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 HECHT, dissenting.

One Justice on the court of appeals panel, the author of its opinion,[1] practiced in a large firm with two lawyers who, unbeknownst to her, briefly represented two parties in this case, withdrawing more than a year before she took the bench. She and her court first learned of this fact after her opinion issued, on motion for rehearing, and the court concluded en banc that she was not constitutionally disqualified.[2] The other two members of the panel declined to recuse themselves[3] and voted to deny the motion for rehearing. In this Court, the petitioner has raised the

[1] 129 S.W.3d 606 (Tex. App.—Houston [1st Dist.] 2004).

[2] 129 S.W.3d 594 (Tex. App.—Houston [1st Dist.] 2003) (en banc order on motion to disqualify).

[3] *Id.* at 596.

disqualification issue along with a number of other issues on the merits of the appeal, all of which have been fully briefed. The Court concludes, I think correctly, that the author of the court of appeals' opinion was disqualified from sitting in the case, but then remands the case to that court to reconsider the merits, again, having done so once already on motion for rehearing. The other two Justices who participated in the decision before are not required to recuse but may continue to sit on the case, even though their having denied rehearing before leaves little doubt as to the outcome on remand. They may even reissue the same opinion, perhaps this time per curiam. If this futile exercise does not exhaust the parties, they will return, almost certainly with the same issues and the same arguments, and all the Court will have accomplished is to waste everyone's time and resources. The merits of the case are fully and fairly before us, and I would decide them now. Accordingly, I respectfully dissent.

I agree with the Court that before she took the bench, Justice Higley was "counsel" in this case within the meaning of article V, section 11 of the Texas Constitution, which states in part that "[n]o judge shall sit in any case . . . when the judge shall have been counsel in the case."[4] Though she never *actually* represented respondents Strong Industries, Inc. and Brooks Strong when she was in practice, two lawyers in her firm did, without her knowledge, for a few months before any briefs were filed in the court of appeals, and we held in *In re O'Connor*[5] that for purposes of article V, section 11, "counsel" includes a lawyer in the same firm with a party's counsel. The court of appeals

[4] TEX. CONST. art. V, § 11 ("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.").

[5] 92 S.W.3d 446, 449 (Tex. 2002) (per curiam).

read *O'Connor* as applying only Rule 18b(1)(a) of the Texas Rules of Civil Procedure, which expressly includes counsel's associates,[6] and not the Constitution,[7] but the Court stated quite clearly:

> Rule 18b(1)(a) incorporates [the constitutional] language, and also provides that a judge is disqualified if "a lawyer with whom [the judge] previously practiced law served during such association as a lawyer concerning the matter." 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.[8]

The court of appeals interpreted "under the Constitution" to mean that the rule had been adopted with constitutional authority,[9] but grammatically, the phrase modifies "disqualified", not "rule". Moreover, if, as the court of appeals believed, the rule enlarged the constitutional grounds for judicial disqualification, it is not clear how it could have been constitutionally authorized. The

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[6] TEX. R. CIV. P. 18b(1)(a) ("Judges shall disqualify themselves in all proceedings in which: (a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter . . . .").

[7] 129 S.W.3d at 600 ("*O'Connor* specifically distinguishes the constitutional standard for disqualification from the standard for disqualification under Rule of Civil Procedure 18b. Quoting the language from article V, section 11 of the constitution that '[n]o judge shall sit in any case . . . when the judge shall have been counsel in the case,' *O'Connor* states, 'Before a judge is disqualified on this ground, "it is necessary that *the judge acted as counsel* for some of the parties in [the] suit before him in some proceeding in which the issues were the same as in the case before him."' The constitutional standard thus requires that the judge *himself* must have acted as counsel for a party to the litigation on the same matter. *O'Connor* continues, '*Rule 18b(1)(a)* incorporates this [constitutional] language and also provides that a judge is disqualified if "a lawyer with whom [the judge] previously served during such association as a lawyer concerning the matter." 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.' *O'Connor* thus expressly distinguishes the constitutional standard for disqualification of a judge who personally served as counsel in a case from the procedural standard set out in Rule 18b(1)(a), promulgated under the constitution, which includes not only direct personal disqualification but also vicarious disqualification.") (brackets and emphasis in original, indented quote replaced with quotation marks, citations omitted).

[8] 92 S.W.3d at 448-49 (emphasis added, citations omitted).

[9] 129 S.W.3d at 600 n.8 ("That Rule 18a is promulgated 'under the constitution' does not entail that it is co-extensive with article V, section 11. All valid rules ultimately derive their authority from constitutional provisions.") (citation omitted).

Constitution cannot be amended, expanded, or contracted by court rule. What we said in *O'Connor* is that Rule 18b(1)(a) correctly sets out the meaning of "counsel" in article V, section 11.[10] Although *O'Connor* involved the disqualification of a trial judge, article V, section 11 expressly applies the same standard to appellate judges, providing for replacements when a member of an appellate court is "thus disqualified".[11]

We offered no justification in *O'Connor* for our construction of "counsel" in article V, section 11, other than to observe that it was "consistent with our holding . . . that '[an] attorney's knowledge is imputed by law to every other attorney in the firm'" for the purpose of determining whether an attorney is disqualified from representing a client.[12] Although that was true (it *was* consistent), the comparison is not very instructive because the bases for disqualifying attorneys and judges are not the same. The principal reason for disqualifying an attorney from accepting representation in conflict with a former associate's client is to preserve client confidences.[13] The constitutional bases for judicial disqualification are not aimed at preventing judges from sharing the confidences of their former clients or their former firm's clients with their new colleagues, although

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[10] 92 S.W.3d at 449.

[11] TEX. CONST. art. V, § 11 ("When the Supreme Court, the Court of Criminal Appeals, the Court of Appeals, or any member of any of those courts shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.").

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

[13] *National Med. Enters.*, 924 S.W.2d at 131 (observing that the authorities supporting disqualification were based "on the attorney's duty to the party to preserve its confidences").

such disclosures would be improper. Rather, the purpose of article V, section 11 is to preserve the appearance of judicial impartiality by prohibiting a judge from sitting in a case to which he or she has too close a relationship — financial, familial, or professional.[14]

With respect to professional relationships, the constitutional concern is that a judge may appear not to be impartial in a case in which he or an associate once participated. To be sure, no judge in Justice Higley's situation — that is, from a firm with 500-plus lawyers,[15] two of whom, briefly and without any awareness on her part, represented clients in a case that would later be randomly assigned to her on a panel of a nine-member appellate court, more than a year after her former associates had withdrawn from representing the clients — could possibly be suspected of actual partiality due to that representation. But the appearance would be stronger, even compelling, if the firm were much smaller or the representation much longer, or if the judge knew of the representation and, say, had discussed it with his or her former partner. The constitutional rule does not permit disqualification to turn on such factors, however, for two reasons. The consequences of

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[14] *Newcome v. Light*, 58 Tex. 141, 145 (1882) ("Disqualification by reason of having been of counsel, relied on in this case, seems to be of recent origin and created by express constitutional or statutory provision. As it may exist independently of relationship or pecuniary interest in the result, it was doubtless based upon considerations of supposed bias, partiality or prejudice, arising from the relationship of client and attorney, which may reasonably be presumed might influence the action of the judge."); *Slaven v. Wheeler*, 58 Tex. 23, 25 (1882) ("The object of that provision was to secure to litigants an impartial judge, one who had not previously formed an opinion or reached a conclusion in regard to the subject matter of that particular case; and additional force should be given to that construction when the advice given and conclusion formed is between the identical parties who are afterwards litigants."). *See also Taylor v Williams*, 26 Tex. 583, 585-586 (1863) (noting that, under the common law, a judge was not disqualified from sitting in a cause in which he had been of counsel); *Chambers v Hodges*, 23 Tex. 104, 111-112 (1859) (concluding that a judgment rendered in 1842, and final in 1848, was not subject to TEX. CONST. of 1845, art. IV, § 14, and would not, in the absence of any other law, be void on the ground that the district judge had acted as an attorney in the case).

[15] *See Lexis Nexis Sixth Annual Survey — 1,000 Largest Law Firms,* CORP. LEGAL TIMES 73 (June 2001) (reporting that Baker Botts' main office was in Houston and that the firm had 581 lawyers in the United States and abroad).

judicial disqualification are too severe — any action by a constitutionally disqualified judge is void and may therefore be challenged at any time[16] — for a rule that depends on too many circumstances. And the issue is appearance, not actuality, so the rule can apply categorically without regard to circumstances tending to show, or not show, impartiality in fact.

The court of appeals worried that this construction of article V, section 11 would "enable litigants to 'lie behind the log' and 'sample' the justices of this Court before moving to disqualify, and then to void the judgment and opinion of the Court by collateral attack on otherwise final judgments on merely procedural grounds."[17] Of course, a litigant can always use constitutional disqualification this way, but the court's concern appears to have been the *increased* risk when a judge's only connection with a party was through the judge's former associate and thus less likely to be recognized and raised earlier. The concern is real, of course, although not in this case. Nothing indicates that petitioner Tesco American, Inc. waited until after the panel opinion issued before raising the disqualification issue, and nothing suggests that Justice Higley previously had any inkling of her former firm's representation of the Strongs. Her former associates were not identified as counsel in any of the briefs, and the four documents in the court of appeals' file on which their names appeared — a notice of cross-appeal, a status report, a joint motion to extend time, and a motion to withdraw — were not likely to have been noticed by the Justices in deciding whether to sit on the case. But even if the actors' hands had not been so clean, the risk of opportunism in raising

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[16] *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982) (citing *Fry v. Tucker*, 202 S.W.2d 218, 221 (Tex. 1947), *Templeton v. Giddings*, 12 S.W. 851 (Tex. 1889), *Stephenson v. Kirkham*, 297 S.W. 265, 267 (Tex. Civ. App.——San Antonio 1927, writ ref'd), and *Nalle v. City of Austin*, 22 S.W. 960 (1893)).

[17] 129 S.W.3d 594, 601 (Tex. App.—Houston [1st Dist.] 2003).

disqualification operates not to shrink the constitutional grounds but to encourage diligence in determining that no basis for disqualification exists.

So I agree that Justice Higley was disqualified from sitting in this case. I also agree that her disqualification provides no basis for also disqualifying the other two members of the panel or the other eight members of the court, but for reasons different from those offered by the Court. The Court's analysis runs thus:

- as we have held,[18] for purposes of lawyer disqualification, a lawyer's associates must be irrebuttably presumed to have knowledge of the lawyer's clients' confidences because of (i) the difficulty in proving what an associate actually knew, and (ii) the importance of protecting client relations and the legal profession from possible misconduct;

- for the same reasons, the same presumption is necessary for purposes of judicial disqualification because "lawyers who become appellate judges" — like lawyers who leave firms for other reasons — "might take confidential information with them for future use";[19]

- we have also held,[20] again for the same reasons, that for purposes of lawyer disqualification an associate's imputed knowledge is further imputed to the lawyers with whom he or she later associates;

- but we cannot likewise presume, for purposes of judicial disqualification, that a judge may share the confidences of a former associate's client with his or her colleagues because (i) a judge is not an advocate for an adversary, and (ii) to do so "would be presuming a serious ethical breach."[21]

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[18] *In re O'Connor*, 92 S.W.3d 446, 449 (Tex. 2002) (per curiam); *National Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996).

[19] *Ante* at ___.

[20] *National Med. Enters.*, 924 S.W.2d at 131-132.

[21] *Ante* at ___.

It is, of course, just as unethical for a lawyer to reveal client confidences as it is for a judge,[22] and it is not at all clear to me why we must presume, irrebuttably, that a lawyer acts unethically, while refusing even to consider that a judge may.

As I have explained above, I do not think the analogy to lawyer disqualification works well. The reasons for the double imputation in the context of lawyer disqualification — the difficulty of proving actual knowledge, and the risk of harm to client relations and the legal profession — lack the same force in determining judicial disqualification, which is concerned with preventing an appearance of partiality. It is simply carrying appearances too far to say that a judge's *mere* association on the same appellate court or panel with another judge who happens to be disqualified casts any reasonable doubt on his or her own impartiality. To impute disqualification in such a situation not only would do nothing to serve the constitutional purpose of avoiding the appearance of partiality, it would impede the operation of appellate courts by forcing the transfer of a case whenever a single Justice is disqualified. Thus, I agree that the other two members of the panel in this case, Chief Justice Radack and Justice Alcala, were not disqualified from sitting, nor was any other member of the court.

I also agree with the Court that the court of appeals' judgment was not void by reason of Justice Higley's disqualification because the concurrence of the other panel members was enough

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[22] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A (TEX. STATE BAR art. X, § 9).

to decide the case.[23] But I disagree that the judgment must be reversed and the case remanded for reconsideration. The Court's justification for this result is contained in but two sentences:

> But the judgment must be reversed because the opinion on which it was based was authored by a justice who was constitutionally disqualified; it would be stretching the Constitution too far to simply assume [Justice Higley] was not involved. 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.[24]

Why? Certainly not because the participation of a disqualified justice affected the result when we have every indication it did not. Chief Justice Radack and Justice Alcala knew of the factual basis for Justice Higley's disqualification, as did every other member of the court, since the matter was considered en banc.[25] And being fully aware of the facts, they declined to recuse[26] and voted to deny rehearing.[27] True, they were mistaken on the legal issue of disqualification as it turns out, but the Court cannot explain why they might have ruled differently on the merits had they known Justice Higley was disqualified, or why they might do so on remand, now that the mistake has been set right. No one suggests that Justice Higley was aware of any basis for disqualification before she issued her

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[23] *See* TEX. CONST. art. V, § 6 ("The Court of Appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a section is necessary to decide a case."); TEX. GOV'T CODE § 22.222(a), (c) ("(a) Each court of appeals may sit in panels of not fewer than three justices for the purpose of hearing cases. . . . (c) A majority of a panel constitutes a quorum for the transaction of business, and the concurrence of a majority of a panel is necessary for a decision."); 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.").

[24] *Ante* at ___ (citations omitted).

[25] 129 S.W.3d 594.

[26] *Id.* at 596.

[27] 129 S.W.3d 606.

opinion, so it is impossible to think that facts revealed for the first time afterward could have influenced her.

The only possible reason for remanding this case is for appearance' sake. The rule will be that any time a disqualified appellate judge participates in a decision, right or wrong, it must be reversed, period, even if it is to be reconsidered by the same court and two of the same judges, who may reissue the same opinion. If this approach bears any real benefit, and I cannot see that it does, the detriments are greater. A remand suggests that Justices on the courts of appeals do not endorse the opinions and judgments they join but simply go along with the author. Yet the Court itself acknowledges that "judgments and opinions are generally rendered by a multi-member court, not a single judge".[28] The reality is that appellate court opinions are usually the work of many hands. Colleagues offer or insist on changes in text and approach. The result is importantly a collegial product, even when signed by one Justice. The message of today's remand disserves this process.

Furthermore, a remand sends the parties on what is almost certain to be a fool's errand, wasting their time and resources and, though to a much lesser extent, those of the court of appeals. Having presented their case for decision twice now, the parties are returned to the court of appeals to reconfirm that the same Justices who decided their case and denied rehearing have still not changed their minds. Only one thing has changed: the court of appeals was mistaken about one of the constitutional grounds for disqualification, a matter unrelated to any other issue in the case. Of course, the court is free to reassign the case to an entirely new panel, have it reargued, maybe even

[28] *Ante* at __.

rebriefed, and write an entirely new opinion, but since none of these things is required or useful, none is likely to happen. Instead, the Justices who joined Justice Higley's opinion will almost certainly reaffirm their decision, and then the parties can refile their petition for review and response. The Court will consider them again, and if it requests briefing as it did before, the parties will file the same briefs, omitting the discussion of disqualification. The parties will get twice as many appeals on the exact same issues, but the same number of decisions. All this to preserve appearances.

Finally, regarding the procedure to be used by an appellate court to determine whether one of its members is disqualified, the court of appeals divided over whether it could itself consider issues of disqualification raised on motion, as the majority held,[29] or whether those issues should properly be left to this Court on petition for mandamus, as the dissent urged.[30] The Court does not address this issue but tacitly sides with the majority. I, too, agree with the majority that an appellate court should follow the same procedure in determining disqualification as in determining recusal.[31]

Justice Higley's participation in the decision of the court of appeals was error, though no fault of her own, but not error that requires reversal. We have an opinion joined by two other Justices, fully explaining the reasons for their decision, and we should proceed to determine the issues the parties have raised here. I respectfully dissent.

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[29] 129 S.W.3d at 597 (citing *McCullough v. Kitzman*, 50 S.W.3d 87, 88 (Tex. App.—Waco 2001, pet. denied); *Sears v. Olivarez*, 28 S.W.3d 611, 615 (Tex. App.—Corpus Christi 2000, no pet.).

[30] *Id*. at 604-605 (Jennings, J., dissenting).

[31] *See* TEX. R. APP. P. 16.3(b).

Nathan L. Hecht
Justice

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