IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 5, 2019

MARIAN NEAMTU v. IVETA NEAMTU

Appeal from the Circuit Court for Davidson County
No. 05D3102 Philip E. Smith, Judge

No. M2019-00409-COA-T10B-CV

This is an accelerated interlocutory appeal from the trial court's denial of Appellant's motion for recusal. Because the record contains insufficient evidence of bias requiring recusal under Tennessee Supreme Court Rule 10B, we affirm.

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

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

Jeffrey L. Levy, Smyrna, Tennessee, for the appellant, Marian Neamtu.

Thomas F. Bloom, Nashville, Tennessee, for the appellee, Iveta Neamtu (Simacek).

OPINION

I. Background

Appellant Marian Neamtu (Mr. Neamtu) and Appellee Ivetta Neamtu Simacek (Ms. Simacek) were divorced in December 2007. At the time of divorce, the trial court found that Ms. Simacek "was suffering . . . from a form of Lyme Disease and was not employable but should she become employable in the future and be self-supporting, that would certainly constitute a change in circumstance." The trial court ordered Mr. Neamtu to pay Ms. Simacek $1,200 per month in alimony *in futuro* until her death or remarriage.

On February 25, 2016, Mr. Neamtu filed a petition to terminate alimony alleging that Ms. Simacek had a common law marriage in Alabama. On May 31, 2016, Ms. Simacek filed an answer and counter-petition seeking an increase in alimony due to increased medical expenses as a result of treatment for Lyme Disease. Ms. Simacek also averred that Mr. Neamtu's salary had increased due to advancement in his career in the Mathematics Department at Vanderbilt University. On June 3, 2016, Mr. Neamtu filed his answer to the counter-petition, wherein he alleged that Ms. Simacek's medical treatments were not recognized as medically effective and were not covered by insurance.

Trial was set for February 5 and 6, 2019. At the end of the first day of trial, the trial court suggested that the parties discuss a resolution. On February 6, 2019, as the second day of trial began, Mr. Neamtu's attorney made an oral motion for the trial court's recusal based on the trial court's suggestion that the parties try to resolve the case. The trial court advised that a motion for recusal must comply with Tennessee Supreme Court Rule 10B, which requires, *inter alia*, that the motion be made in writing. Mr. Neamtu's attorney subsequently filed a written motion for recusal, together with his affidavit. In his motion, Mr. Neamtu made the following allegations:

> [Ms. Simacek] presented the deposition and re-deposition of her expert witness, Tracey Pinkston, M.D. [Mr. Neamtu] submitted the deposition and re-deposition of his expert witness, Robert Schoen, M.D. [Mr. Neamtu] took the position that Dr. Pinkston, [Ms. Simacek's] treating physician, was not an expert in treating Lyme Disease.
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> The court, without having read any of the depositions, indicated that, because Dr. Pinkston was a licensed physician, it would credit her testimony. At the end of the first day of trial and before hearing the testimony of [Mr. Neamtu], the court addressed counsel for [Mr. Neamtu] and suggested that he try to reach a settlement with counsel for [Ms. Simacek].

Mr. Neamtu's motion further averred that the trial court "prejudged certain elements of the case and is, therefore, not impartial." The accompanying affidavit asserted that the trial judge "has already made up his mind regarding crucial elements in the case and that his bias will have a negative effect on my client's case."

On February 11, 2019, the trial court entered its order denying Mr. Neamtu's motion for recusal. In finding that Mr. Neamtu's motion contained no factual or legal basis for the trial court's recusal, the trial court stated:

> The court's very purpose is to form opinions based on the evidence in order to determine the merits of the case. The court does not reach its opinion suddenly, as if by lightning strike, when the proof is closed. The court's

> "impressions, favorable or unfavorable, develop[ ] *during the trial*." [***Spain v. Connolly***, 606 S.W. 2d 540, 544 (Tenn. Ct. App. 1980)] (Emphasis added). Again, the court stated, "I have not made up my mind, I'll hear the proof, but . . . ." After reading the parties' pleadings and pre-trial briefs, and during the course of the trial, the court had begun to form impressions of the case. That those impressions may have been unfavorable to Mr. Neamtu's position is not a basis for the court's recusal.
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> [T]he motion also fails to establish that the [trial] court holds any subjective bias against Mr. Neamtu, or that a reasonably prudent person, knowing all the facts and circumstances before the court, has reasonable cause to question the [trial] court's impartiality.

Mr. Neamtu filed his petition for interlocutory appeal on March 4, 2019.

After reviewing the filings and supporting documents, we have determined that oral argument is unnecessary in this matter. Accordingly, we will act summarily on the appeal in accordance with sections 2.05 and 2.06 of the Tennessee Supreme Court Rule 10B and will consider the case on the submissions of the parties and the attachments thereto.

II. Issues

The only order this Court may review on an appeal pursuant to Tennessee Supreme Court Rule 10B 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[.]"). Accordingly, the sole issue is whether the trial court erred in denying the Appellant's motion for recusal. ***Garner v. Garner***, No. W2016-01213-COA-T10B-CV, 2016 WL 4249479, at *2 (Tenn. Ct. App. Aug. 10, 2016).

III. Standard of Review

Tennessee Supreme Court Rule 10B requires appellate courts to review a trial court's ruling on a motion for recusal *de novo* 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." ***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) (citing ***McKenzie v. McKenzie,*** No. M2014-00010-COA-T10B-CV, 2014 WL 575908, at *3 (Tenn. Ct. App. Feb. 11, 2014)).

IV. Analysis

As a preliminary matter, we note that Mr. Neamtu's motion fails to state that it is not being presented for any improper purpose as required under Tennessee Supreme Court Rule 10B, to-wit:

> Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by a timely filed written motion. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials. The motion shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and *shall affirmatively state that it is not being presented for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this rule.

Tenn. Sup. Ct. R. 10B (emphasis added). The trial court analyzed the motion to recuse on the merits despite this shortcoming. Like the trial court, we will proceed to consider the substantive issue raised in this appeal. However, we caution litigants that "while in this case we chose to proceed with our review despite the fact that the parties chose not to abide by the rules of th[e Tennessee Supreme] Court, we cannot say we will be so accommodating and choose to do the same in the future." ***Watson v. City of Jackson***, 448 S.W.3d 919, 928 (Tenn. Ct. App. 2014) (quoting ***Wells v. Wells,*** No. W2009-01600-COA-R3-CV, 2010 WL 891885, *4 (Tenn. Ct. App. March 15, 2010)).

Turning to the question of recusal, the legal principles applicable to this case were set forth in ***In Re: Samuel P.***, No. W2016-01592-COA-T10B-CV, 2016 WL 4547543, at *2 (Tenn. Ct. App. Aug. 31, 2016):

> 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***, 398 S.W.3d at 671 (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)).
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> 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)).

In Re: Samuel P., No. W2016-01592-COA-T10B-CV, 2016 WL 4547543, at *2 (Tenn. Ct. App. Aug. 31, 2016) (emphases added).

With the foregoing in mind, we turn to Mr. Neamtu's specific grounds for recusal. Mr. Neamtu first argues that the trial court demonstrated bias by "suggest[ing] that [Ms. Simacek] had the right to consult any licensed physician and impl[ying] that the nature and cost of [Ms. Simacek's] treatment, and by implication resulting financial need was beyond the trial court's review." Mr. Neamtu insists that "[t]he [trial] court, without having read any of the depositions, indicated that, because Dr. Pinkston was a licensed physician, it would credit her testimony."[1] Despite Mr. Neamtu's failure to cite to the portion of the record containing the trial court's alleged statements, our review of the record found the following discussion between Mr. Neamtu's lawyer and the trial court

[1] As required under Tennessee Rule of Appellate Procedure 27(a)(6), Mr. Neamtu's brief does not provide an "appropriate reference[ ] to the record" where this Court may find the trial court's statement. We caution litigants to ensure proper compliance with the Rules of Appellate Procedure when practicing in this Court. Failure to do so may result in waiver. *See* ***Bean v. Bean***, 40 S.W. 3d 52, 55 (Tenn. Ct. App. 2000).

regarding Ms. Simacek's choice of physician and treatments, to-wit:

> MR. LEVY: [W]hat I'm asking the court to say is, if . . . you do it on your own dime, that's perfectly fine, but if you're talking about necessary expenses, which the court should be taking into account in taking a look at whether there's a need for funds, and it's something that this court does all the time, that that kind of treatment should not be taken into account.
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> I don't care, and certainly Mr. Neamtu doesn't care if Ms. Simacek gets whatever kind of treatment she wants or doesn't want, but the fact is, in her alimony request she is essentially asking that he be required to pay for something that does not appear to have weight.
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> THE COURT: I understand. On the increase, it would be relevant. . . .

The trial court then stated its uncertainty as to whether it was the trial court's duty to "pass [judgment] on a person's choice of medical doctors if that medical doctor is licensed, regardless of . . . the procedure or process or method of therapy they use."

Importantly, the trial court did not make a specific ruling regarding the expert's testimony. Nonetheless, Mr. Neamtu alleges that the trial court credited the testimony of Ms. Simacek's medical expert. The record, however, does not support this allegation. As set out in context above, the trial court merely opines that although Ms. Simacek may choose her medical doctors and the type of medical treatments she receives, the necessity of those treatments would be relevant to her claim for spousal support. In this regard, the trial court merely stated the applicable law. *See* ***Gonsewski v. Gonsewski***, 350 S.W.3d 99, 110 (Tenn. 2011) (stating that the two factors "considered the most important [in determining spousal support] are the disadvantaged spouse's need and the obligor spouse's ability to pay.") This is no ground for recusal. The trial court also candidly stated that it had not yet read the depositions of the parties' experts. Accordingly, the trial court reserved ruling on the experts' credibility until it "hear[d] the proof." The trial court was correct to reserve its ruling pending sufficient proof on which to make its determination. In fact, at trial, Mr. Neamtu's attorney conceded as much, stating "[i]t's hard for the court to judge what the scientific evidence is going to be without having read the depositions." Although Mr. Neamtu couches the trial court's reservation as bias, it was not. The trial court stated the law and then reserved ruling pending development of the record. In so doing the trial court showed patience not prejudice.

Mr. Neamtu next argues that the trial court showed bias by encouraging the parties to resolve their issues. Specifically, the trial court stated:

I would strongly suggest that you and your client talk to [Ms. Simacek's attorney] about a possible resolution in this case. I've not made up my mind, I'll hear the proof, but the stuff I've heard today, like I say, I would strongly recommend you-all have a discussion. With that said, the court is adjourned.

The following morning, Mr. Neamtu's attorney addressed the trial court's comment:

Mr. Levy: [T]his is one of the most difficult things that I have ever had to do in my entire legal career. The closing comments that you made yesterday, when you suggested that, although you hadn't read the evidence – you hadn't read all of the evidence, including tendered depositions, that I specifically should seek to settle with Mr. Bloom –

The Court: I said have discussions. I don't think I used the term "settlement."

Mr. Levy: Engage in settlement discussions or similar words like that, indicate to me that, at least, you may have – and I believe that you have, made up your mind on certain aspects of this case.

The Court: Well, have you filed – filed a motion?

Mr. Levy: I haven't filed a motion yet, I'm making an oral motion now to ask that you recuse yourself.

The Court: Yeah, under Rule 10B it's got to be filed and sworn to. 10B is very specific.

Mr. Levy: I understand.

The Court: So, you know, if you file it, I'll entertain it. But I will tell you – and I've heard part of the proof, I've read the pleadings, I've read the briefs, that's – I don't have any other information outside of that, but you-all understand that's part of the reason for the briefs, is we get to kind of start –

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--And I will be quite frank with you, I believe that your position in this case, quite frankly, is not a good position. I haven't heard all of the proof. I will reserve ruling until I

> hear all of the proof, but what I have seen so far – quite frankly, what I've seen so far, I can use the term – I would use the term "ridiculous." So –
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> File your motion in accordance with the 10B and I'll hear it. We have to have it done in accordance with the rules.

Based on the foregoing, Mr. Neamtu argues that the trial court pre-judged the case by suggesting that the parties try to resolve the matter. Mr. Neamtu further contends that the trial court showed bias in calling his position "ridiculous." Usually, an opinion formed on the basis of what a judge properly learns during judicial proceedings, and comments that reveal that opinion, is not disqualifying unless the opinion is so extreme that it reflects an utter incapacity to be fair. ***Cain-Swope v. Swope***, 523 S.W.3d 79, 89 (Tenn. Ct. App. 2016). *See* ***Alley v. State***, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994). In other words, "[f]orming an opinion of litigants and issues based on what is learned in the course of judicial proceedings is necessary to a judge's role in the judicial system." ***Groves v. Ernst-W. Corp.***, No. M2016-01529-COA-T10B-CV, 2016 WL 5181687, at *5 (Tenn. Ct. App. Sept. 16, 2016) (footnote omitted) (citing ***Liteky v. U.S.***, 510 U.S. 540, 550-51 (1994)). As this Court has explained:

> The word prejudice implies an opinion held before the beginning of the trial. No such mental leaning is evident in the present case. 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.

Spain v. Connolly, 606 S.W.2d 540, 544 (Tenn. Ct. App. 1980). The trial court's order denying the motion to recuse states that "[a]fter reading the parties' pleadings and pre-trial briefs, and during the course of the trial, the court had begun to form impressions of the case. That those impressions may have been unfavorable to Mr. Neamtu's position is not a basis for the court's recusal." We agree. At no point in its order or statements from the bench, *supra*, does the trial court state an intention to rule against Mr. Neamtu. The trial court candidly stated that it had not heard all the proof and clarified that it would "reserve ruling until I hear all the proof." By revealing its initial thinking and advising the parties to discuss a possible resolution, the trial court simply afforded Mr. Neamtu an opportunity to negotiate with Ms. Simacek.

While we concede that the trial court could have shown a more judicious disposition by not using "ridiculous" to describe Mr. Neamtu's position, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." ***McKenzie v. McKenzie***, No. M2014-00010-COA-T10B-CV, 2014 WL

575908, at *4 (Tenn. Ct. App. Feb. 11, 2014) (quoting ***United States v. Adams***, 722 F.3d 788, 837 (6th Cir. 2013)). 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. ***Gibson v. Bikas,*** No. E2018-00911-COA-T10B-CV, 2018 WL 2671627, at *5 (Tenn. Ct. App. June 4, 2018) (quoting ***In Re: Samuel P.***, 2016 WL 4547543, at *2). Despite the trial court's choice of word, from our review, it is clear that the trial court's underlying motive was to provide an opportunity for resolution. While the trial court's use of "ridiculous" may have been directed toward Mr. Neamtu's chance of success in the modification hearing, it was not an attack of a personal nature. ***Gibson***, 2018 WL 2671627 at *5.

Statements and suggestions of the trial court must be construed in the context of all surrounding facts and circumstances to determine whether a reasonable person would construe them as indicating partiality on the merits of the case. ***Cain-Swope v. Swope***, 523 S.W.3d 79, 89 (Tenn. Ct. App. 2016) (citing ***Groves v. Ernst-W. Corp.***, No. M2016-01529-COA-T10B-CV, 2016 WL 5181687, at *5 (Tenn. Ct. App. Sept. 16, 2016)). From the totality of the circumstances, and for the reasons discussed above, we conclude that a reasonable person "knowing all of the facts known to the judge, would [not] find a reasonable basis for questioning the judge's impartiality." ***Williams by & through Rezba v. HealthSouth Rehab. Hosp. N.***, No. W2015-00639-COA-T10B-CV, 2015 WL 2258172, at *6 (Tenn. Ct. App. May 8, 2015)(quoting ***Davis v. Liberty Mut. Ins. Co.,*** 38 S.W.3d 560, 564-65 (Tenn. 2001)). Consequently, the record does not support the conclusion that the trial court erred in denying Mr. Neamtu's motion for recusal.

V. Attorneys' Fees

Ms. Simacek requests an award of her attorney's fees and costs on appeal. Litigants must typically pay their own attorneys' fees absent a statute or agreement providing otherwise. See ***State v. Brown & Williamson Tobacco Corp.***, 18 S.W. 3d 186, 194 (Tenn. 2000). Here, however, Ms. Simacek alleges that Mr. Neamtu's appeal is frivolous. Tennessee Code Annotated section 27-1-122 states that:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Tenn. Code Ann. § 27-1-122. "A frivolous appeal is one that is devoid of merit or has no reasonable chance of success." ***Selitsch v. Selitsch***, 492 S.W.3d 677, 690 (Tenn. Ct. App. 2015). However, the statute must be interpreted and applied strictly so as not to

discourage legitimate appeals. ***Henderson v. SAIA, Inc.***, 318 S.W.3d 328, 342 (Tenn. 2010) (citing ***Davis v. Gulf Ins. Group***, 546 S.W. 2d 583, 586 (Tenn. 1977)). "The decision to award damages for the filing of a frivolous appeal rests solely in the discretion of this Court." ***Chiozza v. Chiozza***, 315 S.W.3d 482, 493 (Tenn. Ct. App. 2009). From our review of the record, we conclude that the appeal is not frivolous or taken solely for delay. Accordingly, we exercise our discretion to deny Ms. Simacek's request for appellate attorneys' fees.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's order denying the motion for recusal. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs on the appeal are assessed against the Appellant, Marian Neamtu, for all of which execution may issue if necessary.

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KENNY ARMSTRONG, JUDGE