IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned October 6, 2014

JAMES CULLUM ET AL. v. BAPTIST HOSPITAL SYSTEM, INC. ET AL.

Appeal from the Circuit Court for Davidson County
No. 04C2121 Amanda Jane McClendon, Judge

No. M2014-01905-COA-T10B-CV - Filed October 31, 2014

This is an interlocutory appeal as of right pursuant to Tennessee Supreme Court Rule 10B from the trial court's denial of a motion for recusal. Having reviewed the petition for recusal appeal pursuant to the de novo standard as required under Rule 10B, § 2.06, we affirm the trial court's decision to deny the motion for recusal.

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

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Jennifer Eberle, John Everette Hall, Jr., and James E. Looper, Jr., Nashville, Tennessee, for the appellants, Baptist Hospital Systems, Inc. and Baptist Women's Health Center, LLC.

Joseph P. Bednarz, Sr., and Joseph P. Bednarz, Jr., Nashville, Tennessee, for the appellees, James Cullum and Patricia Cullum.

OPINION

This appeal arises out of a medical malpractice action that has been appealed to this court on two previous occasions. In the most recent appeal, this court reversed and remanded the case to the trial court for a new trial. *Cullum v. Baptist Hosp. Sys. Inc., et al.*, No. M2012-02640-COA-R3-CV, 2014 WL 576012 (Tenn. Ct. App. Feb. 12, 2014).[1]

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[1]The Supreme Court denied Defendants' Tenn. R. App. P. 11 Application for Permission to Appeal on June 20, 2014.

On remand, the defendants, Baptist Hospital System, Inc. and Baptist Women's Health Center, LLC d/b/a Baptist Women's Pavilion Hospital ("Defendants"), filed a motion to recuse or disqualify the trial judge pursuant to Tenn. Sup. Ct. R. 10B. The trial court heard the motion on September 5, 2014. On September 18, 2014, the trial court entered an order denying the motion together with a memorandum opinion stating in detail the grounds for the denial. Defendants timely filed this petition for recusal appeal pursuant to Tenn. Sup. Ct. R. 10B, § 2.02 on October 1, 2014.

Appeals from orders denying motions to recuse are governed by Tenn. Sup. Ct. R. 10B. Pursuant to § 2.01 of Rule 10B, a party is entitled to an "accelerated interlocutory appeal as of right" from an order denying a motion for disqualification or recusal. The appeal is effected by filing a "petition for recusal appeal" with the appropriate appellate court.[2] Tenn. Sup. Ct. R. 10B, § 2.02. If this court, based on the petition and supporting documents, determines that no answer is needed, we may act summarily on the appeal. Tenn. Sup. Ct. R. 10B, § 2.05. Otherwise, this court may order an answer and may also order further briefing by the parties. In addition, Tenn. Sup. Ct. R. 10B, § 2.06 grants this court the discretion to decide the appeal without oral argument.

Based upon our review of Defendants' petition and supporting documents, we have determined that an answer, additional briefing, and oral argument are not necessary, and elect to act summarily on the appeal in accordance with Tenn. Sup. Ct. R. 10B, §§ 2.05 and 2.06.

This court reviews the trial court's denial of a motion for recusal under a de novo standard of review. Tenn. Sup. Ct. R. 10B, §2.06.

ISSUE

The issue presented by Defendants is "[w]ould a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, find a reasonable basis for questioning the judge's impartiality, such that the trial court should have granted Defendants''Appellants' motion to recuse?"

ANALYSIS

Defendants contend that comments made by the trial judge during the course of the most recent trial and post-trial hearings "were of a biased, personal and/or partial nature and

[2] In civil cases other than workers' compensation cases, this court is the appropriate appellate court.

created the reasonable perception that Defendants/Appellants did not receive a fair trial secondary to the apparent bias and partiality of the court towards Plaintiffs and against Defendants/Appellants and/or Defendants'/Appellants' counsel."

The importance of impartiality of a court was succinctly stated in *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560 (Tenn. 2001):

> Litigants, as the courts have often said, are entitled to the "cold neutrality of an impartial court." *Kinard v. Kinard*, 986 S.W.2d 220, 227 (Tenn. Ct. App. 1998). Thus, one of the core tenets of our jurisprudence is that litigants have a right to have their cases heard by fair and impartial judges. *Id.* at 228. Indeed, "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). Accordingly, judges must conduct themselves "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and "shall not be swayed by partisan interests, public clamor, or fear of criticism." Tenn. Sup. Ct. R. 10, Cannon 2(A), 3(B)(2). As we said many years ago, "it is of immense importance, not only that justice be administered . . . but that [the public] shall have no sound reason for supposing that it is not administered ." *In re Cameron*, 151 S.W. 64, 76 (Tenn. 1912). If the public is to maintain confidence in the judiciary, cases must be tried by unprejudiced and unbiased judges.
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> Given the importance of impartiality, both in fact and appearance, decisions concerning whether recusal is warranted are addressed to the judge's discretion, which will not be reversed on appeal unless a clear abuse appears on the face of the record. *See State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995). A motion to recuse should be granted if the judge has any doubt as to his or her ability to preside impartially in the case. *See id.* at 578. However, because perception is important, recusal is also appropriate "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." *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). Thus, even when a judge believes that he or she can hear a case fairly and impartially, the judge should grant the motion to recuse if "the judge's impartiality might reasonably be questioned." Tenn. Sup. Ct. R. 10, Canon 3(E)(1). Hence, the test is ultimately an objective one since the appearance of

> bias is as injurious to the integrity of the judicial system as actual bias. *See Alley*, 882 S.W.2d at 820.

Id. at 564-65.

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.* (citations omitted). However, "[i]f 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.* (citations omitted).

"A trial judge's adverse rulings are not usually sufficient to establish bias." *State v. Cannon*, 254 S.W.3d 287, 308 (Tenn. 2008) (citing *Alley*, 882 S.W.2d at 821). "Rulings of a trial judge, even if erroneous, numerous and continuous, do not, without more, justify disqualification." *Id*. (quoting *Alley*, 882 S.W.2d at 821). The reason for this proposition has been explained by our Supreme Court as follows:

> [T]he mere fact that a judge has ruled adversely to a party or witness . . . is not grounds for recusal. Given the adversarial nature of litigation, trial judges necessarily assess the credibility of those who testify before them, whether in person or by some other means. Thus, the mere fact that a witness takes offense at the court's assessment of the witness cannot serve as a valid basis for a motion to recuse. If the rule were otherwise, recusal would be required as a matter of course since trial courts necessarily rule against parties and witnesses in every case, and litigants could manipulate the impartiality issue for strategic advantage, which the courts frown upon.

Davis, 38 S.W.3d at 565.

The relevant portions of the Rules of Judicial Conduct provide:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

> (1) The judge has a personal bias or prejudice concerning a party or party's lawyer, or personal knowledge of facts that are in dispute in the proceedings.

Tenn. Sup. Ct. R. 10, RJC 2.11(A).

Defendants have identified six statements by the trial judge in support of their claim of bias. The first statement occurred at trial while discussing whether to admit the Walton Life Care Plan,[3] at which time the trial court stated:

> [Plaintiffs' Counsel]: Judge, Rule 26 opinions that I have state specifically that he's going to critique a life care plan of Ms. Walton and Ms. Willard–
>
> The Court: Since they're not introducing it, it's irrelevant.
>
> [Plaintiffs' Counsel]: But when I took his deposition, he said he was going to testify to it.
>
> [Defendants' Counsel]: Then we withdrew her.
>
> [Plaintiffs' Counsel]: It doesn't matter. That's what he based his opinion on.
>
> [Defendants' Counsel]: Not on–
>
> [Plaintiffs' Counsel]: This is just the same. Judge, if I could show it to you, it's point-blank Rule 26 disclosure, see. So if they withdraw it, that's fine.
>
> The Court: They've withdrawn it. *I would love for you to be able to on a personal note, but I don't think you can–*

(Emphasis added). Defendants contend this statement shows sympathy for Plaintiffs' position. The trial court stated in its order denying Defendants' motion for recusal that Defendants were taking the statement out of context, and that it must be considered in the proper context. We are not certain what other context the court is referring to and find the statement was ill-advised for a trial judge to make. Nevertheless, what is relevant is that the trial court did, in fact, note that the Rule 26 disclosure of the life care plan of Ms. Walton was withdrawn, and the court did not allow it to be shown to the jury. Thus, Defendants'

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[3] Ginger Walton was a life care planner who was initially identified as an expert witness for Defendants, but was withdrawn.

inference of partiality that could arise from the court's statement is mitigated by the action of the court. Although the statement appears to arise from frustration and not bias, the trial court should avoid making such statements; nevertheless, the foregoing statement, standing alone, is wholly insufficient for us to conclude that the trial court poses a bias or partiality that gives rise to a denial of due process. *See Wilson*, 987 S.W.2d at 562 (stating "a trial before a biased or prejudiced fact finder is a denial of due process.").

The second statement occurred when counsel for Defendants interrupted Plaintiffs' cross-examination of one of Defendants' expert witnesses, the relevant excerpt of which is as follows:

> [Plaintiffs' Counsel]: Well, Doctor, when your deposition was taken in 2007, it was your opinion to a reasonable degree of medical certainty – and you qualified it by saying 51 percent – in your opinion, Samuel would have been normal had he been delivered at 1:50, correct?
>
> [Defendants' Counsel]: Your Honor, I object. That's not any different than what he's just said.
>
> [Plaintiffs' Counsel]: He hasn't answered it.
>
> The Court: I don't know. Go ahead and answer.
>
> Witness: My answer was going to be I don't – I think that's what I just said.
>
> The Court: *Of course it is because your attorney over there just said that.*

(Emphasis added). Defendants assert that the italicized statement expresses contempt for Defendants' counsel. Based upon our review, the statement appears to reflect frustration by the trial court but not contempt for Defendants' counsel in the statement. As stated earlier, although the statement appears to arise from frustration, not bias or contempt, the trial court should avoid making such statements.

The third repartee at issue concerned whether Dr. Frank Boehm, Defendants' principal expert witness, would be available to testify in person at trial. When Dr. Boehm's availability was announced by Defendants, Plaintiffs' counsel objected to him being permitted to testify, at which time the trial court stated as follows: "There's a degree of ambush, but I think y'all could have asked. *I'm upset for the Cullums*, they deserve to have a trial that's final finally." (Emphasis added). Defendants assert that, because the court was "upset" for the Cullums, this bias prevented Defendants' primary expert on the central issues in the case from testifying,

which caused severe prejudice to the Defendants. Defendants further assert they were also entitled to finality and fairness in the third trial.

If we only considered the above, one could infer bias *for the Cullums*; however, "[a]ny comments made by the trial court must be construed in the context of all the facts and circumstances to determine whether a reasonable person would construe those remarks as indicating partiality on the merits of the case." *Alley*, 882 S.W.2d at 822 (citations omitted). Fortunately, we have the benefit of the rest-of-the-story concerning the above statement, which sheds an entirely different light on the court's concerns for the Cullums. As the trial court revealed in its written memorandum in which it denied the motion for recusal, "the statement [that it was upset for the Cullums] was a very specific reference to trial maneuvers by the plaintiffs with which the Court was expressing frustration. The Court later went on to clarify, when discussing the comment in open court, that it wanted both sides to have a fair trial." A more complete context of what transpired is revealed in our earlier opinion in this matter, the relevant portion of which is as follows:

> After the trial court ruled that Dr. Boehm "needs to testify live or not at all," the defendants set out to get Dr. Boehm to testify live at trial. He was identified during voir dire as a potential witness. When asked on the second day of trial by the court whether Dr. Boehm was "going to be here in any form or fashion," defendants' counsel stated that, "We intend to bring him, still checking on his availability."
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> On Wednesday, July 18, in a discussion between the court and defendants' counsel, counsel stated that, "We have Dr. Boehm coming in first thing Thursday morning." Plaintiffs' counsel then began complaining that he found out about Dr. Boehm's testifying too late to prepare adequately and after his witnesses had been released. Counsel for plaintiffs and defendants engaged in a considerable back and forth argument about who said what when. At one point, the judge said, "I'm going to let him testify live unless you agree otherwise and stipulate that you'll do it recorded." The judge also said, "I could give you more time to prepare." Plaintiffs' counsel then argued he would have asked different questions of one of his witnesses if he had known Dr. Boehm was going to testify. The court eventually asked if Dr. Boehm could appear Monday instead of Thursday and said that she found "fault with both of y'all," meaning both plaintiffs' and defendants' attorneys. Defendants' counsel observed that "[t]here was never any doubt that we were working to bring in Dr. Boehm," and the court agreed. Finally, after Dr. Boehm agreed to appear on Monday, the court ruled as follows:

> I appreciate the fact that during the break that I took that defense contacted Dr. Boehm, and he says he can be here Monday, but I'm faced with a situation while that's 72 hours away, plaintiffs have rested their proof, Dr. Boehm has gone from not being able to be here to being on vacation, being able to be here on Thursday and under threat being able to be here on Monday. I'm going to deny his testifying. That is concluded.

> The next day, July 19, the defendants asked the court to reconsider its ruling. The judge observed: "since they've put on their proof and they've closed their case, they are potentially looking at recalling expert witnesses from other parts of the country, and that just - it doesn't seem fair." She adhered to her prior ruling.
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> We agree with the trial judge that both sides are to blame for the confusing situation involving Dr. Boehm. George Bernard Shaw once said, "The single biggest problem with communication is the illusion that it has taken place." Neither side communicated well with the other or with the court. . . .

Cullum, 2014 WL 576012, at *3-4.

The foregoing reveals that the trial court was frustrated with counsel for both parties due to their failure to communicate, which made it most difficult for the trial court to allow the case to reach its appropriate conclusion, regardless of who prevailed. More importantly, the trial court made no indication that it wanted the case to be resolved in favor of the Cullums; the court merely expressed the desire that this case needs to be resolved on its merits, once and for all, and we could not agree more. Appreciating the context in which the statement "*I'm upset for the Cullums*, they deserve to have a trial that's final finally" was made, we have concluded it does not indicate any bias for or against either party, merely frustration with the lack of finality.

Defendants next point to an exchange between the trial court and defense counsel regarding the presence of a child-size wheelchair in the jury room. Defense counsel inquired of the trial court as to its presence in the jury room, as well as whether there were other "children's paraphernalia" in the room. The trial court responded, "Absolutely not. If you want to look in my office, since I'm the thirteenth juror, you're welcome to look there," and shortly thereafter stated, "I think it's very clear what the comment is. I am a thirteenth juror. If you need to preserve the record, you're welcome to look in my office, too." Defendants assert that the trial court's responses "further created the reasonable perception to a third person as to the Court's impartiality and whether the Court held a bias against the

Defendants." In its order, the trial court noted it expressed frustration in the exchange, but that it did not make any prejudicial statements toward Defendants. After reviewing the exchange in context, we agree.[4]

Defendants also contend the aforementioned statements, and two other examples we have not mentioned,[5] when considered cumulatively provide an objective concern regarding the trial court's perceived bias and lack of impartiality and, thus, require the trial judge's recusal. Having considered the cumulative effect of the trial court's statements we cannot conclude that a person of ordinary prudence, knowing all the facts, would find a reasonable basis for questioning the judge's impartiality. *See Davis*, 38 S.W.3d at 565; *see also Alley*, 882 S.W.2d at 820.

Defendants also contend certain communications between the trial court and the jury require recusal based on the appearance of impropriety. After the first day of deliberations, the jury notified court personnel that they had further questions. The jury was informed that they would have to be recalled into open court with counsel and the parties present in order for the court to hear their questions. The jury then evidently decided to proceed without having their questions answered. Based upon this fact, Defendants argue that "reversal is required" and the case should be assigned to another judge.

We have decided that this so-called "ex-parte communication" was neither inappropriate nor a basis for recusal. Moreover, the contention constitutes a challenge to the correctness of the trial court's decisions regarding the merits of the case; specifically, they contend it was error for the trial court to not include the parties in such a mundane inquiry by the jury of *what happens if we have a question?*.[6] The only issues this court may consider in an appeal under Tenn. Sup. Ct. R. 10B concern whether the trial court erred in denying the motion for recusal.

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[4]The record reveals that a broken wheel chair, which had been used by a litigant in a previous trial, was not removed following that trial and was left behind other chairs. Why it had not been removed was not explained.

[5]We considered the other two statements and found no basis upon which to infer bias, thus, they are not discussed separately.

[6]We would add that the trial court responded properly by having a court officer inform the jury that they would have to be recalled into open court with counsel and the parties present in order for the court to hear their questions.

CONCLUSION

Having reviewed Defendants' petition and supporting documents pursuant to the de novo standard as required by Tenn. Sup. Ct. R. 10B, § 2.06, we have concluded that Defendants have failed to establish grounds to require recusal under the Rules of Judicial Conduct. The trial court's decision to deny the motion for recusal is affirmed. The motion for a stay pending appeal is denied as moot. This case is remanded to the trial court for further proceedings consistent with this opinion. Defendants and their surety are taxed with the costs for which execution, if necessary, may issue.

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FRANK G. CLEMENT, JR., JUDGE