

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 26, 2023

FILED
08/16/2023
Clerk of the
Appellate Courts

KAREN ELIZABETH PHILLIPS LOWE v. ROBERT MELVIN LOWE

**Appeal from the Circuit Court for Unicoi County
No. C8668 Suzanne S. Cook, Judge**

No. E2023-01061-COA-T10B-CV

This is an interlocutory appeal as of right, pursuant to Rule 10B of the Rules of the Supreme Court of Tennessee, filed by the plaintiff, Karen Elizabeth Phillips Lowe (“Former Wife”), seeking to recuse the judge in this post-divorce case. Having reviewed the petition for recusal appeal filed by Former Wife, and finding no error, we affirm.

**Tenn. Sup. Ct. R. 10B Interlocutory Appeal as of Right;
Judgment of the Circuit Court Affirmed**

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which ANDY D. BENNETT, J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Lois B. Shults-Davis, Erwin, Tennessee, for the appellant, Karen Elizabeth Phillips Lowe.

Carl Roberts, Jr., Elizabethton, Tennessee, for the appellee, Robert Melvin Lowe.

OPINION

Former Wife and Robert Melvin Lowe (“Former Husband”) were divorced by previous order of the Unicoi County Circuit Court (“Trial Court”). Following entry of the Trial Court’s final divorce decree, Former Wife appealed the judgment to this Court. The appeal is still pending before this Court.

After the Trial Court’s final divorce decree was entered, Former Husband filed a post-judgment motion seeking to enforce the judgment to require Former Wife to pay spousal support. When the judge’s judicial assistant inquired with the parties via e-mail about dates for the upcoming hearing, Former Wife’s attorney asked whether the Trial Court Judge would be amenable to allowing another judge to handle the post-judgment

matters in the case. The parties ultimately agreed to schedule the hearing for the post-judgment motion on July 6, 2023, and a notice of hearing was filed on June 27, 2023.

On July 3, 2023, Former Wife filed a motion for recusal with the Trial Court, alleging that the Trial Court's ruling was inconsistent with the parties' stipulations and announcements made to the Trial Court and that the Trial Court's rulings were not consistent between the parties. The affidavit required by Rule 10B, § 1.01 was not filed with the Trial Court until July 5, 2023. Also on July 5, 2023, the Trial Court entered its order denying the motion for recusal, finding that the motion "was not filed 'no later than ten days before trial' nor promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal"; that no affidavit or declaration was included with the motion, pursuant to section 1.01; that the motion failed to affirmatively state that it was not being presented for an improper purpose; and that Former Wife's only allegations of "an appearance of impropriety" consisted wholly of Former Wife's disagreement with the Trial Court's division of the assets and debts of the parties. At the hearing on July 6, 2023, the Trial Court stated that Former Wife's affidavit was filed approximately forty-five minutes after the Trial Court's order denying the motion had been stamped as filed and served on the parties by e-mail.

Former Wife filed an interlocutory appeal as of right from the Trial Court's denial of the recusal order, pursuant to Tenn. Sup. Ct. R. 10B on July 25, 2023. In her appeal, Former Wife raised two issues for our review, which have been restated slightly as follows: (1) whether the Trial Court erred by denying the motion for recusal after the alleged disparate treatment between the parties had demonstrated an appearance of impropriety necessary for recusal, and (2) whether the Trial Court erred by summarily denying the motion for recusal due to the timeliness of the motion.

We have determined in this case after a review of the petition and supporting documents submitted with the petition, that an answer, additional briefing, and oral argument are unnecessary to our disposition because the record provided by Former Wife does not demonstrate error by the Trial Court Judge with regard to the denial of Former Wife's motion for recusal. As such, we have elected to act summarily on this appeal in accordance with sections 2.05 and 2.06 of Rule 10B. *See* Tenn. Sup. Ct. R. 10B, § 2.05 ("If the appellate court, based upon its review of the Petition for recusal appeal and supporting documents, determines that no answer from the other parties is needed, the court may act summarily on the appeal. Otherwise, the appellate court shall order that an answer to the petition be filed by the other parties. The court, in its discretion, also may order further briefing by the parties within the time period set by the court."); § 2.06 ("An accelerated interlocutory appeal shall be decided by the appellate court on an expedited basis. The appellate court's decision, in the court's discretion, may be made without oral argument.").

We review a trial court’s ruling on a motion for recusal under a *de novo* standard of review with no presumption of correctness. Tenn. Sup. Ct. R. 10B § 2.01. “The party seeking recusal bears the burden of proof, and ‘any alleged bias must arise from extrajudicial sources and not from events or observations during litigation of a case.’” *Neamtu v. Neamtu*, No. M2019-00409-COA-T10B-CV, 2019 WL 2849432, at *2 (Tenn. Ct. App. July 2, 2019), *no appl. perm appeal filed*, (quoting *Williams by & through Rezba v. HealthSouth Rehab. Hosp. N.*, No. W2015-00639-COA-T10B-CV, 2015 WL 2258172, at *5 (Tenn. Ct. App. May 8, 2015), *no appl. perm. appeal filed*). As this Court explained in *Neamtu*:

The party seeking recusal bears the burden of proof. *Williams*, 2015 WL 2258172, at *5; *Cotham v. Cotham*, No. W2015-00521-COA-T10B-CV, 2015 WL 1517785, at *2 (Tenn. Ct. App. Mar. 30, 2015) (*no perm. app. filed*). “[A] party challenging the impartiality of a judge ‘must come forward with some evidence that would prompt a reasonable, disinterested person to believe that the judge’s impartiality might reasonably be questioned.’” *Duke [v. Duke]*, 398 S.W.3d [665,] 671 [(Tenn. Ct. App. 2012)] (quoting *Eldridge v. Eldridge*, 137 S.W.3d 1, 7-8 (Tenn. Ct. App. 2002)). When reviewing requests for recusal alleging bias, “it is important to keep in mind the fundamental protections that the rules of recusal are intended to provide.” *In re A.J.*, No. M2014-02287-COA-R3-JV, 2015 WL 6438671, at *6 (Tenn. Ct. App. Oct. 22, 2015), *perm. app. denied* (Tenn. Feb. 18, 2016). **“The law on judicial bias is intended ‘to guard against the prejudgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court had reached a prejudged conclusion because of interest, partiality, or favor.’”** *Id.* (quoting *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009)).

The terms “bias” and “prejudice” usually refer to a state of mind or attitude that works to predispose a judge for or against a party, but not every bias, partiality, or prejudice merits recusal. *Watson v. City of Jackson*, 448 S.W.3d 919, 929 (Tenn. Ct. App. 2014) (citing *Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994)). **“Even though the judge is expected to have no bias at the beginning of the trial, he must, perforce, develop a bias at some point in the trial; for the decision at the conclusion of the trial is based upon the impressions, favorable or unfavorable, developed during the trial.”** *Id.* at 933 (quoting *Spain v. Connolly*, 606 S.W.2d 540, 544 (Tenn. Ct. App. 1980)). To merit disqualification, the prejudice must be of a personal character, directed at the litigant, and stem from an extrajudicial source resulting in an opinion on the merits on some basis other than what the judge learned from participation in the case. *Id.* at 929. “A trial judge’s opinions of the parties or witnesses that are based on what he or she has seen at trial are not improper and ‘generally do[] not warrant recusal.’” *Id.* at 933

(quoting *Neuenschwander v. Neuenschwander*, No. E2001-00306-COA-R3-CV, 2001 WL 1613880, at *11 (Tenn. Ct. App. Dec. 18, 2001)).

Neamtu, 2019 WL 2849432, at *3 (quoting *In re Samuel P.*, No. W2016-01592-COA-T10B-CV, 2016 WL 4547543, at *2 (Tenn. Ct. App. Aug. 31, 2016), *no appl. perm. appeal filed*) (emphasis in original).

Furthermore, “a judge should not decide to recuse unless a recusal is truly called for under the circumstances.” *Rose v. Cookeville Reg’l Med. Ctr.*, No. M2007-02368-COA-R3-CV, 2008 WL 2078056, *2 (Tenn. Ct. App. May 14, 2008), *no appl. perm. appeal filed*. This is true because “[a] judge has as much of a duty not to recuse himself absent a factual basis for doing so as he does to step aside when recusal is warranted.” *Id.* at *2 (quoting *Mass v. McClenahan*, No. 93 Civ. 3290 (JSM), 1995 WL 106106, *1 (S.D.N.Y. Mar. 9, 1995)). Recusal based upon an asserted appearance of bias or prejudice “is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge’s impartiality.” *Id.* at *2 (quoting *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981)).

Former Wife argues on appeal that the Trial Court’s disparate treatment between the parties has demonstrated an appearance of impropriety such that the Trial Court Judge should enter an order of recusal. Former Wife has not included the Trial Court’s final divorce decree as part of her petition for an appeal pursuant to Rule 10B.¹ However, Former Wife takes issue with the Trial Court’s rulings in that judgment in this Rule 10B appeal regarding the denial of the motion for recusal. Former Wife argues that the Trial Court’s disparate treatment of the parties during the divorce proceedings has demonstrated an appearance of impropriety to a reasonable person such that the Trial Court should be directed to recuse itself in this matter. Specifically, Former Wife provides several examples of rulings by which she alleges support her arguments that the Trial Court’s rulings were inconsistent between the parties and with the stipulations the parties had provided to the Court, including the following: (1) the Trial Court ordered that Former Wife would be granted a divorce on fault grounds as stipulated by the parties but then taxed the court costs to Former Wife; (2) the Trial Court altered the parties’ stipulations to state that they were related to “possession only” when those words were not part of the stipulations made to the Court; (3) the Trial Court ruled that the property Former Wife had inherited was marital property contrary to the parties’ stipulation but that Former Husband’s inherited property was separate property; (4) the Trial Court ruled that Former Husband was awarded a Gladiator Jeep but that Former Wife was required to pay half the

¹ While not explicitly stated as such in the rule, it is clear that the only record the appellate court generally will have in expedited appeals under Rule 10B is the record provided by the appellant with his or her petition pursuant to the mandatory language of section 2.03 of the rule. *See* Tenn. Sup. Ct. R. 10B, §2.03 (“The petition shall be accompanied by a copy of the motion and all supporting documents filed in the trial court, a copy of the trial court’s order or opinion ruling on the motion, and a copy of any other parts of the trial court record necessary for determination of the appeal.”).

indebtedness contrary to the parties' announced stipulation; (5) despite how the Trial Court resolved the issue of the Jeep, the Trial Court awarded Former Wife a Suburban vehicle valued at \$5,000 that she did not normally drive and directed Former Wife to sell the vehicle that she usually drove, pay off the outstanding debt on that vehicle, and give the proceeds to Former Husband; (6) the Trial Court ignored the parties' stipulation regarding Former Wife's inherited premarital interest, the deed, and the use of the inherited funds to purchase real property; (7) the Trial Court allowed Former Husband to submit additional documentation after the hearing regarding annuities of the parties but would not allow Former Wife to present documentation during the same time period rebutting Former Husband's testimony during the divorce proceedings; (8) the Trial Court excused Former Husband's denial of an existing annuity investment, but Former Wife was criticized by the Trial Court for failing to list her annuity investment; (9) Former Husband's debts were ordered to be paid from the proceeds of the sale of the parties' lake property but Former Wife's debts and the debt owed by Former Husband to Former Wife were not included in this disposition; and (10) the Trial Court denied Former Wife's request to extend the order of protection against Former Husband and stated that all testimony regarding fault would be disregarded.

All of Former Wife's allegations regarding the disparate treatment between the parties stems from the final divorce decree that is currently on appeal to this Court. However, the only order this court may review in a Tennessee Supreme Court Rule 10B recusal appeal is the trial court's order denying a motion to recuse. *Duke v. Duke*, 398 S.W.3d 665, 668 (Tenn. Ct. App. 2012) ("Pursuant to [Tennessee Supreme Court Rule 10B], we may not review the correctness or merits of the trial court's other rulings . . .").

Without question, "[t]he right to a fair trial before an impartial tribunal is a fundamental constitutional right." *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009) (quoting *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002)); *see also* Tenn. Const. Art. VI, § 11. This constitutional right "is intended 'to guard against the prejudgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court had reached a prejudged conclusion because of interest, partiality, or favor.'" *Id.* (quoting *Austin*, 87 S.W.3d at 470). "[P]reservation of the public's confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial." *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998); *see also Offutt v. United States*, 348 U.S. 11, 14 (1954) (holding that "justice must satisfy the appearance of justice"). As such, Rule 2.11(A) of the Code of Judicial Conduct as set forth in Rule 10 of the Rules of the Supreme Court of Tennessee requires a judge to recuse himself or herself "in any proceeding in which the judge's impartiality might reasonably be questioned." *See also Smith v. State*, 357 S.W.3d 322, 341 (Tenn. 2011) (noting that recusal is required, even if a judge subjectively believes he or she can be fair and impartial, whenever "the judge's impartiality might be reasonably questioned because the appearance of bias is as injurious to the integrity of the judicial system as actual bias" (quoting *Bean*, 280 S.W.3d at 805)).

The terms “bias” and “prejudice” generally “refer to a state of mind or attitude that works to predispose a judge for or against a party”; however, “[n]ot every bias, partiality, or prejudice merits recusal.” *Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994). To merit disqualification of a trial judge, “prejudice must be of a personal character, directed at the litigant, ‘must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from . . . participation in the case.’” *Id.* “If the bias is based upon actual observance of witnesses and evidence given during the trial, the judge’s prejudice does not disqualify the judge.” *Id.* “However, if the bias is so pervasive that it is sufficient to deny the litigant a fair trial, it need not be extrajudicial.” *Id.* That said, “[a] trial judge’s adverse rulings are not usually sufficient to establish bias.” *State v. Cannon*, 254 S.W.3d 287, 308 (Tenn. 2008); *see also Alley*, 882 S.W.2d at 821. In fact, “[r]ulings of a trial judge, even if erroneous, numerous and continuous, do not, without more, justify disqualification.” *Alley*, 882 S.W.2d at 821; *see also State v. Reid*, 313 S.W.3d 792, 816 (Tenn. 2006). In other words, “if the bias is alleged to stem from events occurring in the course of the litigation, the party seeking recusal has a greater burden to show bias that would require recusal, i.e., that the bias is so pervasive that it is sufficient to deny the litigant a fair trial.” *McKenzie v. McKenzie*, No. M2014-00010-COA-T10B-CV, 2014 WL 575908, *3 (Tenn. Ct. App. Feb. 11, 2014).

In this appeal concerning the denial of Former Wife’s motion for recusal, Former Wife has demonstrated no reason for recusal other than the fact that she is unhappy with a number of the rulings of the Trial Court. Such unhappiness is insufficient to justify recusal. Former Wife’s concerns regarding the Trial Court Judge’s “appearance of impropriety” involve the merits of the underlying divorce proceedings. The divorce proceedings are currently on appeal to this Court, and Former Wife may raise her concerns regarding the Trial Court’s rulings in that appeal. Former Wife has failed to produce “evidence that would prompt a reasonable, disinterested person to believe that the [Trial Court Judge’s] impartiality might reasonably be questioned.” *Neamtu*, 2019 WL 2849432, at *3 (quoting *In re Samuel P.*, No. W2016-01592-COA-T10B-CV, 2016 WL 4547543, at *2 (Tenn. Ct. App. Aug. 31, 2016), *no appl. perm. appeal filed*). As such, we find no error in the Trial Court’s denial of Former Wife’s motion for recusal. Former Wife’s motion to recuse is DENIED.²

² Because we have determined that the substantive argument made by Former Wife in her motion did not require recusal, we need not address the Trial Judge’s additional finding regarding the timeliness of the motion. *See Bean*, 280 S.W.3d at 803 (considering the substantive merit of recusal issue despite a “considerable passage of time between the assignment of the case to [the trial court] and the formal filing of the motion for recusal”); *Boren v. Hill Boren, PC*, 557 S.W.3d 542, 548 (Tenn. Ct. App. 2017) (considering the substantive merit of recusal issue in Rule 10B appeal despite “Petitioner’s failure to seek recusal in a timely manner”).

V. CONCLUSION

Having determined that the record provided by Former Wife does not demonstrate error, we affirm the Trial Court's denial of the motion for recusal. Karen Elizabeth Phillips Lowe is taxed with the costs of this appeal, for which execution may issue. This case is remanded for further proceedings.

KRISTI M. DAVIS, JUDGE