

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

RICHARD A. FRISK,

Petitioner,

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

NORTHWEST SURGICAL
DEVELOPMENT COMPANY, INC.,

Real Party in Interest.

G045591

(Super. Ct. No. 30-2011-00484502)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING; NO CHANGE IN
JUDGMENT

The opinion filed on October 28, 2011, and certified for publication is ordered modified as follows:

1. On page 2, second and third lines of the fourth full paragraph, delete the phrase “but *Louisiana-Pacific* has not stood the test of time” and substitute “but *Louisiana-Pacific* based its decision on a legal landscape that has since shifted” so the sentence reads:

We recognize that *Louisiana-Pacific Corp. v. Philo Lumber Co.* (1985) 163 Cal.App.3d 1212 (*Louisiana-Pacific*) holds to the contrary, but *Louisiana-Pacific* based its decision on a legal landscape that has since shifted.

2. On page 3, first line of the second full paragraph, delete the phrase “In June 2011, Northwest fired Frisk” and replace it with, “In June 2011, Northwest purported to fire Frisk” so that the sentence reads:

In June 2011, Northwest purported to fire Frisk, and sued him for injunctive relief, breach of employment contract, breach of the shareholders’ agreement, and breach of fiduciary duty.

3. On page 5, first sentence of the third full paragraph, the phrase “before ruling on contested issues,” is inserted between the words “opportunity,” and “lest” so the sentence now reads:

Trial courts must act upon peremptory challenges at the first available opportunity, before ruling on contested issues, lest this important right be lost or diminished through procedural tactics or maneuvers.

4. On page 8, delete the last sentence of the fourth full paragraph, starting with “The peremptory challenge” and ending with “therefore moot.”

5. On page 8, a new paragraph is added following the fourth full paragraph and directly above subsection IIC. The new paragraph provides:

Our opinion does not contradict the longstanding principle that peremptory challenges, once accepted by the court, remain effective notwithstanding the subsequent dismissal of the challenging party. As our Supreme Court noted in *Home Ins. Co., supra*, 34 Cal.4th at p. 1033, “when a party among several on the same side has disqualified a trial judge pursuant to section 170.6 and subsequently is dismissed from the action, the disqualification is not thereby annulled — the remaining parties on the

same side are not entitled to a new peremptory challenge.” Here, Avanti was dismissed from the litigation *before* its motion to disqualify Judge Horn (Code Civ. Proc., § 170.6) came to the court for acceptance. Far from being annulled, the peremptory challenge was never effective because it had been rendered moot.

These modifications do not effect a change in the judgment. The petition for rehearing is DENIED.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.