IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 2, 2023

BEN C. ADAMS v. BUCHANAN D. DUNAVANT ET AL. v. WATSON BURNS, PLLC ET AL.

Appeal from the Probate Court for Shelby County
No. PR-24390 Joe Townsend, Judge

No. W2023-00304-COA-T10B-CV

Two law firms seek accelerated interlocutory review of the denial of their motion to disqualify the trial judge. Because there is a reasonable basis for questioning the judge's impartiality, we reverse and remand for reassignment.

Tenn. Sup. Ct. R. 10B Interlocutory Appeal as of Right; Judgment of the Probate Court Reversed

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which THOMAS R. FRIERSON II and KENNY W. ARMSTRONG, JJ., joined.

John S. Golwen, Memphis, Tennessee, for the appellant, Bass, Berry & Sims, PLC.

William F. Burns, Frank L. Watson III, and William E. Routt III, Memphis, Tennessee, for the appellant, Watson Burns, PLLC.

George Nassar, Jr. and Jeremy G. Alpert, Memphis, Tennessee, for the appellees, Mary Douglas Dunavant, individually and as guardian, and Lillian Dunavant.

OPINION

I.

A.

Watson Burns, PLLC and Bass, Berry & Sims PLC (collectively "the Firms") claim an interest in funds held in two trusts for payment of their fees. Their interests purportedly

arise from a lien granted by their client, Buchanan Dobson Dunavant, who is a beneficiary of the trusts. The Firms also claim a statutory lien in the trust funds. *See* Tenn. Code Ann. §§ 23-2-102, -103 (2021).

On November 29, 2022, the trustee of the trusts commenced this interpleader action, seeking to deposit the funds held in the trusts with the Shelby County Probate Court. *See* TENN. R. CIV. P. 22.02. Previously, the probate court had ordered the trustee to pay funds from the trusts to Mr. Dunavant's former spouse, an adult child, and a law firm under settlements reached in four other cases. The Firms did not represent Mr. Dunavant in the settled cases. The trustee alleged that there were insufficient funds to satisfy both the Firms' claims and those of the settlement claimants. So the trustee requested permission to interplead the funds held in trust for Mr. Dunavant, an award of attorney's fees and costs, and an order discharging the trustee from liability and dismissing him from the case.

On December 6, 2022, the Firms moved for disqualification and recusal of the probate court judge. As grounds, the Firms asserted that, before taking the bench, the judge served as an expert witness for a petitioner in another trust dispute in which one of the Firms, Watson Burns, PLLC, represented the respondent. The court in that case ultimately concluded that the petitioner's challenge was frivolous and awarded sanctions and attorney's fees to the respondent. When Watson Burns filed a fee application, the petitioner opposed it and hired the probate court judge, then a private attorney, to review the law firm's fees and billing statements. In an affidavit, the judge had opined that the fees were "outrageous and clearly excessive under [Rule of Professional Conduct] 1.5 for the work allegedly performed and the straightforward nature of the issues involved."

The following day, apparently unaware of the Firms' motion for disqualification and recusal, the probate court entered an order on the petition for interpleader. The court granted the request to interplead the funds from the trusts, awarded the trustee his attorney's fees and court costs, and dismissed him from the case. But the court also made a finding that one of the attorneys with Watson Burns had acted against Mr. Dunavant's interests by opposing the settlements in the four other cases. So it reasoned that the Firms should forfeit their statutory lien for attorney's fees. The court also found that, because the settlements did not allow for the payment of the Firms' fees, Mr. Dunavant opposed the award of attorney's fees to the Firms. "[T]o achieve judicial economy," the court "assume[d] jurisdiction" over the Firms' request for attorney's fees. And it ordered that the interpleaded funds be distributed to Mr. Dunavant's former spouse and adult child.

We addressed the Firms' motion for disqualification and recusal in a related interlocutory appeal. *See Adams v. Dunavant*, No. W2022-01747-COA-T10B-CV, 2023 WL 1769356 (Tenn. Ct. App. Feb. 3, 2023). Because the probate court never ruled on the motion, we vacated its order on the interpleader petition. *Id.* at *4. And we remanded with instructions for the probate court judge to decide the motion for disqualification and recusal promptly and, if the judge denied the motion, to "state in writing the grounds upon which

he denied the motion." *Id.* We also provided that, in the event the motion for disqualification and recusal was denied on remand, "the [F]irms may seek further appellate relief as they deem necessary and appropriate." *Id.*

B.

Following the remand, the probate court promptly denied the Firms' motion for disqualification and recusal. It determined that, to the extent disqualification or recusal was based on rulings in the four cases that Mr. Dunavant settled, the "factual and legal arguments are moot" based upon the outcome of the related interlocutory appeal. And even if not moot, adverse rulings are not grounds for recusal. The court also determined that the prior expert testimony was not a basis for recusal. It reasoned as follows:

> The only other specific fact alleged in the 10B motion for recusal concerns a 2017 opinion in an affidavit by then private attorney Joe Townsend involving Watson Burns and other attorneys regarding the reasonableness of fees as a basis for sanctions against a trust beneficiary in the amount of approximately 1.9 million dollars. The amount appeared to exceed the amount of fees related to action for which the trust beneficiary was being sanctioned. The issue regarding the sanctions was resolved by the trial court, the appellate courts, and the parties years ago. Attorney Joe Townsend did not represent a party in that action. These facts do not appear to be a basis for recusal. A judge's prior participation in other litigation as a private attorney adverse to a party in current litigation does not necessitate disqualification from presiding over different litigation involving one of the same parties.

A few days later, the probate court entered a new order granting interpleader and discharging the trustee from liability. The court noted that the new order mirrored its previous order "with a few modifications and notice provisions." In the new order, it found "the actions of The Firms to set aside the settlement agreements in the Other Probate Cases were not in the interest of Buchanan D. Dunavant and The Firms should forfeit their Attorney Charging lien against Buchanan D. Dunavant." The court again found that Mr. Dunavant opposed the award of attorney's fees to the Firms. And it assumed jurisdiction over the Firms' request for attorney's fees and ordered distributions to Mr. Dunavant's former spouse[1] and adult child.

[1] The court ordered distributions to Mr. Dunavant's former spouse in her capacity as a trustee or as a custodian for their minor children.

II.

A.

Rule 10B of the Rules of the Supreme Court of Tennessee governs the procedure for "determin[ing] whether a judge should preside over a case." TENN. SUP. CT. R. 10B. In a Rule 10B accelerated interlocutory appeal, our review is limited to the trial court's denial of the motion for disqualification or recusal. *Duke v. Duke*, 398 S.W.3d 665, 668 (Tenn. Ct. App. 2012). We apply a de novo standard of review. TENN. SUP. CT. R. 10B § 2.01.

In Tennessee, litigants "have a fundamental right to a 'fair trial before an impartial tribunal.'" *Holsclaw v. Ivy Hall Nursing Home, Inc.*, 530 S.W.3d 65, 69 (Tenn. 2017) (quoting *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002)); *see Kinard v. Kinard*, 986 S.W.2d 220, 227 (Tenn. Ct. App. 1998) (reasoning that litigants "are entitled to the 'cold neutrality of an impartial court'" (quoting *Leighton v. Henderson*, 414 S.W.2d 419, 421 (Tenn. 1967))); *see also* TENN. CONST. art. VI, § 11. It "goes without saying that a trial before a biased or prejudiced fact finder is a denial of due process." *Wilson v. Wilson*, 987 S.W.2d 555, 562 (Tenn. Ct. App. 1998).

But actual bias is not the only basis for recusal. Tennessee has long recognized that "the appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 565 (Tenn. 2001); *see In re Cameron*, 151 S.W. 64, 76 (Tenn. 1912) ("[I]t is of immense importance, not only that justice shall be administered . . . , but that [the public] shall have no sound reason for supposing that it is not administered."). A judge must "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." TENN. SUP. CT. R. 10, Rule 2.11(A). This test is "an objective one." *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008). It requires recusal "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Davis*, 38 S.W.3d at 564-65 (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994)).

B.

The thrust of the motion for disqualification and recusal filed by the Firms was that the probate court judge was actually biased against them. As evidence, they relied on an expert opinion the judge gave while in private practice. Before joining the bench, the judge had reviewed a fee request of Watson Burns in connection with a probate court case. In his opinion, the law firm's billing statements were "unintelligible" and "objectionable" due to the manner in which they had been redacted before submission. He also criticized the firm's use of "'block billing' by lumping together various tasks in one general entry and failing to delineate the time devoted to each task. And in his view, the firm's statements

"reflect[ed] that numerous attorneys . . . ha[d] work[ed] on this matter which [wa]s . . . unnecessary, unreasonable, and duplicitous for the work performed." As for the amount of fees requested, he opined that they were "outrageous," "clearly excessive," and in violation of the Rules of Professional Conduct.[2] The Firms contended that, as co-counsel with Watson Burns, "Bass, Berry & Sims PLC ha[d] been equally negatively impacted by the Court's [lack of] impartiality."

As the probate judge correctly noted, a judge is generally not required to recuse simply because he advocated against one of the parties while in private practice. *Balmoral Shopping Ctr., LLC v. City of Memphis*, No. W2022-01488-COA-T10B-CV, 2022 WL 17075631, at *3 (Tenn. Ct. App. Nov. 18, 2022) (holding recusal unnecessary even though the judge, before taking the bench, served as opposing counsel against one of the parties); *see also* Hon. Virginia A. Phillips & Hon. Karen L. Stevenson, RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL-NATIONAL EDITION, Ch. 16-D, (The Rutter Group 2022) (recognizing "[a] judge's prior career is generally *not* ground for disqualification in cases in which the judge has no knowledge of the facts or interest"). But serving as a lawyer in a case is not the same as serving as an expert witness in a case. A lawyer's "duty [is] to advance a client's objectives diligently through all lawful measures." ABA Comm. on Ethics & Pro. Resp., Formal Op. 407 (1997) [hereinafter Formal Op. 407]. The lawyer's representation "does not constitute an endorsement of the client's political, economic, social, or moral views or activities." TENN. SUP. CT. R. 10, Rule 1.2(b). The expert witness offers his own views. A "testifying expert provides evidence that lies within his special knowledge by reason of training and experience and has a duty to provide the court . . . truthful and accurate information." Formal Op. 407.

We presume the judge's prior expert testimony about Watson Burns's billing statements and fees was truthful. Of course, the judge's prior opinions might be assumed to be limited to the billing statements submitted and fees requested in the case for which he was hired as an expert. And the circumstances under which the Firms are seeking recovery of a fee are different here. This is an interpleader action; the Firms are not seeking an award of fees from the court. So the opinions the judge offered as expert witness might be insufficient alone to justify recusal.

Here, the Firms also point to other actions of the probate court judge that they claim indicate bias. Among other things,[3] they complain that the court's order on their motion

[2] Under Tennessee Rule of Professional Conduct 1.5, a lawyer must "not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." TENN. SUP. CT. R. 8, Rule 1.5(a).

[3] The Firms also complain that the probate court did not hold a hearing on their motion for disqualification and recusal despite their request for a hearing. Although a hearing might be appropriate in some instances, given that judges must "act promptly by written order" on motions to recuse, we do not find the lack of a hearing indicates bias. *See* TENN. SUP. CT. R. 10B § 1.03.

for disqualification and recusal "does not address or explain how or whether he can act with impartiality in connection with Watson Burns' lien and claim for legal fees in light of the inflammatory opinions he lodged against Watson Burns just a few years ago in connection with a fee request." They also complain that the court's order "summarily extinguish[ing] [the Firms'] liens by finding that they [sic] such liens are forfeited." The court did so "without allowing any party to file answers and preserve defenses and without holding any hearings."

Taking all these facts together, we find "a reasonable basis for questioning the judge's impartiality." *Davis*, 38 S.W.3d at 564 (citation omitted). We agree that the court's order does not address the probate judge's prior opinion testimony. Instead, it summarily concludes that opinion testimony is not a proper basis for recusal. And, under the circumstances, the relief the probate court granted on the petition for interpleader provides an additional basis for questioning impartiality. Usually, adverse rulings alone do not establish bias. *Cannon*, 254 S.W.3d at 308. But here the court forfeited the Firms' "charging lien" in its initial order even though no party had answered the petition for interpleader and the trustee had not requested that relief in his petition. The court seemingly made factual findings without holding an evidentiary hearing. And it ordered distribution of the interpleaded funds to some claimants without hearing from all the competing claimants.

III.

We reverse the denial of the motion for disqualification and recusal. This case is remanded for reassignment and such further proceedings as may be necessary.

s/ W. Neal McBrayer
W. NEAL MCBRAYER, JUDGE