

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS KNICKMEYER,
Appellant,

vs.

STATE OF NEVADA, ex rel.,
EIGHTH JUDICIAL DISTRICT
COURT,
Respondent.

Case No. 71372

District Court No. A-14-711200-P

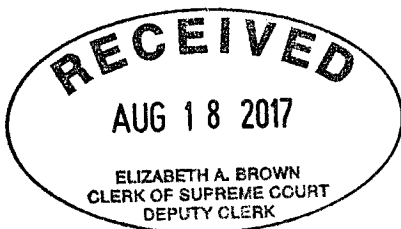
FILED

AUG 18 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  -
DEPUTY CLERK

**RESPONSE IN OPPOSITION TO APPELLANT'S MOTION TO
DISQUALIFY JUSTICE [sic] OF THE COURT OF APPEALS**

Respondent, the State of Nevada, ex rel. Eighth Judicial District Court, by and through counsel, Adam Paul Laxalt, Nevada Attorney General, Clark G. Leslie, Chief Deputy Attorney General, and D. Randall Gilmer, Senior Deputy Attorney General, for the reasons set forth in the attached points and authorities, and pursuant to NEV. R. APP. P. 27(a)(3), hereby bring this response in opposition to Appellant's Motion to Disqualify Justice [sic] of the Court of Appeals.



17-901708

ORIGINAL

MEMORANDUM OF POINTS AND AUTHORITIES

1. Statement of Facts

This case was transferred to this Court on July 7, 2017.¹ On July 10, 2017, Chief Judge Silver, for unknown reasons, “voluntarily recused herself from participation in this matter.”² Now, more than one month following Chief Judge Silver’s voluntary recusal, and two months following transfer of this case to the Court of Appeals, Appellant has sought to disqualify Judge Tao. This request is based solely on the fact that Judge Tao served as an Eighth Judicial District Court (EJDC) judge from 2011–2016, which according Appellant, who admits that there is “no evidence that [Judge] Tao ha[d] any knowledge or involvement with the underlying case,” should be disqualified from hearing this case under Rules 1.2 and 2.11 of the Nevada Code of Judicial Conduct (Code).³

¹ See Supreme Court Docket, Notice of Transfer to Court of Appeals, issued June 7, 2017.

² See Court of Appeals Docket, Notice of Judicial Disqualification, issued July 10, 2017.

³ Motion, p. 2.

Unless otherwise stated, for the remainder of this Response, “Rule” refers to the applicable rule contained within the Nevada Code of Judicial Conduct.

2. Rule 1.2 and 2.11 Do Not Require or Suggest Disqualification

Rule 1.2 provides that a judge should “act at all times in a manner that promotes ‘impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.’” The comments to Rule 1.2 provide that while the rule is cast in general terms due to the impracticality of determining all conduct that could be perceived as “compromis[ing] or appear[ing] to compromise the . . . the impartiality of a judge,” the comments also note that “[a]ctual improprieties include violations of the law, court rules, or provisions of [the] Code.”⁴ Comment 5 to Rule 1.2 also provides that “[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s . . . impartiality . . . to serve as a judge.”⁵

Similarly, Rule 2.11 provides a judge should disqualify him or herself in numerous situations, include situations in when the “judge has a personal bias” or in other situations where a personal or professional relationship of the judge or his or her family members may call into

⁴ Rule 1.2, cmts. 2 & 5.

⁵ Rule 1.2, cmt. 5.

question the impartiality of the judge. Tellingly, neither the text of 2.11 nor the comments to the Rule suggest that recusal should occur based on the mere fact that the judge and one of the parties worked for or at the same entity for a brief period of time, especially when there is no evidence to suggest that they knew each other either professionally or personally.

In addition to the specifics contained in Rules 1.2 and 2.11, and the comments associated with those rules, the Supreme Court has held that “[t]he test under the NCJC to evaluate whether a judge’s impartiality might reasonably be questioned is an objective one—whether a reasonable person knowing all the facts would harbor reasonable doubts about the judge’s impartiality.”⁶

While it is true that Appellant served as a deputy marshall at the EJDC, and that his employment at the EJDC overlapped with an approximate two year span in which Judge Tao served as a District Judge, that short time frame, without any evidence that Appellant worked for, with, or even knew Judge Tao, is simply too remote of a connection to trigger either Rule 1.2 or Rule 2.11. Indeed, carrying

⁶ *Mkhitaryan v. Eighth Jud. Dist. Court*, No. 71177, 2016 WL 5957647 at * 1 (Nev. Oct. 13, 2016) (citing *Ybarra v. State*, 127 Nev. 47, 51 (2011)).

Appellant's theory to its logical conclusion would require Judge Tao to recuse himself from hearing any case in which an EJDC judge, who served in that capacity with Judge Tao, decided the issue to be reviewed by this Court. Such a requirement or decision is neither required nor wise.

3. The Motion Is Stale

In addition to the lack of impropriety or appearance of impropriety, Respondent notes that this case was assigned to this Court on June 7, 2017, and Chief Judge Silver recused herself on July 10, 2017. Appellant knew or should have known as early as June 7, 2017 that Judge Tao was scheduled to hear this case. Yet, no motion was made until one month after Chief Judge Silver decided—for reasons unknown to either party—to voluntarily recuse herself.

Based on this case pending before this court for two months, and given that one judge has already recused herself from deciding the case, Respondent respectfully states that this motion to disqualify, while not untimely under the rules, should have been brought much sooner. Simply put, the fact that Chief Judge Silver made a decision to recuse herself from deciding this case should have no bearing on whether Judge

Tao continues to address the issues in this pending case. Further, Judge Tao's recusal would mandate either the appointment of a senior justice, because only Judge Gibbons would be available to hear the matter, or require the case be recalled by the Nevada Supreme Court. It is clear that Appellant originally did not believe recusal by any judge was necessary because the docketing statement does not request any judicial disqualification.⁷ Appellant's current request is untimely, disingenuous, and would unnecessarily delay the resolution of this case.

4. This Decision Should Be Left to Judge Tao's Sole Discretion

Respondent sees no reason for recusal. Judge Tao, from an objectively reasonable person standard, has no reason to recuse himself from this case. Respondent has full confidence in Judge Tao's ability to continue to consider this case as well as his professional judgment, as reflected by the two month time in which this case has been before him, to not voluntarily recuse himself from this case. Of course, as such decisions are ultimately for the judge to decide based on all factors as the

⁷ See Supreme Court Docket, Docketing Statement filed on October 21, 2016.

case proceeds, Respondent leaves the ultimate decision as to whether to recuse himself to Judge Tao himself.

5. Conclusion

Appellant has admitted that there is no evidence regarding Judge Tao's knowledge or involvement in this case during his time serving as a judge at the EJDC. Appellant has also admitted that there is "no evidence that [Judge] Tao had any prior interaction or contact" with Appellant. Nothing in Rule 1.2 or 2.11 requires disqualification or voluntary recusal.

Accordingly, Respondent respectfully requests that this Motion be denied.

RESPECTFULLY SUBMITTED this 17th day of August, 2017.

ADAM PAUL LAXALT
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CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25(5)(c), I hereby certify that, on the 17th day of August, 2017, service of the **RESPONSE IN OPPOSITION TO APPELLANT'S MOTION TO DISQUALIFY JUSTICE [*sic*] OF THE COURT OF APPEALS** was made this date by depositing a true and correct copy of the same for mailing, first class mail, at Las Vegas, Nevada, addressed follows:

Mr. Kirk T. Kennedy
815 S. Casino Center Blvd.
Las Vegas, NV 89101
Attorney for Plaintiff

/s/ *Barbara Fell*

Barbara Fell, an employee of
The Office of the Attorney General