Case No. S165906

IN THE

SUPREME COURT OF CALIFORNIA

RANDAL D. HAWORTH, M.D., F.A.C.S.,
THE BEVERLY HILLS SURGICAL CENTER, INC.,
Petitioners

vs.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
Respondent,

SUSAN AMY OSSAKOW
Real Party in Interest.

After a Decision By the Court of Appeal,
Second Appellate District, Division Five
Case No. B204354

REPLY BRIEF ON THE MERITS

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REJOINDER ARGUMENTS

Real party in interest Susan Ossakow offers no reasoned explanation for application of an abuse of discretion review standard with respect to a vacatur order of a binding arbitration award based on the alleged bias of a neutral arbitrator. (Code of Civil Procedure section 1281.9, subdivision (a)(1).)

Ms. Ossakow represents that the facts are disputed. [Answer Brief (AB) pp. 35-49.] She fails to acknowledge that in the appellate court, "the parties suggest[ed] that a de novo standard of review should be applied in this case because the facts underlying respondent court's determination that a reasonable person might doubt Judge Gordon's ability to be impartial are undisputed." (*Haworth v. Superior Court* (2008) 79 Cal.Rptr.3d 800, 803.)

Further, Ms. Ossakow's reliance on *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706 is misplaced. [AB, pp. 38-43.] *Haraguchi* concerned Penal Code section 1424, governing *prosecutorial* recusal for a conflict of interest. It has no conceivable relevancy to the appropriate standard of review in this case.

In *Haraguchi*, this court "reaffirm[ed] [its] long-standing rule that [prosecutorial] recusal motions are reviewed under a deferential abuse of discretion standard." (43 Cal.4th at 709.) The issue in *Haraguchi* was not what standard of review applied, but whether there should be "a change in the standard of review." (*Id.* at 713.)

Haraguchi simply does not support Ms. Ossakow's position that abuse of discretion is the proper standard of review of vacatur orders of binding arbitration awards in a civil proceeding due to alleged statutory

failures of disclosure under Code of Civil Procedure section 1281.9.[1] As this court recently said: "The case is of no assistance to plaintiffs. . . because a judicial decision is not authority for a point that was not actually raised and resolved." (*Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 64, citations omitted.)

Ms. Ossakow concludes that the abuse of discretion standard should apply because it will encourage "arbitrators to error [sic] on the side of caution" by "creating a simple, common-sense, rule of thumb: 'When in doubt disclose.' Period." [AB, p. 3.] Her position is overly broad. It fails to address section 1286.2, subdivision (a) (6). That statute requires vacation of a binding arbitration award only in those instances where the neutral arbitrator failed to disclose matters of which he or she "was then aware" may constitute grounds for disqualification. (*Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc.* (2008) 162 Cal.App.4th 468, 477.)

Further, Standard 9 of the Ethics Standards for Neutral Arbitrators requires only that "[a] person who is nominated or appointed as an arbitrator must make a reasonable effort to inform himself or herself of matters that must be disclosed under standards 7 and 8."

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[1] All further references are to the Code of Civil Procedure unless otherwise indicated.

Also unaddressed by Ms. Ossakow is why case precedent specifically addressing trial court orders concerning jural bias should not be a baseline for determining the appropriate standard of review. After all, the factual grounds for seeking disqualification of a neutral arbitrator and a sitting jurist are the same. (section 1281.9, subd.(a)(1).)

> In any arbitration pursuant to an arbitration agreement, when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial, including all of the following: (1) The existence of any ground specified in Section 170.1 for disqualification of a judge. (*Ibid.*)

Indeed, neutral arbitrators and jurists have the same continuing duty of disclosure throughout the proceedings. Section 1281.91, subdivision (d), requires that "[i]f any ground specified in Section 170.1 exists, a neutral arbitrator shall disqualify himself or herself upon the demand of any party made before the conclusion of the arbitration proceeding." The parallel jural recusal statute reads:

> If grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge. (section 170.3., subd. (b)(2)(B)(4).)

In the end, regardless of the standard of review applied, the result will be the same. Respondent committed prejudicial error in vacating the binding arbitration award (Award) in petitioners' favor as there is no substantial evidence supporting that vacatur order, as otherwise contended by Ms. Ossakow. [AB, pp. 43-48.]

Finally, Ms. Ossakow proposes no viable rule for the scope of 1281.9 disclosure by a potential neutral arbitrator. [AB, pp. 61-62.] Instead, Ms. Ossakow offers a narrow rule tailored to what she perceives are the "facts of this case." [AB, p. 61.] Such a rule will not benefit the public. It will not provide guidance to the bench and bar. It will not assist future parties in analyzing the adequacy of a neutral arbitrator's 1281.9 disclosures should that neutral's partiality be raised as the basis for a vacatur order.

Petitioners, on the other hand, posit that since neutral arbitrators and sitting jurists owe the same duty of disclosure to the parties, then the criteria considered by this court and the appellate courts in analyzing claims of jural bias should apply equally to a proposed neutral's 1281.9 disclosure obligations. [Petitioners' Opening Brief (OB), pp. 16-36.] That criteria is whether the matter constituting potential bias has a factual and temporal nexus to the parties and/or the arbitral issues. [OB, pp. 34-35; *People v. Chatman* (2006) 38 Cal.4th 344, 363-364.]

LEGAL DISCUSSION

I.

APPELLATE REVIEW SHOULD BE DE NOVO BECAUSE A VACATUR ORDER SUBSTANTIALLY IMPACTS THE ADMINISTRATION OF JUSTICE.

Ms. Ossakow states that binding "[a]rbitration is the most common form of alternate dispute resolution" "because arbitration 'does not depend on courts, except for enforcement.' " [AB, p. 18.] She argues: "Because this Court has been silent as to the proper standard of review applicable to orders vacating arbitration awards for the neutral arbitrators' failure to make a disclosure, the Courts of Appeal have been able to reverse or affirm those orders by employing whichever standard of review best suits their own personal predilections." [AB, p. 37.]

By her very statements then, Ms. Ossakow concedes that a trial court's vacatur order under section 1281.9 substantially impacts the administration of justice in California because, following her argument, without clear guidance from this court, the appeal courts will continue to utilize whichever standard of review they choose.

As discussed at length in petitioners' opening brief (OB, pp. 8-16), this is the type of case which involves "a critical consideration, in a factual context, of legal principles and their underlying values," thus making the issues for review "predominantly legal" and the appeal court's "determination is [thus] reviewed independently." (*Crocker National v. City and County of San Francisco* (1989) 49 Cal. 3d 881, 888.)

Justice Mosk pointed out in his *Haworth* dissent that because respondent's vacatur order was "based in part on section 170.1 subdivision (a)(6)(A)(iii), [the majority opinion] *also significantly expands the circumstances in which California judges must be disqualified from hearing cases*." (*Haworth, supra,* 79 Cal.Rptr.3d 800 at 809, italics added.)

> To approve vacating the award in this case is therefore contrary to the California Supreme Court's mandate that section 170.1 is to be 'appl[ied] with restraint' (*People v. Chatman* (2006) 38 Cal.4th 344, . . .), and is unjustified by any articulated benefit to the administration of justice. (*Ibid.*)

In his follow-on discussion of the appropriate standard of review, Justice Mosk noted, as did the majority justices (79 Cal.Rptr.3d at 803), that "[t]he parties agreed the standard of review is de novo." (*Id.* at 809, dis.opn., Mosk, J.)

> The facts in this case are undisputed. The sole question in this case is whether those undisputed facts gave rise to a duty to disclose – that is, whether "a person aware of the [undisputed] facts might reasonably entertain a doubt that the judge would be able to be impartial." (§§ 170.1, subd.(a)(6)(A)(iii); 1281.9, subd.(a)(1). In the context of judicial disqualification, this court has held that when the facts are not disputed, this is a question of law subject to de novo review. (*Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 319. . .; *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 171. . .) There is no reason why the rule should be different in the context of arbitrator disclosure. (*Id.* at 810, dis.opn. Mosk, J.)

The nub of the issue then is the *interpretation* of the undisputed facts which led to Judge Gordon's censure. Ms. Ossakow argues that "Judge Gordon was disciplined – published by public censure – for his treatment of women, including disparaging comments about their physical characteristics, based on the discriminatory courtroom environment he created by demeaning women as stereotypical objects." [AB, p. 44.]

Ms. Ossakow thus contends that section 1281.9 was triggered, compelling a duty by Judge Gordon to disclose his censure, because the facts of that censure reveal that he possesses an attitude or state of mind that is hostile towards women and their physical attributes, precluding him from acting as a fair-minded person in judging her cosmetic surgery malpractice case against petitioners.

Petitioners disagree. Ms. Ossakow distorts the Commission's factual findings which were adopted by this court in publically censuring Judge Gordon. While Judge Gordon's " 'conduct [was] prejudicial to the administration of justice that brings the judicial office into disrepute,' " this court also concluded that Judge Gordon's "actions were taken in an ostensibly joking manner and there was no evidence of intent to cause embarrassment or injury, or to coerce, to vent anger, or to inflict shame. . ." (*In re Gordon* (1996) 13 Cal.4th 472, 473-474.) [Vol. I, Ex. E, pp. 51-52.]

Although injudicious, Judge Gordon's conduct does not reveal a state of mind reflecting bias against women and/or their physical attributes. The undisputed facts reflected in this court's public censure of Judge Gordon mandate de novo review.

LEGAL DISCUSSION

II.

REGARDLESS OF THE STANDARD OF REVIEW UTILIZED, THERE WAS NO EVIDENCE OF GENDER BIAS BEFORE RESPONDENT JUSTIFYING THE VACATUR ORDER.

Much of the purported evidence that Ms. Ossakow relies on to support her position that Judge Gordon is biased against women was stricken. [AB, pp. 7, 8, 11-13, 47, 48.] Any objections to respondent's

evidentiary rulings are waived as Ms. Ossakow did not raise the issue before the appeal court. (*Tiernan v. Trustees of Calif. State Univ. & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

Initially, Ms. Ossakow discusses her complaints following the lip enhancement procedure performed by petitioner Haworth and her emails to plastic surgeons regarding surgical correction. [AB, pp. 7, 8.] This information was disclosed in Ms. Ossakow's response to demand for production. [Vol. I, Ex. E, pp. 90-101.] Respondent sustained petitioners' evidentiary objections to this evidence proffer by Ms. Ossakow. [Vol. II, Ex. G, pp. 322:21-323:8; Ex. N, p. 381:12.]

Ms. Ossakow also points to Judge Gordon's grant of petitioners' motion for summary adjudication of her medical battery claim as evidence of gender bias. [AB, pp. 11, 12, 47-48.] Again, respondent sustained petitioners' evidentiary objections to the parties' pleadings lodged with the arbitration panel with respect to this motion on the ground that it was irrelevant to Ms. Ossakow's vacatur petition. [Vol. I, Ex. E, pp. 197-200; Vol. II, Ex. E, pp. 201-260; Ex. G, pp. 325:6-326:22; Ex. N, p. 381:12.]

Respondent likewise sustained petitioners' evidentiary objections to Ms. Ossakow's proffer of Internet articles, and an excerpt from a May 17, 1996 article in the Los Angeles Times regarding Judge Gordon's censure. [Vol. II, Ex. E, pp. 301-307; Ex. G, pp. 328:1-329:9; Ex. N., p. 381:12.]

Regardless, Ms. Ossakow quotes the internet articles as proof of Judge Gordon's "bias against women, minorities and physical attributes". [AB, pp. 12-13, 48.] At the same time, she decries "the reliability of any information obtained in this manner", namely, by accessing the Web. [AB, p. 59.]

In Ms. Ossakow's words: "Given the intentionally misleading and blatantly erroneous information on the Web, reliance on the integrity of online information sources is no solution." [AB, p. 59.] Her statement addresses the "suggest[ion]" of dissenting Justice Mosk in *Haworth, supra* (79 Cal.Rptr.3d 800 at 817, fn. 4) that an internet search of a proposed neutral arbitrator by the arbitrating parties' counsel may be a far more economical and less time-consuming endeavor than

> forc[ing]the parties to endure the time and expense of a pointless arbitration proceeding, a motion to vacate the arbitration award in the trial court, a writ proceeding in this court, review before the California Supreme Court, perhaps further proceedings in the California Supreme Court, remand to the trial court and then another arbitration proceeding, and whatever happens thereafter. (*Ibid.*)

Ms. Ossakow's very argument against the reliability of information gleaned from internet searches belies her reliance on the internet articles she read after the Award issued to support her claim of gender bias against Judge Gordon.

Finally, Ms. Ossakow points to the Award's factual findings as evidence of "actual" gender bias by Judge Gordon. [AB, pp. 46, 49.] This issue was addressed in petitioners' opening brief. [OB, pp. 32-33.] Suffice to state that had the same factual findings been contained in a statement of decision by the trial court, such would not be a ground for disqualification of the trial judge.

Thus, section 170.2 reads: "It shall not be grounds for disqualification that the judge: (a). . . (b) Has in any capacity expressed a view on a legal or factual issue presented in the proceedings, except as provided in paragraph (2) of subdivision (a) of, or subdivision (b) or (c) of, Section 170.1."[2]

In a similar vein, the United States Supreme Court said that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." (*Liteky v. United States* (1994) 510 U.S. 540, 555, cit. omit.) The Court concluded that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (*Ibid.*)

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[2] The 170.1 statutory exceptions are inapplicable.

It follows that Ms. Ossakow's reliance on the Award's factual findings as proof of bias by Judge Gordon has no basis in the record. Rather, Judge Gordon's attribution of Ms. Ossakow's prior multiple cosmetic facial procedures as a causative factor in the poor cosmetic outcome she attributed to petitioner Haworth was a reasonable inference gleaned from the medical evidence presented at the arbitration.

LEGAL DISCUSSION

III.

NEUTRAL ARBITRATORS AND JURISTS HAVE THE SAME ONGOING DUTY TO DISCLOSE TO THE PARTIES THOSE MATTERS WITH A FACTUAL AND TEMPORAL NEXUS TO THE ISSUES BEING ARBITRATED/LITIGATED WHICH COULD CAUSE A PERSON AWARE OF THE FACTS TO REASONABLY ENTERTAIN A DOUBT CONCERNING THEIR RESPECTIVE IMPARTIALITY.

Whether a neutral arbitrator/jurist is potentially biased must be analyzed from the standpoint of the "average person on the street", not " the litigants' necessarily partisan views' ". (*Leland Stanford Junior*

University v. Superior Court (1985) 173 Cal.App.3d 403, 408.) Further, the matter constituting the alleged bias must be analyzed "as of the time" the charge of bias is leveled, not at the time the offending matter occurred. (*Ibid.*)

Moreover, the test of arbitral/jural bias must be based on objective criteria. As one appeal court observed: "If the impression of possible bias rule is not to emasculate the policy of the law in favor of the finality of arbitration, the impression must be a reasonable one." (*San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co.* (1972) 28 Cal.App.3d 556, 568.) [In the case before it, the appeal court concluded "that the evidence [of arbitral bias] was insufficient to create a reasonable impression of possible bias regardless of whether the issue be viewed as one of law or fact or as a mixed question of law and fact." (*Ibid.*).]

The federal recusal statute, 28 U.S.C., section 455, subdivision (a), likewise applies an objective "impression of possible bias" rule. It reads: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The U.S. Supreme Court calls subdivision (a) the " 'catchall' recusal provision, covering . . . 'bias or prejudice' grounds' ", and which "requir[es]" that such matter "be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance." (*Liteky, supra,* 510 U.S. 540 at 1153-1154, cits. omit., italics, the Court's.)

The United States Judicial Conference adopted a new version of its ethics rules effective July 1, 2009. The revised Code of Conduct for United States Judges for the first time defines "appearance of impropriety". Revised Canon 2A reads, in pertinent part,

> An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.[3]

The definition of "appearance of impropriety" stated in revised Canon 2A is similar to the existing statutory language of section 170.1, subdivision (A)(6)(A)(iii) ["A judge shall be disqualified if . . . [a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial"] and section 1281.9, subdivision (a) [". . .the

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[3] Concurrently with this reply brief, petitioners filed a motion requesting that judicial notice be taken of the revised federal Code of Conduct.

proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial . . ."].

On the state of the record, there is no basis to conclude that Judge Gordon's ill-advised attempt at humor directed to female court staffers some 17 to 19 years ago could cause a reasonable person aware today of the circumstances under which that conduct occurred to conclude that Judge Gordon is biased against women and their physical attributes. [OB, p. 4.]

Indeed, the evidence Ms. Ossakow proffered to respondent to support her claim of gender bias was, in part, dredged from the very internet articles she now claims are "intentionally misleading and blatantly erroneous. . ." [AB, p. 59.]

Insofar as the specific misconduct attributed to Judge Gordon, the only reliable information is that set forth in his public censure. No where within the four corners of *In Re Gordon, supra,* did this court censure Judge Gordon for gender bias against females generally, or female litigants specifically.

An example of the quantum of proof necessary to establish "a deep-seated. . .antagonism that would make fair judgment impossible" is cited in

Liteky, supra. There, the majority quoted the "statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed.481 (1921), a World War I espionage case against German-American defendants: 'One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their 'hearts are reeking with disloyalty.' *Id.* at 28 (internal quotation marks omitted)." (*Liteky, supra,* 510 U.S. 540 at 555.)

In sharp contrast, Ms. Ossakow predicates her gender bias claim upon the fact that Judge Gordon was publically censured for injudicious comments made to female court staffers almost two decades ago. [*In re Gordon, supra,* 13 Cal.4th 472 at 473-474.) [Vol. I, Ex. E, p. 51.] Ms. Ossakow claims that such is substantial evidence that Judge Gordon is biased *today* against "women" and was thus required to disclose his censure to the arbitrating parties.

Ms. Ossakow not only tortures the facts underlying Judge Gordon's censure, that conduct occurred so long ago that no reasonable person aware of all the relevant facts today could reasonably entertain a doubt that Judge Gordon could not be neutral or objective in adjudicating her medical malpractice claim against petitioners.

As Justice Mosk remarked: ". . .the trial court's position might well require disclosure by one who had decades earlier carried out or complied with the policies of a law firm or club that would not admit female lawyers or members. And it might cover those who did what Judge Gordon did but were never reported or disciplined." (*Haworth, supra,* 79 Cal.Rptr.3d 800 at 815, dis. opn., Mosk, J.)

In analyzing Judge Gordon's conduct, society's changing mores must be considered. For instance, in *Parrish v. Board of Commissioners of Alabama State Bar* (5th Cir. 1975) 524 F.2d 98, cert. denied, 425 U.S. 944 (1977), plaintiffs sued alleging discrimination in the administration of the Alabama Bar examination. They sought the trial judge's disqualification, in part, on the ground that he had been president of the Montgomery County Bar Association during which time the Association's bylaws barred Black members. (*Id.* at 100-101.)

The Fifth Circuit Court of Appeals affirmed the district court's denial of plaintiffs' recusal motion. It reasoned:

> Considering first the s 455(a) claim, and the relevant facts and circumstances, we are of the view that a reasonable man would not infer that Judge Varner's "impartiality might reasonably be questioned". []

> Judge Varner was president of a local bar association in which black lawyers were denied membership. This policy was changed during or shortly after his administration as president. As the affidavit makes clear, . . ., he, at the least, set the change in policy in motion by appointing a committee to revise the by-laws. He is faulted for not making an effort to obtain membership for black lawyers through inviting them to join, yet he, in effect, did just this in having the by-law changed. *Appellants' logic would catch saint and sinner alike.*
>
> There is hardly any judge in this circuit who was not a member of a segregated bar association at one time, and many have held a high office in the bar associations. The way of life which included segregated bar associations has been eliminated but only a new generation of judges will be free from such a charge. In any event, this circumstance will not support a claim of lack of impartiality. *Such a claim must be supported by facts which would raise a reasonable inference of a lack of impartiality on the part of a judge in the context of the issues presented in a particular law suit.* There are no such facts here. The stated conduct of Judge Varner does not support such an inference. (*Id.* at 103-104, italics added.)

Very recently, the U.S. Supreme Court emphasized the importance of a factual and temporal nexus between the matter consisting of alleged bias and the litigation issues before the challenged jurist. In *Caperton v. A.T. Massey Coal Co., Inc.* (June 8, 2009, No. 08-22) ___U.S.___[2009 WL 1576573 (U.S.W.Va.)], the Court recused Brent Benjamin, the acting chief justice of the Supreme Court of Appeals for West Virginia. He had refused to recuse himself from hearing an appeal of a $50 million trial court judgment entered on a jury verdict. Defendants A.L. Massey Coal Co. and

its affiliates (Massey) were found liable for fraudulent misrepresentation, concealment, and tortious interference with contract. (*Id.* at pp. 3-4.)

The verdict was rendered in August 2002. Before Massey appealed to the Supreme Court of Appeals, West Virginia held its 2004 judicial elections. Don Blankenship, who was Massey's chairman, CEO and president, contributed over $3 million to then attorney Benjamin's successful campaign to unseat Supreme Court of Appeals Justice McGraw. (*Caperton, supra,* 2009 WL 1576573 (U.S.W.Va.) at p. 4.)

In October 2005, before Massey filed its petition for appeal before West Virginia's highest court, plaintiffs Caperton, et al., moved to disqualify Justice Benjamin under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Plaintiffs contended that they would be denied a fair hearing due to Justice Benjamin's alleged partiality towards Massey. (2009 WL 1576573 (U.S.W.Va.) at p. 4.)

In April 2006, Justice Benjamin denied the motion. He found "no objective information . . .to show that [he] has a bias for or against any litigant, that [he] has prejudged the matters which comprise this litigation, or that [he] will be anything but fair and impartial." (2009 WL 1576573 (U.S.W.Va.) at p. 4.)

In December 2006, Massey filed its petition for appeal challenging the $50 million jury verdict. The West Virginia Supreme Court of Appeals granted review. In November 2007, a five justice panel, in a 3-2 decision, reversed the trial judgment. Justice Benjamin voted with the majority. (2009 WL 1576573 (U.S.W.Va.) at p. 4.)

Plaintiffs sought a rehearing and again moved to recuse Justice Benjamin who was now the acting chief justice. Justice Benjamin once more refused to recuse himself from rehearing the matter. In April 2008, the Court again reversed the jury verdict in another 3-2 decision with Justice Benjamin again in the majority. (2009 WL 1576573 (U.S.W.Va.) at p. 5.)

Plaintiffs' petition for writ of certiorari was subsequently granted by the U.S. Supreme Court. The question presented was whether plaintiffs were denied their due process right to a fair hearing because Justice Benjamin "had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages." (2009 WL 1576573 (U.S.W.Va.) at pp. 3, 5-6.)

Writing for the majority, Justice Kennedy "conclude[d] that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case." (2009 WL 1576573 (U.S.W.Va.) at p. 11.)

> Blankenship's campaign contributions – in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election – had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented." (*Id.* at p. 12, cit. omit.)

Justice Kennedy continued: "The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical." (2009 WL 1576573 (U.S.W.Va.) at p. 12.)

> It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The $50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeal was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor's company $50 million. (*Ibid.*)

Justice Kennedy stressed that "Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome." (2009 WL 1576573 (U.S.W.Va.) at p. 12.) And while "Justice

Benjamin did undertake an extensive search for actual bias," the majority concluded that "objective standards may also require recusal whether or not actual bias exists or can be proved." (*Ibid.*)

> The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship's significant and disproportionate influence – coupled with the temporal relationship between the election and the pending case – " ' offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance [when "weigh[ing] the scales of justice equally between contending parties"] nice, clear and true.' " (*Ibid.*)

In short, both this court (*People v. Chatman, supra,* 38 Cal.4th 344) and the U.S. Supreme Court (*Caperton, supra*) consider as crucial factors in determining jural bias: (1) the relevancy of the matter constituting the bias in the context of the proceedings before the challenged jurist; and (2) its temporal nexus to the proceedings in which the challenge is made.

Further, both this court and the U.S. Supreme Court have concluded that only "*extreme* circumstances" (*Chatman, supra,* 38 Cal.4th at 363-364, italics added) or "*extreme* facts" (*Caperton, supra* (2009 WL 1576573 (U.S.W.Va.) at p.12, italics added) justify the recusal of a sitting judge.

There is no logical reason why this criteria should not be applied by California's trial courts when confronted with a petition/motion to vacate a binding arbitration award based on the purported undisclosed bias of the neutral arbitrator. Requiring the lower courts to evaluate evidence of

alleged arbitral bias in the context of already existing criteria utilized by the courts in determining jural bias will only bring consistency to the lower court's findings. Such consistency favorably impacts the administration of justice.

In turn, the appeal court's inquiry will be to critically consider in a factual context, the trial court's findings and to determine whether those findings support a vacatur order under existing case law. If the lower court's findings are inconsistent with the legal principles governing recusal, namely, an absence of factual relevancy and/or a temporal nexus to the arbitrated matter, then the trial court's vacatur order must be reversed. In this manner, the integrity of binding arbitration and the rule of law are maintained.

Applying these principles here, the record is devoid of evidence that in 2006, when Judge Gordon was chosen as the parties' neutral arbitrator, he had a predisposition to rule against Ms. Ossakow because of injudicious comments made to female court staffers some 16 years earlier.

Disqualification of a neutral arbitrator/jurist should only be "triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a [neutral arbitrator/jurist's] rulings or findings." (*Liteky, supra,* 510 U.S. 540

at 557-558, conc. opn. Kennedy, J.) .) As Justice Kennedy observed: "I think all would agree that a high threshold is required to satisfy this standard." (*Id.* at 558.)

Justice Kennedy said that the "standard that ought to be adopted for all allegations of an apparent fixed predisposition" under the federal recusal statute, 28 U.S.C., section 455, subdivision (a), "follows from the statute itself: Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." (510 U.S. 540 at 564, conc. opn. Kennedy, J.)

"Thus, . . .a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute." (*Liteky, supra,* 510 U.S. at 558, conc. opn. Kennedy, J. ; *Caperton, supra,* 2009 WL 1576573 (U.S.W.Va.) at p. 14.)

The facts underlying Judge Gordon's public censure do not support Ms. Ossakow's claim of gender bias. There is no evidence that Judge Gordon sitting as a neutral arbitrator in 2007 was predisposed to rule against Ms. Ossakow because she was a women with complaints of facial injury after undergoing cosmetic facial surgery.

No reasonable person apprised today of the circumstances of the censurable conduct which occurred in 1990-1992 could reasonably entertain a doubt that Judge Gordon is biased against women and/or their physical attributes. Respondent clearly erred in vacating the Award.

CONCLUSION

For the very reason that binding arbitration awards are not subject to vacatur except on narrow statutory grounds absent a contractual provision allowing for appellate review (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1340), parties utilizing this method of alternate dispute resolution are entitled to the same measure of scrutiny by a reviewing court when a claim of neutral arbitrator bias is raised, as when such a claim is made against the presiding jurist in a civil proceeding.

Appellate courts should exercise their independent judgment in reviewing a trial court's vacatur order given the gravity of a bias challenge. A vacatur order is inimical to the concept of binding arbitration as an economical and expeditious avenue to resolve disputes. When it is based on flimsy evidence, as happened here, the integrity of the arbitral process is eroded. In such a case, it is "the arbitrato[r] and the institution of arbitration

that pay the price." (*Haworth, supra,* 79 Cal.Rptr.3d 800 at 817, dis.opn., Mosk, J.)

Dated: July 20 2009

Respectfully submitted,

SCHMID & VOILES

By: _____
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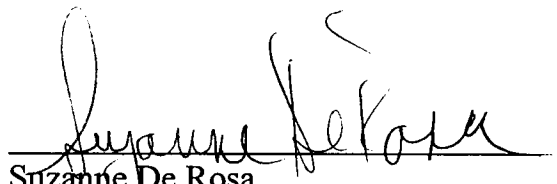
CERTIFICATION OF WORD COUNT

I certify, pursuant to California Rules of Court, Appellate Rule 8.520 (c)(1), that this Reply Brief On The Merits of defendants and petitioners Randal D. Haworth, M.D. and The Beverly Hills Surgical Center, Inc. has a word count of 5,575 as calculated by the Microsoft Windows XP Professional word processing program used to generate the brief.

DATED: July 20, 2009



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