

IN THE SUPREME COURT OF THE

STATE OF NEVADA

E&T VENTURES, LLC,
Petitioner,

vs

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, THE
HONORABLE JOANNA KISHNER,

Respondents,

EUPHORIA WELLNESS, LLC a
Nevada limited liability company,

Real Party in Interest.

Electronically Filed
Jan 31 2023 07:27 PM
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No. 84336

District Court Case No. A-19-796919-B

**PETITION FOR EN BANC RECONSIDERATION
PURSUANT TO NRAP 40A**

LAW OFFICE OF MITCHELL STIPP
MITCHELL STIPP, ESQ. (Nevada Bar No. 7531)
1180 N. Town Center Drive, Suite 100
Las Vegas, Nevada 89144
Telephone: 702.602.1242
mstipp@stipplaw.com
Counsel for Petitioner

DISCLOSURE STATEMENT

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of the Nevada Supreme Court may evaluate possible disqualification or recusal:

1. E&T Ventures, LLC is a private, Nevada limited liability company, which is no longer a going concern.
2. Joseph Kennedy is the beneficial owner of 100% of the membership interests in E&T Ventures, LLC.
3. Mitchell Stipp, Nevada Bar No. 7531, of the Law Office of Mitchell Stipp, represents E&T Ventures, LLC.

DATED this 31st day of January, 2023.

LAW OFFICE OF MITCHELL STIPP

MITCHELL STIPP, ESQ.
Nevada Bar No. 7531
1180 N. Town Center Drive
Suite 100
Las Vegas, Nevada 89144
Telephone: (702) 602-1242
mstipp@stiplaw.com
Counsel for Petitioner

I. Introduction.

Petitioner filed its petition for a writ of prohibition or, in the alternative, for writ of mandamus on March 7, 2022 (“Writ Petition”). See Dkt. No. 22-07119. The Writ Petition was supported by an appendix comprised of two (2) volumes. See Dkt. Nos. 22-07120 (Volume I) and 22-07121 (Volume II).¹ The Writ Petition presented the following three (3) issues for judicial review:

1. Whether the Chief Judge of the Eighth Judicial District Court has the power and authority to decide the issue of disqualification in the absence of disagreement between the parties over the judge to consider the matter?

2. Whether a district court judge has the power and authority to conduct an evidentiary hearing while a new affidavit under NRS 1.235(1) alleging bias or prejudice was filed?

3. Whether a district court judge has the power and authority to refuse to transfer a case despite failing to provide a written response to a new affidavit under NRS 1.235(1) alleging bias or prejudice?

¹ The Table of Contents included as part of Volume II of Petitioner’s Appendix (Dkt. No. 07121) contains errant references to “ppe i,” which appeared after the Appendix was filed. The Table of Contents included as part of Volume I of Petitioner’s Appendix (Dkt. No. 22-07120) can be used for both Volumes I and II of Petitioner’s Appendix.

On April 29, 2022, the Nevada Supreme Court ordered Respondent, Euphoria Wellness, LLC (“Respondent”), to answer the Writ Petition. See Dkt. 22-13615. Subsequently, Petitioner filed on May 16, 2022, a motion to stay the district court case pending the decision by the Nevada Supreme Court on the Writ Petition. See Dkt. No. 22-15505. On June 9, 2022, the Nevada Supreme Court **granted** Petitioner’s request to stay the district court’s proceedings. See Dkt. No. 22-18429.

After Respondent filed its answer (Dkt. 22-18592) and Petitioner filed its reply (Dkt. No. 22-21562) to the answer, the Nevada Supreme Court considered the issues submitted (without scheduling oral argument) and assigned the matter to the Southern Nevada Panel of the Nevada Supreme Court. See Dkt. No. 22-35493.

On December 29, 2022, the Southern Nevada Panel **denied** the Writ Petition. See Dkt. No. 22-40823. On January 4, 2023, Petitioner filed a petition for rehearing pursuant to NRAP 40. See Dkt. Nos. 23-00248/23-00249.² The Southern Nevada Panel denied the rehearing request. See Dkt. No. 23-01425 (citing NRAP 40(c)).

II. Applicable Law.

NRAP 40A(a) sets forth the grounds for en banc reconsideration, which will be considered in **two (2) circumstances**: “(1) reconsideration by the full court is

² Petitioner was required to refile the petition because counsel failed to categorize it initially as a “post-judgment petition,” which triggers payment of \$150.00.

necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue.” NRAP 40A(c) further provides the following guidance for each of the two (2) circumstances:

A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals shall demonstrate that *the panel’s decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and shall include specific citations to those cases.* If the petition is based on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue, *the petition shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel’s decision beyond the litigants involved.*

(emphasis added). Both circumstances are implicated in this case. Nevada law is clear on the issues, which are the subject of the Writ Petition. Due process requires an impartial decision maker. Wolff v. McDonnell, 418 U.S. 539, 570-71 (1974). “The citizen's respect for judgments depends ... upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.” Republican Party of Minn. v. White, 536 U.S. 765, 793, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002) (Kennedy, J., concurring).

///

///

III. Argument.

The matter before the Nevada Supreme Court is simple and requires only the enforcement of a single statutory provision (NRS 1.235). NRS 1.235(5) and (6) provide as follows:

5. Except as otherwise provided in subsection 6, the judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter and shall:

(a) If the judge is a district judge, immediately transfer the case to another department of the court, if there is more than one department of the court in the district, or request the judge of another district court to preside at the trial or hearing of the matter;

6. A judge may challenge an affidavit alleging bias or prejudice by filing a written answer with the clerk of the court within 5 judicial days after the affidavit is filed, admitting or denying any or all of the allegations contained in the affidavit and setting forth any additional facts which bear on the question of the judge's disqualification. The question of the judge's disqualification must thereupon be heard and determined by another judge agreed upon by the parties or, if they are unable to agree, by a judge appointed:

(a) If the judge is a district judge, by the presiding judge of the judicial district in judicial districts having more than one judge, or if the presiding judge of the judicial district is sought to be disqualified, by the judge having the greatest number of years of service[.]
(emphasis added).

The Southern Nevada Panel incorrectly determined that there were only two (2) issues that are the subject of the Writ Petition. See Dkt. No. 22-40823 (page 2). The third issue (“Whether a district court judge has the power and authority to refuse to transfer a case despite failing to provide a written response to a new affidavit under NRS 1.235(1) alleging bias or prejudice?”) was not considered by the Southern Nevada Panel in its decision. The Southern Nevada Panel did not provide any explanation for its omission despite being provided an opportunity to reconsider its decision. See Dkt. Nos. 23-00248/23-00249 and 23-01425.

A. Southern Nevada Panel allows Chief Judge to assume Jurisdiction Regardless of the Statutory Right Granted by the Nevada Legislature.

Petitioner’s first question (“Whether the Chief Judge of the Eighth Judicial District Court has the power and authority to decide the issue of disqualification in the absence of disagreement between the parties over the judge to consider the matter?”) was answered in the affirmative by the Southern Nevada Panel. See 22-

40823 (page 3) (finding “at the time Chief Judge Bell entered her order resolving the motion, the parties were, in fact, ‘unable to agree’ on a judge, and real party in interest’s counsel was planning to convey that disagreement to chief Judge Bell roughly one hour after she entered her order.”).

There is no dispute that Respondent provided Petitioner (although unilaterally) until 9am on February 9, 2022 to agree on a judge or Respondent would notify Chief Judge Bell that the parties were “unable to agree.” See Dkt. No. 22-07121, Volume II of Appendix (Exhibit 4 to Appendix, Motion to Withdraw/Reconsider Decision), APP 264-286 (Exhibit 1 to Motion to Withdraw/Reconsider Decision, APP 276-279). The only way to determine whether parties are “unable to agree” is to assess the state of agreement/disagreement as of a specific point in time. Unfortunately, NRS 1.235(6) fails to provide a deadline for the parties to reach an agreement, but the statute is clear that the chief judge only has jurisdiction if the parties are “unable to agree.” The open question is how much time they should be provided.

Petitioner believes the Nevada Supreme Court would likely impose the standard adopted in NuVeda, LLC v. The Eighth Judicial Dist. Court of the State, 137 Nev. Adv. Op. 54 (Nev. 2021) (reasonable promptness). Chief Judge Bell did not find Petition’s Motion to Withdraw/Reconsider Decision untimely. See Dkt. No.

22-07121, Volume II of Appendix (Exhibit 9 to Appendix, Decision by Chief Judge Bell), APP 332-337. Instead, Chief Judge Bell determined that “once a judge has responded to a disqualification request, the matter is considered procedurally ready for decision.” Id. (APP 333). However, Chief Judge Bell cites no authority to support this conclusion. Accordingly, Chief Judge Bell’s view provides no time for the parties to select a judge to decide the matter (because she believed she could decide the matter as soon as the judge subject to disqualification responds to the affidavit). Chief Judge Bell’s standard wrongfully deprives the parties of their right provided by the Nevada Legislature to select a judge to decide the matter of disqualification.

Nevada’s appellate courts do not defer to the district court's reasonableness determinations when jurisdiction is at stake. Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court of State, 131 Nev. 30,35, 342 P.3d 997, 1001 (2015). In the Writ Petition, Petitioner contended that Chief Judge Bell’s jurisdiction **was conditional** by the plain meaning of the statute. Writ Petition, Dkt. 22-07119 (page 9) (citing to NRS 1.235(6)). When denying the Writ Petition, the Southern Nevada Panel did not consider whether the deadline imposed by Chief Judge Bell was even reasonable. Instead, the Southern Nevada Panel determined that the parties were “unable to agree” (because they had not reached an agreement) at the time Chief

Judge Bell issued her decision. There is nothing in the record to suggest that the parties were not acting with reasonable promptness before Chief Judge Bell issued her decision. Rather than an objective standard, the Southern Nevada Panel has allowed the chief judge to decide matters of disqualification based on the timing of his/her written decision. Compare Dkt. No. 22-07121, Volume II (Exhibit 3 to Appendix, APP 256-263 with Exhibit 9 to Appendix, APP 332-337) (timing of decisions).

B. Southern Nevada Panel allows District Court to Proceed Regardless of the Filing of a New Affidavit under NRS 1.235 in violation of Nevada law because personal service did not occur at the time the Affidavit was Filed.

Petitioner's second question ("Whether a district court judge has the power and authority to conduct an evidentiary hearing while a new affidavit under NRS 1.235(1) alleging bias or prejudice was filed?") was answered in the affirmative by the Southern Nevada Panel. See 22-40823 (pages 3-4) (finding that "NRS 1.235 is unclear regarding what a judge whose disqualification is sought must do when an affidavit is filed but not served"). Id. In support of its conclusion, the Southern Nevada Panel inappropriately compared NRS 1.235(5)(a) with NRS 1.235(4).

The issue is a matter of statutory interpretation. "Statutory interpretation is a question of law subject to de novo review." State v. Catanio, 120 Nev. 1030, 1033,

102 P.3d 588, 590 (2004). The goal of statutory interpretation "is to give effect to the Legislature's intent." Hobbs v. State, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). To ascertain the Legislature's intent, Nevada's appellate courts look to the statute's plain language. Id. "[W]hen a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." Edgington v. Edgington, 119 Nev. 577, 582–83, 80 P.3d 1282, 1286 (2003). Nevada's appellate courts "avoid statutory interpretation that renders language meaningless or superfluous," Hobbs, 127 Nev. at 237, 251 P.3d at 179, and "whenever possible ... will interpret a rule or statute in harmony with other rules or statutes," Watson Rounds v. Eighth Judicial Dist. Court, 131 Nev. —, 358 P.3d 228, 232 (2015) (quotation marks omitted).

NRS 1.235(5)(a) is clear and unambiguous that the district court judge "shall proceed no further" with the case after an affidavit is filed regardless of personal service. The requirement personally to serve the judge subject to disqualification is not a condition precedent to the judge's statutory obligation to refrain from presiding over the case until the matter of disqualification is resolved. NRS 1.235(4) simply imposes the obligation of personal service on the party filing the affidavit. There is no dispute that the district court already has notice of the filing. The Southern

Nevada Panel simply ignores the fact that it is *impossible* personally to serve the judge subject to disqualification “at the time the affidavit is filed.”

The Southern Nevada Panel suggests that Nevada law only requires judges “*generally* [to] refrain from presiding over the matter until the disqualification request is resolved.” See 22-40823 (page 4). However, this is not the law. The Nevada Supreme Court has firmly held when interpreting NRS 1.235 that “once a motion to disqualify *is filed* by a party, the subject judge can take no further action in the case until the motion to disqualify is resolved.” Debiparshad v. The Eighth Judicial Dist. Court of State, 137 Nev. Adv. Op. 71, 7 (Nev. 2021) (emphasis added).

The Southern Nevada Panel further concludes that the decision of the district court judge to conduct the evidentiary hearing *and preside over the case for the next “roughly” four (4) months* was not clearly erroneous to warrant the relief (vacation of subsequent orders). Id. Yet, the Southern Nevada Panel ignores the fact that the affidavit was *personally served* on February 14, 2022--- *one (1) judicial day* after the evidentiary hearing held on February 11, 2022. See Dkt. No. 22-07121, Volume II (Exhibit 6 to Appendix, APP 289-325, Certificate of Service). Moreover, the Nevada Supreme Court has firmly established following policy in Nevada to promote confidence in the judiciary:

We further conclude that any order entered by the judge while a timely motion to disqualify is pending becomes void should the judge later be

disqualified. *Voiding the orders of a judge whose impartiality has reasonably been questioned promotes confidence in the judiciary.* See Liljeberg v. Health Serus. Acquisition Corp., 486 U.S. 847, 865 (1988) (stating that 28 U.S.C. § 455(a), a statute substantially similar to NCJC Rule 2.11, is designed "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible"). While courts have split on whether orders entered by disqualified judges are void or merely voidable, Debiparshad timely challenged the court's order here, and we conclude that the order, entered after disqualifying acts arose and Debiparshad's motion to disqualify was filed, is properly deemed void. See Christie v. City of El Centro, 37 Cal.Rptr.3d 718, 725 (Ct. App. 2006) ("[Disqualification occurs when the facts creating disqualification arise, not when disqualification is established."); see also Hoff v. Eighth Judicial Dist. Court, 79 Nev. 108, 110, 378 P.2d 977, 978 (1963) ("That the actions of a district judge, disqualified by statute, are not voidable merely, but void, has long been the rule in this state."); Frevert v. Smith, 19 Nev. 363, 11 P. 273 (1886) ("[T]he general effect of the statutory prohibitions ... [is] to render those acts of a judge involving the exercise of judicial discretion, in a case wherein he is disqualified from acting, not voidable merely, but void.").

Debiparshad, 137 Nev. Adv. Op. 71, 8 (Nev. 2021).

C. The Southern Nevada Panel Avoided Addressing the Statutory Requirement that the Case be Transferred if the District Court Judge failed to Respond to the New Affidavit.

The Southern Nevada Panel refused to address Petitioner's third question ("Whether a district court judge has the power and authority to refuse to transfer a case despite failing to provide a written response to a new affidavit under NRS 1.235(1) alleging bias or prejudice?"). See Dkt. Nos. 22-40823, 23-00248/23-

00249, and 23-01425. No explanation is provided by the Southern Nevada Panel for its decision. There is no dispute Judge Kushner failed to respond to the new affidavit. See Dkt. No. 22-07121, Volume II of Appendix (Exhibit 4 to Appendix, Motion to Withdraw/Reconsider Decision), APP 264-286. Regardless of the decision by the Southern Nevada Panel on Petitioner's first two (2) questions, there is no argument on the third question. **Judge Kushner had two (2) choices: (a) respond to the affidavit; or (b) transfer the case. Here, she decided to do neither.**

IV. Conclusion

For the reasons set forth in this Petition, Petitioner seeks the following relief:

A. An order disqualifying Judge Kushner from presiding over the district court case below.

B. An order instructing the clerk of the court to re-assign the case to another business court judge.

C. An order vacating any orders entered by Judge Kushner after the initial application/affidavit in support of disqualification was filed by Petitioner.

///

///

///

DATED this 31st day of January, 2023

LAW OFFICE OF MITCHELL STIPP

MITCHELL STIPP, ESQ.
Nevada Bar No. 7531
1180 N. Town Center Drive
Suite 100
Las Vegas, Nevada 89144
Telephone: (702) 602-1242
mstipp@stipplaw.com
Counsel for Petitioner

Certificate of Compliance

1. I hereby certify that this petition for rehearing/reconsideration or answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ It has been prepared in a proportionally spaced typeface using **MS Word for MAC Version 16.69.1**; or

☐ It has been prepared in a monospaced typeface using *[state name and version of word processing program]* with *[state number of characters per inch and name of type style]*.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains **2,729** words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

☐ Does not exceed ____ pages.

Dated this 31st day of January 31, 2023.

LAW OFFICE OF MITCHELL STIPP

MITCHELL STIPP, ESQ.
Nevada Bar No. 7531
1180 N. Town Center Drive, Suite 100
Las Vegas, Nevada 89144
Telephone: (702) 602-1242
mstipp@stipplaw.com
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of January, 2023, I filed the foregoing **PETITION**, using the court's electronic filing system. Notice of the filing of the Petition was made upon acceptance by the Nevada Supreme Court to the following:

Judge Joanna Kishner:

Dept31lc@clarkcountycourts.us

Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89155

Euphoria Wellness, LLC as Real Parties-in- Interest:

Nicole E. Lovelock, Esq.
Nevada State Bar No. 11187
JONES LOVELOCK
6600 Amelia Earhart Ct., Suite C
Las Vegas, Nevada 89119
Telephone: (702) 805-8450
Fax: (702) 805-8451
Email: nlovelock@joneslovelock.com

By:

An employee of Law Office of Mitchell Stipp