

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Alternative Dispute Resolution

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Frisk v Superior Court 10/28/11

Peremptory Challenge; Timeliness; Waiver or Abandonment

Richard Frisk founded Northwest Surgical Development Company which operated cosmetic treatment centers. In June, 2011, Northwest fired Frisk, and sued him for breach of employment contract, breach of the shareholders' agreement, and breach of fiduciary duty. It alleged Frisk diverted over \$650,000 from Northwest for his personal benefit, and to benefit another corporation, Avanti Skin Company, which Frisk is also said to have created. Northwest asserted additional causes of action against Frisk and Avanti for fraud and declaratory relief.

On June 16th, the case was assigned for all purposes to Orange County Superior Court Judge Frederick Horn, and Northwest appeared seeking a temporary restraining order to prohibit Frisk from contacting Northwest's officers and employees. Judge Horn granted the TRO. The next day, Northwest served Frisk with a copy of the complaint and the TRO, but did not then serve Avanti. Northwest sought a preliminary injunction against Frisk, alleging he misappropriated funds for his personal use and attempted to destroy evidence. Frisk opposed the preliminary injunction and appeared before Judge Horn who held an initial meeting to set a briefing schedule and set the matter for further hearing.

In July, Northwest served Avanti, by personally serving Frisk, its registered agent for process. Avanti retained separate counsel. On July 19th, Avanti filed a peremptory challenge to Judge Horn. Avanti's lawyer alleged that Judge Horn is "prejudiced against Defendant Avanti or the interest of the Defendant Avanti so that this declarant believes that Defendant Avanti cannot

have a fair or impartial hearing of any matter before the Honorable Frederick P. Horn.” On July 22nd, Northwest filed a request for dismissal without prejudice of the causes of action against Avanti only. On July 26th, Judge Steven Perk took the bench to determine the timeliness and technical sufficiency of Avanti’s peremptory challenge. Judge Perk declined to accept the peremptory challenge because Avanti was not a party to the action.

On July 28th, Frisk objected to Judge Horn’s failure to recuse himself following Avanti’s peremptory challenge. Frisk filed a petition for writ of mandate, asking the appellate court to direct the trial court to immediately assign the matter to another judicial officer. The Fourth Appellate District, Division Three issued a temporary stay and requested briefing, to consider issuing a peremptory writ in the first instance.

The Justices noted in their decision, following briefing, that the Legislature’s enactment of section 170.6 granted litigants the right to disqualify judges for “prejudice” without proof. Prejudice is deemed to be established if a party or an attorney declares, under penalty of perjury, a good faith belief the judge is prejudiced. The affidavit of prejudice is incontestable, both regarding the alleged prejudice and the declarant’s sincerity. (*Solberg v Superior Court* (1977) 19 Cal.3d 182) Peremptory challenges are presented in the form of a motion, but they fall outside the usual law and motion procedural rules, and are not subject to a judicial hearing. (*Truck Ins. Exchange v Superior Court* (1998) 67 Cal.App.4th 142) A duly presented peremptory challenge is effective “without any further act or proof” upon acceptance by the trial court. (Section 170.6(a)(4))

Trial courts must act upon peremptory challenges at the first available opportunity, lest this important right be lost or diminished through procedural tactics or maneuvers. (*Hemingway v Superior Court* (2004) 122 Cal.App.4th 1148) Once the court promptly determines the motion is properly made, “the disqualification takes effect instantaneously and requires the court to transfer the cause immediately for reassignment. As a significant judicial event, the determination is reviewable only by immediate writ of mandate, not by appeal from a subsequent judgment. (*People v Hull* (1999) 1 Cal.4th 266)

The Legislature endeavored to strike a balance between the needs of

litigants and the operating efficiency of the courts. (Home Ins. Co. v Superior Court (2005) 34 Cal.4th 1025) The Justices observed that to discourage abusive tactics like judge shopping and the unfair manipulation of erroneously denied challenges, the statute permits only one peremptory challenge for each side, and there are strict rules regarding timing. The statute is intended for “spare and protective use” not to be converted into a weapon of offense and thereby to become an obstruction to efficient judicial administration. (See, Home Ins., at p. 1033)

One of the most important limitations upon peremptory challenges is the requirement that a party to the action or proceeding must bring the challenge. (Section 170.3(d); Section 170.6(a)(1); Curle v Superior Court (2001) 24 Cal.4th 1057) A second key limitation on peremptory challenges involves the doctrines of waiver and abandonment. Such challenges do not implicate the court’s fundamental jurisdiction and may be waived by litigants who permit the proceedings to go forward without objection. (Stebbins v White (1987) 190 Cal.App.3d 769) Avanti became a party to this action when personally served by Northwest in mid-July 2011, and maintained that status when it filed its peremptory challenge.

When Northwest later dismissed Avanti on July 22, 2011, the peremptory challenge was still pending. Judge Perk did not consider the matter until July 26th. Although he was barred from considering the merits of the challenge, Judge Perk properly considered whether the challenge was “duly presented” and “duly filed.” (Section 170.6(a)(4)) At that time, Avanti was not a party to the action, having been recently dismissed. As such, Avanti could not assert it was a party to the action who “...cannot or believes that he or she cannot have a fair or impartial trial or hearing before the judge...” (Avelar v Superior Court (1992) 7 Cal.App.4th 1270) The result is the same as if the peremptory challenge had been waived or abandoned. The peremptory challenge, as Judge Park ruled, was therefore moot.

Frisk argues the Justices should follow Louisiana-Pacific Corp. v Philo Lumber Co. (1985) 163 Cal.App.3d 1212, which assumes that peremptory challenges are instantaneous and irrevocable immediately upon filing. In that case, the challenging party was also dismissed shortly after filing the challenge. There, the

appellate court upheld the challenge, stating that all parties benefit from the challenge. Louisiana-Pacific held the effect of the filing terminated “forthwith and irrevocably that judge’s authority to act in any manner in that case, save to transfer the case to another judge...” (Louisiana-Pacific, at p. 1221)

The Fourth DCA turned to subsequent case law to address the argument. The California Supreme Court’s decision in People v Hull (1999) 1 Cal.4th 266, stresses the trial court must first determine to accept or reject the peremptory challenge. In certain situations, the judge may determine that prejudice was not properly established. (Hull, at p.274) In like fashion, Truck Ins. Exchange v Superior Court (1998) 67 Cal.App.4th 142, concluded peremptory challenges are not self-executing, and they take effect when accepted by the court and assigned to another judge. “The object of section 170.6(3) ... is to provide the party and attorney with a substitution of judge to safeguard the right to a fair trial or hearing. The resulting change of judge completes the peremptory challenge.” (Truck Ins. Exchange, at p. 147)

Under these circumstances, Judge Perk properly looked at the state of the pleadings when the matter came before him at the July 26th hearing and determined Avanti’s peremptory challenge was moot because Avanti, the only party who had asserted the challenge, had been dismissed out of the lawsuit. Because of the dismissal, the motion was not duly and properly made by a party. The 4th DCA concludes by noting this opinion is published to clarify its finding that Louisiana-Pacific has been trumped by subsequent cases like Hull and Truck.

Because peremptory challenges are reviewable by writ, not appeal, published judicial opinions in writ proceedings are the only way to clarify issues arising under section 170.6, or to address apparent conflicts in the law. (See, Guedalia v Superior Court (1989) 211 Cal.App.3d 1156)

The petition for writ of mandate is denied. The temporary stay is lifted. The parties shall bear their own costs in these proceedings.