art. IV, § 14 (substituting "cause" for "case" as the last word); TEX. CONST. of 1845, art. IV, § 14 (same).

The question presented here is whether an appellate judge is disqualified because, unbeknownst to her, before she took the bench another attorney at her very large firm played a very small role in the early stages of this appeal. For the reasons discussed below, we hold that she is, and thus reverse and remand for further proceedings.

Background

Strong Industries, Inc. manufactures dump-truck trailing axles[2] designed by its founder, Brooks Strong. In 1992, Tesco American, Inc. signed a dealer agreement with the company that contained covenants not to compete or disclose confidential information. Five years later, Tesco and F.S. New Products, Inc. ("FSNP") began marketing a competing trailing axle.

Both Strongs sued Tesco and FSNP, alleging fraud, breach of contract, and misappropriation of trade secrets. Based on favorable jury findings, the trial court entered judgment against Tesco for over $2 million (for fraud and exemplary damages) and against FSNP for over $100,000 (for breach of contract).

Both appealed. A panel of the First Court of Appeals, in a lengthy and unanimous opinion authored by Justice Laura C. Higley, affirmed as to Tesco, but reversed and rendered a take-nothing judgment as to FSNP.

Shortly thereafter, Tesco filed a motion for rehearing that included a motion to disqualify Justice Higley and reassign the case to a different panel. In the motion, Tesco asserted that Justice Higley was an attorney at Baker Botts L.L.P. in 2001, during which time another attorney at the firm

[2] The trailing axles here extend behind the truck, allowing heavier loads while still complying with road weight restrictions.

briefly appeared as lead counsel for the Strongs in this appeal (filing a cross-notice of appeal, participating in a status conference, and agreeing to extend deadlines), before moving to withdraw in October 2001. None of the appellate briefs mentioned Baker Botts's limited involvement,[3] and Tesco concedes there is no evidence Justice Higley knew of any connection between her former firm and this case.

Nevertheless, Tesco asserted Justice Higley was constitutionally disqualified, and that the appeal should be assigned to a new panel "to avoid any appearance of impropriety." The panel members disagreed, but referred both motions to the other members of the First Court. Sitting en banc, a majority of that court denied both motions,[4] after which the original panel reissued substantially the same opinion, again authored by Justice Higley.[5] Tesco appeals the denial of its motions, as well as the panel's judgment on the underlying merits.

Disqualification

For trial judges, Rule 18b(1)(a) of the Texas Rules of Civil Procedure requires disqualification if "a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter."[6] Three years ago, we held in *In re O'Connor* that this rule requires "vicarious disqualification" for trial judges:

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[3] *See* TEX. R. APP. P. 38.1 (requiring appellant's brief to list, *inter alia*, "the names and addresses of all trial and appellate counsel") & 38.2(a)(1)(A) (allowing appellee's brief to omit list of counsel "unless necessary to supplement or correct the appellant's list").

[4] 129 S.W.3d 594 (Tex. App.–Houston [1st Dist.] 2003).

[5] 129 S.W.3d 606 (Tex. App.–Houston [1st Dist.] 2003).

[6] TEX. R. CIV. P. 18b(1)(a).

> Rule 18b(1)(a) accordingly recognizes that a judge is vicariously disqualified under the Constitution as having "been counsel in the case" if a lawyer with whom the judge previously practiced law served as counsel to a party concerning the matter during their association. This conclusion is consistent with our holding in *National Medical Enterprises, Inc. v. Godbey*, that "[an] attorney's knowledge is imputed by law to every other attorney in the firm."[7]

For appellate judges, by contrast, Rule 16.1 of the Texas Rules of Appellate Procedure simply states that disqualification is "determined by the Constitution and laws of Texas."[8] The only ground for disqualification asserted here is that Justice Higley was "counsel in the case." The Texas Constitution does not indicate whether that phrase includes the members of a judge's former firm; thus, we must decide whether the Constitution, or just Rule 18b(1)(a), requires vicarious disqualification.

For several reasons, we hold that both do.

First, Rule 18b(1)(a) was not intended to expand disqualification further than constitutionally required. As long ago as 1893, this Court noted there was a "grave question" whether the grounds of disqualification could be extended beyond those listed in the Texas Constitution.[9] Both the rule and the Constitution specify the same three grounds for disqualification (interest, connection, and counsel), and no others. "Texas courts have consistently held these three grounds to be the mandatory, inclusive, and exclusive bases for disqualification."[10] Accordingly, our statement in

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[7] 92 S.W.3d 446, 449 (Tex. 2002)(citations omitted).

[8] TEX. R. APP. P. 16.1.

[9] *Nalle v. City of Austin*, 22 S.W. 668, 669-70 (Tex. 1893).

[10] Charles Bleil & Carol King, *Focus on Judicial Recusal: A Clearing Picture*, 25 TEX. TECH L. REV. 773, 775-76 (1994); *accord* William Wayne Kilgarlin & Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599, 601-04 (1986); Robert W. Calvert, *Disqualification of Judges*, 47 TEX. B.J. 1330, 1337 (1984).

O'Connor that Rule 18b(1)(a) "recognizes that a judge is vicariously disqualified *under the Constitution*" reflected our understanding that the rule was intended to *expound* rather than *expand* the Constitution.[11]

Second, as *O'Connor* also noted, Texas law imputes one attorney's knowledge to all attorneys in a firm.[12] We adopted this irrebuttable presumption for attorney disqualification in *National Medical Enterprises, Inc. v. Godbey*, noting the damage to attorney-client relations and the legal profession generally if the rule were otherwise.[13] The same considerations apply here — proving misuse would be just as difficult, and damage to the profession just as extensive, if lawyers who become appellate judges might take confidential information with them for future use.[14]

Finally, we must construe any ambiguity in the constitutional provision here to effectuate its purpose.[15] Repeatedly, the people of Texas have insisted on constitutional protection against

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[11] The court of appeals held the 1997 amendment of the appellate rules replacing a reference to Rule 18b with a reference to the Constitution indicates a substantive change. 129 S.W.3d at 600-01; *compare* TEX. R. APP. P. 16.1 *with* 785-786 S.W.2d (Texas Cases) xxxi, lxxxi (Supreme Court of Texas Order of Apr. 24, 1990, effective Sept. 1, 1990). But as rules changes may be either substantive or nonsubstantive, this change alone gives no indication either way.

[12] 92 S.W.3d at 449 (citing *Nat'l Med. Enter., Inc. v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996)).

[13] 924 S.W.2d at 132.

[14] We express no opinion on cases involving attorneys entering or leaving government service, as those circumstances and the professional rules governing them are often different from those governing attorneys in private firms. *See, e.g.*, TEX. DISCIPLINARY R. PROF'L CONDUCT 1.10, reprinted in TEX. GOV'T. CODE tit. 2, subtit. G, app. A, art. 10 § 9 (allowing attorneys who participate personally and substantially as public officers or employees in a matter to represent private clients in the same matter if the government agency consents); TEX. R. CIV. P. 18b(2)(d) (providing a discrete recusal rule for judges who previously served as government lawyers).

[15] *Tilton v. Marshall*, 925 S.W.2d 672, 677 n.6 (Tex. 1996) ("The construction of any provision of the Texas Constitution depends upon factors such as the language of the constitutional provision itself, its purpose, the historical context in which it was written, the intention of the framers and ratifiers, the application in prior judicial decisions, the relation of the provision to other parts of the Constitution and the law as a whole, the understanding of other branches of government, the law in other jurisdictions, state and federal, constitutional and legal theory, and fundamental values

"counsel in the case" becoming a judge in the case, a guarantee that makes no distinction between trial and appellate judges. When we adopted Rule 18b(1)(a) and applied it in *O'Connor*, we construed "counsel" to include the former firms of trial judges; we think construing the Constitution otherwise for appellate judges would be construing it too narrowly.

We recognize the risk cited by the First Court that vicarious disqualification may allow litigants to "lie behind the log" and move to disqualify only if an appeal is unsuccessful.[16] But no supine surprise was sprung on the Strongs here — none knew better than they of Baker Botts's early involvement in their appeal.

As it is undisputed Justice Higley was an attorney at Baker Botts at the same time another attorney with the firm served as counsel in this appeal, we hold she was disqualified under the Texas Constitution.

Disposition

We have never before addressed what happens when an appellate opinion and judgment issue before it is discovered that one of the justices is disqualified. "There is considerable diversity of opinion as to the effect on a decision of the fact that one or more of the judges participating therein is disqualified."[17]

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including justice and social policy.").

[16] 129 S.W.3d at 601.

[17] Marjorie A. Caner, Annotation, *Disqualification of Judge as Affecting Validity of Decision in Which Other Nondisqualified Judges Participated*, 29 A.L.R.5TH 722, 729 (1995).

To some degree, the different results reached in other jurisdictions can be explained by the extent of the disqualified jurist's involvement. At one extreme, a disqualified appellate judge cannot cast the deciding vote. In *Aetna Life Insurance Co. v. Lavoie*, the United States Supreme Court found a violation of Due Process when a justice of the Alabama Supreme Court authored a 5-4 opinion that allowed him to recover a "tidy sum" in his own very similar lawsuit.[18] Notably, the Court vacated the judgment but did not disqualify the remaining judges from further proceedings on remand.[19]

At the other extreme, appellate courts universally proceed to dispose of an appeal when one or more members disqualify themselves at the outset.[20] It is true that when an attorney moves between private firms, an irrebuttable presumption of shared confidences attaches to both the sending and receiving firms.[21] But attorneys who take a seat at opposing-counsel table are not like those who take the bench — the former become advocates for an adversary, while judges are advocates only for the law.[22] The Rules of Professional Conduct make no allowance for judges to share the confidences of former clients with their new colleagues; presuming they do so would be presuming a serious ethical breach.

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[18] 475 U.S. 813, 823-25 (1986).

[19] *Id*. at 825-27.

[20] *See, e.g., Nalle*, 22 S.W. at 670-71.

[21] *Nat'l Med. Enter.,* 924 S.W.2d at 131-32.

[22] *See* TEX. CODE JUD. CONDUCT Canon 3(B)(2), reprinted in TEX. GOV'T CODE tit. 2, subtit. G, app. B ("A judge should be faithful to the law and shall maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.").

In between these extremes, there is little consensus. Several courts have concluded that a decision need not be vacated if a disqualified judge's vote was "mere surplusage."[23] At least one would appear to apply this rule even if a disqualified judge authored the opinion,[24] but others hold that a disqualified author requires that the judgment be vacated,[25] and perhaps requires recusal of the entire court.[26]

It has always been the rule in Texas that any orders or judgments rendered by a trial judge who is constitutionally disqualified are void and without effect.[27] But in the appellate courts, judgments and opinions are generally rendered by a multi-member court, not a single judge;[28] unless *every* judge who participates is constitutionally disqualified, the single-judge rule does not easily fit the multi-judge situation.

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[23] *See, e.g., State v. Lund*, 718 A.2d 413, 418 (Vt. 1998) (refusing to vacate 5-0 judgment as vote of one allegedly disqualified judge was "mere surplusage"); *Goodheart v. Casey*, 565 A.2d 757, 762 (Pa. 1989) (refusing to vacate 6-1 judgment as votes of two allegedly disqualified judges were "mere surplusage"); *State v. Kositzky*, 166 N.W. 534, 535 (N.D. 1918) (refusing to vacate 5-0 judgment as alleged disqualification of one judge would not have affected judgment).

[24] *See Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985) (noting that if disqualification or recusal of authoring judge had occurred, the remaining two judges "would have been at liberty to decide the appeal").

[25] *See Powell v. Anderson*, 660 N.W.2d 107, 123 (Minn. 2003) (vacating judgment as disqualification of authoring judge was not cured by participation of two qualified judges); *Reg'l Sales Agency, Inc. v. Reichert*, 830 P.2d 252 (Utah 1992) (vacating and remanding judgment authored by disqualified judge).

[26] *Johnson v. Sturdivant*, 758 S.W.2d 415, 415-16 (Ark. 1988) (vacating 6-1 decision authored by disqualified judge, and voluntarily recusing remaining members).

[27] *In re Union Pac. Res. Co.*, 969 S.W.2d 427, 428 (Tex. 1998); *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry v. Tucker*, 202 S.W.2d 218, 221 (Tex. 1947); *Postal Mut. Indem. Co. v. Ellis*, 169 S.W.2d 482, 484 (Tex. 1943); *State v. Burks*, 18 S.W. 662, 662-63 (Tex. 1891); *Templeton v. Giddings*, 12 S.W. 851, 852 (Tex.1889).

[28] TEX. R. APP. P. 41.1(a) ("Except as otherwise provided in these rules, a panel's opinion constitutes the court's opinion, and the court must render a judgment in accordance with the panel opinion.").

In *Mapco, Inc. v. Forrest*,[29] we rejected a general rule that appellate judgments issued in violation of the constitution are void. In that case, a court of appeals rendered judgment even though the panel of two judges disagreed, thus violating the constitutional requirement that "[t]he concurrence of a majority of the judges sitting in a section is necessary to decide a case."[30] This Court held the judgment was not void because "[a] judgment is void only when it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court."[31] But because a 1-1 decision violated the Constitution, we held it must be reversed.[32]

Applying the same analysis, we reach the same conclusion here. The judgment below is not void, as the First Court of Appeals certainly had jurisdiction of the parties and the subject matter, jurisdiction to enter judgment, and capacity to act as a court. But the judgment must be reversed because the opinion on which it was based was authored by a justice who was constitutionally disqualified;[33] it would be stretching the Constitution too far to simply assume she was not involved.

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[29] 795 S.W.2d 700 (Tex. 1990).

[30] TEX. CONST. art. 5, § 6.

[31] *Id.* at 703; *see also Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003) ("In general, as long as the court entering a judgment has jurisdiction of the parties and the subject matter and does not act outside its capacity as a court, the judgment is not void. Errors other than lack of jurisdiction, such as 'a court's action contrary to a statute or statutory equivalent,' merely render the judgment voidable so that it may be 'corrected through the ordinary appellate process or other proper proceedings.'").

[32] *See Carter v. Mapco, Inc.*, 33 Tex.Sup.Ct.J. 465 (May 9, 1990) (unpublished order)(citing *Hayden v. Liberty Mut. Ins. Co.*, 786 S.W.2d 270 (Tex. 1990).

[33] *See* TEX. R. APP. P. 41.1 (requiring that court of appeals "must render a judgment in accordance with the panel opinion").

In accordance with the appellate rules, the two remaining justices may decide this case, but they must do so without the participation of a disqualified justice.[34]

We see no need to answer other factual circumstances today. Post-disposition disqualification of appellate judges has been rare in the 160 years the Texas Constitution has required it.[35] The variations in size of Texas appellate courts and the means they employ to dispose of motions,[36] to hear and decide cases,[37] and to grant discretionary review, means that the level of judicial involvement in any particular order may vary greatly from one situation to another. "Because the issue of disqualification of a single member of a multi-member panel arises in a variety of factual contexts, sound judicial practice wisely counsels judges to avoid unnecessary declarations on issues not presented, briefed, or argued."[38]

Tesco urges us to take two additional steps. First, it asks us to address the merits of its appeal, alleging numerous mistakes by the panel below. But as the judgment must be reversed due to the constitutional disqualification, we postpone addressing those arguments (as we did in *Mapco*) until after that defect has been remedied.[39]

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[34] TEX. R. APP. P. 41.1(b) ("After argument, if for any reason a member of the panel cannot participate in deciding a case, the case may be decided by the two remaining justices.").

[35] *See, e.g., McCullough v. Kitzman*, 50 S.W.3d 87 (Tex. App.-Waco 2001, pet. denied).

[36] *See* TEX. R. APP. P. 10.4 (allowing motions in courts of appeals to be decided by a single justice, a panel, or the entire court).

[37] *See, e.g.,* TEX. CONST. art V., § 6(a) (allowing courts of appeals to "sit in sections"); TEX. R. APP. P. 41.1 (allowing two members of court of appeals to decide argued case, but requiring three members if case is submitted without oral argument) & 59.1 (allowing six members of Supreme Court to issue opinion without oral argument).

[38] *Lavoie*, 475 U.S. at 827 n.4 (citation omitted).

[39] *See Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 & n.2 (Tex. 1991).

The dissent would review the merits here on the ground that "remanding this case is for appearance' sake." We agree there would be an appearance of impropriety if opinions by disqualified justices are simply reviewed on the merits like every other. But constitutional disqualification involves more than appearances; the substantive right is to an appeal decided by qualified judges alone. It is precisely because appellate court opinions are the product of more than one justice that, if one is disqualified, the process must be conducted again. The argument that it is a "fool's errand" to reverse orders by disqualified judges and require reconsideration by qualified ones is an argument that the Constitution should not require disqualification of appellate justices at all.

Second, Tesco argues that this case should be assigned to an entirely different panel of the First Court of Appeals. For several reasons, we disagree. Tesco does not assert the remaining panel members are disqualified, and nothing in the Constitution suggests otherwise — the record reflects no personal interests, connection to the parties, or "counsel in the case" problem under the standards already discussed. Whether the circumstances here require recusal by the remaining panel members is a matter not before us, as Tesco insists this was not its motion below. Further, a party has no right to any particular panel of an appellate court; the assignment of cases and judges to panels is a matter within that court's discretion.

Accordingly, we reverse the court of appeals' judgment against Tesco, and remand for further proceedings.[40]

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[40] As the Strongs have not appealed the take-nothing judgment in favor of FSNP, it remains unaffected. *See* TEX. R. APP. P. 53.1; *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 n.6 (Tex. 1993); *Gulf Coast Inv. Corp. v. Brown*, 821 S.W.2d 159, 160 n.1 (Tex. 1991).

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Scott Brister
Justice

OPINION DELIVERED: March 17, 2006