

2d Civil No. B 178428

**In the Court of Appeal
Of the State of California
Second Appellate District
Division Four**

TOBY HARRIS, K EVIN O'CONNOR, MICHAEL SANDERCOCK,
ALEX LANE and MICHAEL BEY, on behalf of themselves, the general
public, and all others similarly situated,

Plaintiffs and Appellants,

vs.

INVESTOR'S BUSINESS DAILY, INC., a California Corporation, DIRECT
MARKETING SPECIALISTS, INC., a California corporation, DATA ANALYSIS
INC., WILLIAM O'NEIL & CO., etc., et al,

Defendants and Respondents.

Appellants' Motion to Augment the Record
[Declaration of Roxanne Huddleston in support thereof]

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Motion to Augment

Appellants move under California Rules of Court, rule 12(a)(1)(A) and Second Appellate District Local Rule 2 (b) to augment the record with documents which were filed in the superior court after the proceedings which are the subject of this appeal concluded but which are relevant to issues raised by the appeal. The documents which appellants seek to have included in the record through this motion are:

- (1) Statement of disqualification filed on December 16, 2005 (Ex A); and
- (2) Proof of personal service of the statement of disqualification on January 3, 2006, filed on January 10, 2006. (Ex. B.)

Argument

**The Court Should Augment The Record With Appellants'
Statement of Disqualification and Proof of Service of the**

Statement of Disqualification Because It Is Relevant To An Argument Appellants Intend To Raise That They Were Deprived of Their Due Process Right To Have Their Matter Heard and Decided by A Judge Who Was Mentally Competent.

The trial judge in this case was Judge Rodney E. Nelson, who on May 5, 2005 ordered that respondents—a newspaper publisher—were entitled to recover almost \$550,000 in attorneys' fees and costs from appellants—telephone sales employees who sued for wage and overtime violations. The order was subsequently reduced to a judgment, signed by Judge Jerry Fields on July 26, 2005, which is the subject of this appeal. As established by the statement of disqualification made under oath by counsel for appellants, it is likely that at the time Judge Nelson awarded respondents their attorneys' fees and costs, he was suffering from an impairment which prevented him from perceiving, analyzing, evaluating, applying and remembering evidence and arguments presented to him.

As shown in the statement of disqualification, Judge Nelson appears to have been suffering from diminished mental abilities at least as early as early 2004, when he had difficulty understanding an order made by this court on a petition for writ of mandate. (Ex. A, pp. 2-3.) This court directed him to reverse a ruling excluding the testimony of a witness in its entirety and to enter a new order precluding the witness from testifying only upon matters upon which he had asserted his privilege against self incrimination. (Ex. A, p. 3.) In response to the order, Judge Nelson vacated his previous order, then re-entered it exactly as before—an act directly at odds with the holding of this court. (Ex. A, p. 3.) Appellants' counsel was forced to bring this to Judge Nelson's attention and a nunc pro tunc order was entered. (Ex. A, p. 3.)

During 2004, counsel had discussions with his co-counsel and opposing counsel regarding his suspicions concerning Judge Nelson's difficulty remembering evidence and the facts of the case. (Ex. A, p. 4.) He observed Judge Nelson conducting hearings on other matters which also led him to believe the court might have memory problems or was impaired. (Ex. A, p. 4.) Counsel did not, however, have any actual evidence at that time which would establish that Judge Nelson

suffered such an impairment as to interfere with his ability to conduct these proceedings. (Ex. A, p. 4.)

Within one month after Judge Nelson awarded respondents almost \$50,000 in attorneys' fees, appellants' counsel learned the judge had been placed on administrative leave by the Commission on Judicial Performance; however, he still did not know the reason why. (Ex. A, p. 5.) The temporary judge sitting for Judge Nelson stated he did not know whether the leave would be temporary or permanent, leaving counsel in the dark regarding the exact nature of the impairment suffered by Judge Nelson. (Ex. A, p. 5.) It was several months later that counsel learned second hand (from a clerk in another court) that the clerk suspected Judge Nelson suffered from Alzheimer-type symptoms but the clerk did not provide any facts or evidence to support that suspicion. (Ex. A, p. 5)

In early December, 2005 two events caused appellants' counsel to believe that Judge Nelson had been impaired and unable to comprehend the nature of the proceedings before him when he made the attorneys' fees order that is the subject of this appeal.

First, counsel heard hearsay reports that an attorney in another matter which had been tried before Judge Nelson in March 2004 believed the judge was not mentally competent when he presided at that trial. (Ex. A, p. 6.) Second, on December 12, 2005 counsel discovered an article published on December 8, 2005 which stated that "The Commission on Judicial Performance has taken an unusual step of publicly seeking the ouster of a Superior Court Judge allegedly stricken with a degenerative brain disease." (Ex. A, p. 6.) The judge was Judge Nelson, whom the Commission on Judicial Performance had concluded suffered from a disability that "seriously interferes with his ability to serve on the bench" (Ex. A, p. 6.) Similar stories followed in the Metropolitan News and the Los Angeles Times, citing attorneys who had appeared before Judge Nelson as witnesses to a serious decline in Judge Nelson's abilities "during the last couple of years." (Ex. A, p. 7.)

Based on this evidence, counsel concluded that Judge Nelson had been mentally impaired when he presided over the action that is the subject of this appeal. (Ex. A, p. 2.) Counsel filed a statement of disqualification on December 16, 2005 which was personally served on Judge Nelson on January 3, 2006. (Ex. B.) Judge

Nelson did not file a response to that statement of disqualification, thereby consenting to his disqualification. (Code Civ. Proc., § 170.3, subd. (c)(4).) Because no response was filed, the facts set forth in the statement of disqualification are established as true. (*Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 424.)

The evidence with which appellants seek to augment the record is highly relevant to this appeal. A party has a due process right to have his matter decided by a competent judge. (*Cf. Church v. Capital Freight Lines* (1956) 141 Cal.App.2d 246, 248 [right to trial before mentally competent jurors is a fundamental right guaranteed by the Constitution].) This is particularly true where, as here, the trial court was required to exercise its discretion in deciding aspects of the case and the Court of Appeal will review the court's rulings by applying an abuse of discretion standard. In this appeal, appellants appeal a judgment awarding attorneys' fees which required the court to exercise its discretion in several ways. For example, appellants asked the court to apportion the fees between causes of action for which attorneys' fees are recoverable and those for which they are not; however, Judge Nelson refused to apportion the fees. Appellants also argued the court in its discretion should have required them to pay only their proportional shares of the attorneys' fees, rather than all of the fees incurred by the respondents; however, Judge Nelson entered a joint and several judgment against appellants for all of the fees respondents incurred. In addition, a court must exercise its discretion in deciding the amount of attorneys' fees which should be awarded.

Appellants must be allowed in this appeal to raise the very serious issue that they were deprived of their due process right to have their case heard by a court capable of exercising the discretion required to decide the case. The evidence with which appellants seek to augment the record is highly relevant to that argument and, without augmentation, is entirely lacking from the record since appellants had no real proof of Judge Nelson's incapacity until after the attorneys' fees award had already been made. Fundamental fairness requires that the record be augmented.

This motion could not have been made earlier. As shown by the facts outlined in the statement of decision itself, counsel suspected Judge Nelson suffered from mental impairment but he had no firm basis for his suspicions until early December, 2005, when the Judicial Commission proceedings became public. He filed the

statement of disqualification within days after that and appellants brought this motion immediately after Judge Nelson's response was due. Thus appellants have established good cause for failing to move to augment the record earlier.

For these reasons, appellants move that the record be augmented with the statement of disqualification filed in the superior court on December 16, 2005 and the proof of service of the statement of disqualification filed in the superior court on January 10, 2006.

Dated: January 13, 2006

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