

CAUSE NO. 199-00596-97

DSC COMMUNICATIONS CORPORATION (IN THE DISTRICT COURT
VERSUS (COLLIN COUNTY, T E X A S
EVAN BROWN (199TH JUDICIAL DISTRICT

STATEMENT OF FACTS
EXCERPT

A P P E A R A N C E S:

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BE IT REMEMBERED that on the 19th day of May, 1997, the
above styled and numbered cause came on for hearing before
said HONORABLE JOHN R. ROACH, Judge presiding, and the
following proceedings were had; to wit:

ORIC

1 first hearing in this case, so the Court is not going to
2 consider this as a motion to recuse, but I am going to
3 consider it as a motion to disqualify. And if there's a legal
4 reason why the Court shouldn't serve, I --

5 MR. ALDOUS: Your Honor --

6 THE COURT: -- respect it.

7 MR. ALDOUS: -- I don't mean to interrupt, but
8 it is not offered as a motion to recuse; it is solely offered
9 as a -- as a disqualification under the Texas Constitution,
10 Article 5, Section 11.

11 THE COURT: Okay.

12 MR. ALDOUS: There's only one Texas case, your
13 Honor, that discusses whether or not the financial interest
14 that is a disqualifying factor under the Texas Constitution is
15 covered by stock ownership, and that is an El Paso Court of
16 Appeals case decided in 1957.

17 I have the benefit of that, your Honor.

18 It simply says that ownership of stock is a financial
19 interest, however small, in the outcome of a case if it is a
20 for a party.

21 Now, your Honor, there are some other cases. And as the
22 defense has pointed out, there are none really particularly
23 that say it as directly. The only thing the other cases --
24 the Beaumont Court of Appeals case that we cited to you where
25 the spouse of the judge worked for the corporation, but also

1 held stock ownership to the corporation through a 401-K.

2 The Court held in that case that the court was
3 disqualified under the Constitutional issues because of a
4 financial interest in the case.

5 I want to point out, though, something that the Court has
6 brought up on several occasions; that is, this motion doesn't
7 have anything to do with the -- whether or not the Court acts
8 a certain way or doesn't act a certain way. And the important
9 factor that I -- the reason I'm bringing this up is because
10 the test is whether or not there is an interest in the outcome
11 of the case, however small.

12 So whether Your Honor was the majority shareholder under
13 the Constitutional analysis, or whether or not you held one
14 share or ten shares, I don't think that the analysis is any
15 different.

16 My concern, your Honor, as the Court knows, that
17 disqualification under the Constitution constitutes a voiding
18 of all orders in which there was a discretionary -- or use of
19 discretion by the Court.

20 As any lawyers tend to do, I will use to my client's best
21 interest all things that at my disposal. This issue will be
22 raised at a -- at another point time, and all of the work that
23 will have gone into this matter will have been put aside.

24 I do apologize for the Court -- to the Court for not
25 raising this issue sooner.

1 I like to pride myself on the fact that I think I know a
2 lot more than I really do, and it's unquestioned that now that
3 that's true because I wasn't aware of the Constitutional
4 issues and the differences between disqualification and
5 recusal.

6 I will point out, your Honor, that under the Texas
7 Government Code there is a provision which specifically sets
8 forth disqualification of jurors.

9 There is a case directly on point that's from the Tyler
10 Court of Appeals, the only court that I could find to discuss
11 the issue, that says stock ownership by a -- by a prospective
12 juror is disqualification.

13 The disqualification language for a juror is exactly the
14 same as the Constitutional disqualification test for Your
15 Honor.

16 In addition, the Beaumont Court of Appeals case that I've
17 handed you says that the Constitutional disqualification is a
18 financial interest in the outcome of the case. The recusal is
19 an interest in the outcome of the case.

20 The Beaumont Court of Appeals said that the interest is
21 the same -- and I'm sorry I didn't hand it to you -- but that
22 the interest is the same with respect to finances. It doesn't
23 matter -- in other words, I believe it says that if it's a
24 financial interest that would allow recusal, it would also
25 constitute disqualification under the Constitution.

1 The distinguishing factor is if you're interested in some
2 way by -- through hobby or something that could be maybe
3 grounds for recusal but not for disqualification.

4 As a side note, I will point out that after Your Honor's
5 ruling on Thursday, May 2nd, on Monday -- and it appeared in
6 the Dallas Morning News on Saturday -- on the Monday following
7 that, the stock of DSC rose to over \$2 a share.

8 And I don't believe that -- to me the only reason I bring
9 that up is -- whether or not this had an effect on it or not,
10 I have no idea. I'm certainly not a stock aficionado.

11 But under the federal system, stock ownership by a judge
12 is grounds for disqualification under the federal rules.

13 There is a distinguishing factor because they specifically
14 delineate what financial interest is.

15 And I've cited the statute in my paper.

16 But they do make a distinguishing factor for someone
17 who -- a judge who owns a mutual fund because --

18 THE COURT: One of my questions.

19 MR. ALDOUS: That's right. And there's -- it's
20 one step removed, because you actually own shares in the fund;
21 and even though the fund may own shares in the corporation,
22 that doesn't mean that you have the direct financial interest
23 as you would if you were an owner.

24 And there is no way that you can qualify this in any other
25 way if you have stock ownership other than as a direct

1 ownership of the corporation, unless DSC has some way of
2 showing that the stock that you have is nonvoting or that it
3 doesn't fluctuate based upon market price, which I don't
4 believe is the case.

5 So, therefore, you know, your Honor, we thought it best to
6 bring it to your attention first, rather than to really wait
7 until bringing up at the last minute on the appeal, because it
8 is an issue I believe that, if the Court believed, as we do,
9 that it was disqualified, it certainly wouldn't have done
10 anything in the case. And so I'm bringing it to your
11 attention.

12 THE COURT: Okay.

13 MR. PINKER: May it please the --

14 THE COURT: Well, you can, but let me make one
15 point here.

16 I'm of the opinion that, if the Court is disqualified,
17 that things like waiver and estoppel and all that wouldn't
18 apply.

19 MR. PINKER: I understand, your Honor.

20 THE COURT: So let's talk about whether I'm
21 disqualified or not.

22 MR. PINKER: I understand. I appreciate that.

23 THE COURT: Okay.

24 MR. PINKER: I do need to say, however, that I
25 think this an effort to strike a judge simply for a series of

1 rulings that were adverse to them.

2 Now, talking about the financial interest, which is the
3 sole grounds upon which they assert you're disqualified, the
4 only case that they've got and that they're citing to Your
5 Honor is a 40-year-old case out of the Court of Appeals that
6 never went up to the Supreme Court. It's a no writ case.

7 About ten years ago the Texas Supreme Court, pursuant to
8 specific legislative guidelines, adopted the Texas Rules of
9 Civil Procedure, and specifically adopted Rule 18b of the
10 Texas Rules of Civil Procedure.

11 Now, we can all recognize and agree that the Constitution
12 sets forth a broad mandate about what is disqualification.
13 And the Constitution says that if a judge has an interest,
14 that's a grounds, but it doesn't describe what that interest
15 has to be; it doesn't imply it, doesn't interpret it, doesn't
16 talk about how that actually works in the real world. That is
17 left up to the courts, and that is left up to the legislature.

18 The Supreme Court interpreted that provision when they
19 adopted Rule 18b in 1987, 30 years after this case that
20 they're citing to you. And they very, very clearly drew a
21 distinction between a significant interest and something that
22 they called a financial interest.

23 And a significant interest is described to be something --
24 it's not described, but it is something that is a ground for
25 disqualification.

1 In stark contrast, Judge, something that is a financial
2 interest under the rules is specifically and solely a ground
3 for recusal, and that is made very clear in the language of
4 the rule which we've cited to Your Honor in 18b.

5 18b, Subpart 1, talks about disqualification. It says if
6 the Judge has an interest in the subject matter.

7 Section -- Subpart 2 talks about recusal. And it says if
8 a judge knows that he individually, or as a fiduciary, or his
9 spouse or minor child residing in his household, has a
10 financial interest in the subject matter in controversy, that
11 is a ground for recusal.

12 And the rule provides a good deal more help as well,
13 Judge, because the rule goes on to define what a financial
14 interest is.

15 And a financial interest, in Subpart 4d, means ownership
16 of a legal or equitable interest. Quite clearly a stock;
17 ownership of a legal or equitable interest.

18 Now, Mr. Aldous I think pointed out to your court in
19 response to a question, what about common stock; is that what
20 that's talking about? Excuse me; mutual funds.

21 The answer is, no, that's not what it's talking about
22 there. Subpart d, which talks about financial interest,
23 Judge, if you look further, excludes certain things from being
24 a covered financial interest.

25 The very first thing excluded from a financial interest is

1 a mutual fund.

2 THE COURT: Well, let me say that mutual fund
3 does not apply in this case.

4 MR. PINKER: I understand, Judge.

5 But the point is, financial interest is what is talked
6 about as something that could be a recusal ground.

7 What is a financial interest? Well, it's not mutual fund.
8 That doesn't even rise to the level of financial interest.
9 Because under the explicit language of this rule, mutual funds
10 are excluded from being a financial interest.

11 So what else could be a financial interest that meets the
12 definition of a common -- excuse me -- of a legal or equitable
13 interest?

14 We submit the only thing can be stock ownership, Judge.
15 That is what the Texas Supreme Court and the legislature were
16 talking about when they adopted Rule 18b, Subpart 4d, that
17 talks about a financial interest. They're talking about stock
18 ownership, and they're talking about that in and of itself.

19 That is different than some greater interest that might
20 mandate disqualification; interests such as majority
21 stockholder; interests such as wife is an employee; interests
22 such as wife gets a substantial salary from a company that's a
23 defendant.

24 This talks about stock ownership being a financial
25 interest; financial interest being something that can support

1 recusal, but not support disqualification.

2 And it's quite clear, your Honor, and I think Mr. Aldous
3 has recognized, they never filed a motion for recusal, they
4 never -- and quite clearly they've waived it.

5 They have, as Your Honor's noted, been alerted to Your
6 Honor's ownership of stock since the first day they were in
7 this case.

8 I received a motion for protective order from Mr. Drake on
9 Tuesday, April 29th, at 4:30. I faxed a letter back to him --
10 and this is in the record -- I faxed a letter back to him
11 within an hour of that time advising him, pursuant to Your
12 Honor's instruction, that Your Honor held stock in DSC.

13 And at the next -- on the next day, Mr. Drake came into
14 court, filed a motion for protective order, sought the benefit
15 of Your Honor's jurisdiction and authority, and obtained
16 relief through the filing of that motion for protective order.

17 And at that hearing Your Honor turned to him and said, Was
18 this information disclosed. And in clear and unmistakable
19 language, Mr. Drake, on behalf of his client, Mr. Brown, with
20 full knowledge, in open court, on the record, said, and I
21 quote, We have no objections to the Court hearing this case
22 anyway.

23 That's important to me for two reasons, Judge.

24 Number one, it's clear waiver. I don't think there can be
25 an example of greater waiver.

1 THE COURT: Well, let me say this. I agree with
2 you; they've waived any motion to recuse.

3 MR. PINKER: But also --

4 MR. ALDOUS: And I admit it.

5 THE COURT: And he admits it.

6 MR. ALDOUS: I mean, I admit it.

7 THE COURT: Okay. You're talking about waiver
8 of the disqualification claim?

9 MR. PINKER: I'm not. I'm trying to make a
10 distinction between the disqualification and the recusal.

11 Because he goes on and acknowledges implicitly, Judge,
12 understanding of the common sense difference between these
13 two.

14 Mr. Drake goes on and says, We don't have any objection;
15 Your Honor said, Okay. And then he added on his own, But of
16 course we would have an objection if Your Honor was the
17 majority stockholder or something.

18 He is understanding the common sense difference between
19 disqualification and recusal that is set forth in 18b as given
20 to us by the Texas Supreme Court and the Texas legislature.
21 He understood that there was a difference between a small
22 financial interest, which might be grounds for recusal, and
23 something greater; majority stockholder interest. And he
24 explicitly said, We don't have a problem with the first; but
25 if the second applies, let us know. And Your Honor said, It

1 doesn't apply. I'm not a majority stockholder.

2 We submit to you that in order to give any meaning
3 whatsoever to the term of financial interest as set forth in
4 Rule 18b, it must mean stock ownership, because it can mean
5 nothing else.

6 And it is well settled and fundamental to our law that a
7 court must interpret a rule or statute to have some meaning
8 and effect if it can be done at all.

9 Here it is quite easy and quite simple and quite
10 straightforward. The rule says financial interest --
11 financial interest meaning a recusal ground -- means legal or
12 equitable interest. That is a stock, and that is what we
13 submit to you must be a stock, and can only be a stock.

14 That is a recusal ground. And as Mr. Aldous has stated in
15 his opening and has just stated again, that has been waived
16 here pursuant to the specific statute itself. Rule 18b,
17 Subpart 5, provides that a party can waive recusal if given a
18 full notice.

19 THE COURT: All right.

20 And your last word, Mr. Aldous.

21 MR. ALDOUS: Thank you, Judge.

22 Let me -- I would like to give you the benefit of this
23 St. Mary's Law Journal article written by Justice Killgarland
24 (phonetic), who was, I think at the time he wrote this, prior
25 to his dispossession of his office of the Supreme Court.

1 And he states, It has long been apparent when a judge is a
2 stockholder in a corporation he is disqualified to sit in a
3 trial where the corporation is a party.

4 And I've marked that for you, and I've got you a copy.

5 The only reason -- additionally, let me say this. The
6 Texas Supreme Court can make as many rules as they want to in
7 the Rules of Procedure. But as I understand it, they have not
8 amended the Constitution of the State of Texas.

9 And as I had pointed out, the Beaumont Court of Appeals
10 case that I handed you says that financial interest and
11 interest in the disqualification and recusal grounds are the
12 same.

13 The reason I bring that out is because Mr. Pinker admits
14 the stock ownership is a financial interest which would apply
15 under this; under the Beaumont Court of Appeals case. That
16 would make you disqualified in this case.

17 And, finally, I just want to add that, yes, it is not a
18 case of where the -- we're talking about a mutual fund or
19 such.

20 The only case that exists under Texas law, I brought to
21 you; the only case that directly deals with that issue.

22 Mr. Pinker has brought some good argument, but no cases.
23 And I've provided you with cases.

24 And, you know, as far as I can tell, the two Supreme Court
25 cases from the 1800s that I've cited in the footnote, Judge,

1 do not specifically say ownership of stock. One was an owner
2 of -- they called him an owner, a part owner, of the firm.
3 That was all they said on the one. And so I -- I did not
4 provide you those cases because they did not say stock
5 ownership, and I know the Court wants to see those words in
6 there.

7 But they were cited with support in the other cases as
8 well.

9 The Constitution is still the same way it was.

10 And I will also say that the case that you have from the
11 Beaumont Court of Appeals was subsequent to the enactment of
12 the Texas Rules of Civil Procedure.

13 MR. PINKER: Your Honor, may I respond briefly
14 to a couple of those points?

15 THE COURT: No, sir. I've heard all the
16 arguments I'm going to hear. I'm ready to rule on it right
17 now.

18 Well, there's several interests involved here, not the
19 least of which is the Constitutional argument that's made in
20 this case.

21 And I think the Court, in ruling on these types of things,
22 ought to bear in mind -- at least it would certainly be if we
23 were talking about a motion to recuse, which we're not in this
24 instance -- the right of the citizens of this county to have
25 their cases heard in front of the judges they elect for that

1 purpose.

2 I think that's a compelling reason why recusal at least
3 should be fairly strictly construed.

4 With respect to disqualification, the Constitutional
5 arguments were made in this case, if the Court is
6 disqualified, the Court would be absolutely disqualified and
7 finds that no waiver or estoppel argument would modify or
8 change that disqualification aspect of it.

9 I think the arguments that have been made on both sides
10 have a great deal of merit.

11 The Court, however, is going to order and rule that the
12 motion to disqualify be denied and overruled in this case.

13 And since I'm confident, since Mr. Aldous has made it
14 clear that he's going to take this up, we'll get a definitive
15 answer at least in our area of Texas as to whether or not
16 stock ownership of what we're talking about here constitutes a
17 disqualification.

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1 STATE OF TEXAS :

2 COUNTY OF COLLIN :

3 I, SHERI J. VECERA CSR/RPR, Official Court Reporter for
4 the 199th Judicial District Court in and for Collin County,
5 Texas, do hereby certify that the above and foregoing contains
6 a true and correct transcription of all the proceedings
7 directed by counsel to be included in the Statement of Facts
8 in the foregoing styled and numbered cause, all of which
9 occurred in open court or in chambers and were reported by me.

10 Witness my hand this the 19th day of May, 1997.

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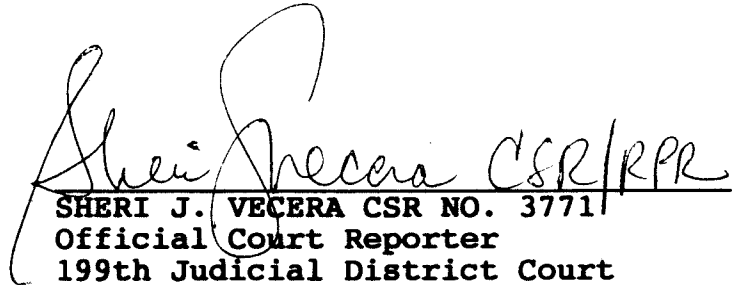
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