RECUSAL

Presented by Judge Steve Stafford and Judge Mary Wagner

Introduction

Harrison v. Wisdom, 54 Tenn. 99 (Tenn. 1872).

- In 1862, the residents of Clarksville convened a public meeting to discuss the impending invasion of the Union. According to the Opinion:

> There was at the time in the hands of merchants and dealers in the city a large quantity of whiskey and other spirituous liquors, which it was supposed would imperil the lives and property of the inhabitants if it should fall into the hands of the Federal soldiery, then flushed with victory and inflamed with the evil passions of civil war. It was therefore resolved by the citizens, convened as aforesaid, to destroy said spirituous liquors, as a measure of safety, and to recommend to the common council of said city, and to the county authorities, to levy a special tax upon the people in order to raise a fund for the reimbursement of those whose property should be thus destroyed.

- The town, therefore, resolved to appoint agents to confiscate and destroy the offending liquor.
- Plaintiff's liquor was destroyed as a result of the town meeting and he later filed suit to recover his loss. During the proceedings it was revealed that the trial judge was present at the town meeting referenced above. Accordingly, plaintiff filed a motion to recuse the trial judge, which was later denied.
- On appeal, the Tennessee Supreme Court affirmed the trial court's denial of the recusal motion, explaining:

> We are not prepared to say that the Circuit Judge who presided at the trial of this cause had such an interest in the result as disqualified him from sitting in judgment upon it. The Constitution of this State provides that no judge of the Supreme or inferior courts shall preside on the trial of any cause in the event of which he may be interested, or when either of the parties shall be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or in which he may have presided in any inferior court, except by consent of all the parties: Art. 5, s. 11. This provision is certainly broad enough to fortify the integrity of the courts against suspicion; for the mere blemish of suspicion is, to the judicial ermine, a blot of defilement. It was an observation of Lord Coke that even

an act of Parliament made against natural equity--as to make a man a judge in his own case--is void in itself: Co. Litt., s. 212. And it is a familiar remark of Sir William Blackstone that the administration of justice should not only be chaste but unsuspected. The maxim applies in all cases where judicial functions are to be exercised and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge or to his sense of decency to decide whether he shall act or not; all his powers are subject to this absolute limitation, and when his own rights are in question he has no authority to determine the cause . . . .

Such is an example of the prestige preserved by the judiciary of England upon this subject, where the rule is a mere maxim of national equity; and it should be even the more sacredly guarded in this country, where it is a principle of the organic law itself. We entirely concur, therefore, with the counsel for the plaintiff, that no judge should preside in a cause, or render any judgment, or make any order, where he can by possibility be suspected of being warped by the influence of fear, favor, partiality, or affection. When once a court has lost the charm of integrity and justice, with which it should ever be invested, it forfeits its influence for good, and degrades the majesty of the law.

The idea that the judicial office is supposed to be invested with ermine, though fabulous and mythical, is yet most eloquent in significance. We are told that the little creature called the ermine[1] is so acutely sensitive as to its own cleanliness, that it becomes paralyzed and powerless at the slightest touch of defilement upon its snow-white fur. When the hunters are pursuing it they spread with mire the passes leading to its haunts, to which they then drive it, knowing that it will submit to be captured rather than defile itself. And a like sensibility should belong to him who comes to exercise the august functions of a judge. It is his exalted province to pronounce upon the rights of life, liberty, and property, to make the law respected and amiable in the sight of the people, to dignify that department of the government upon which, more than all others depend the peace, the happiness, and the security of the people. But when once this great office becomes corrupted, when its judgments come to reflect the passions or the interest of the magistrate rather than the mandates of the law, the courts have ceased to be the conservators of the common weal[th], and the law itself is debauched into a prostrate and nerveless mockery.

[1] Prior to the tenure of Chief Justice John Marshall, who was appointed to the Supreme Court in 1801, Justices on the Supreme Court wore scarlet robes with ermine collars. Chief Justice Marshall began the tradition of simple black robes. Judges in many European countries (Scotland, Italy, Ireland, Belgium, and the Netherlands) still wear ermine-collared robes.

- The Tennessee Supreme Court concluded that the trial judge's mere presence at the meeting was insufficient to require recusal.

Basis for Disqualification

- Section 2.11 of the Rules of Judicial Conduct provides: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."
    - When might a judge's impartiality be reasonably questioned?
        - Personal bias or prejudice against a party or lawyer
        - Personal knowledge of the facts in dispute
        - Third degree relationship with party, lawyer, material witness, or person with more than a de minimis interest in the outcome
        - Judge or judge's close relative has an economic interest in the litigation
        - Judge knows that party, lawyer, or law firm involved in case had made a campaign contribution such that the judge's impartiality may reasonably be questioned.
        - Judge has made a public statement outside of court that appears to commit the judge to reaching a particular result
        - Judge previously represented a party, or presided over the matter in an inferior court or judicial settlement conference
    - Parties can waive all conflicts other than for bias, prejudice, or participation in a judicial settlement conference, if the judge informs the parties of the issue on the record.
    - If no other judge is able to hear the case, the rule of necessity may allow the judge to hear the case "in spite of [the judge's] possible bias" if no one else is authorized to act. ***Gay v. City of Somerville***, 878 S.W.2d 124, 128 (Tenn. Ct. App. 1994) (involving an administrative decision where only the Mayor and Board of Alderman were authorized to act).

- ***Bean v. Bailey***, 280 S.W.3d 798 (Tenn. 2009) (holding that recusal is based upon an objective standard).
    - Plaintiff sought recusal of the trial judge in a personal injury case based upon the acrimonious relationship between the trial judge and plaintiff's counsel. The trial court denied the motion on the basis that he could be fair and impartial.

- The Supreme Court reversed, ruling that the trial judge applied an improper, subjective standard. According to the Court, the appropriate standard requires:

> Even if a judge believes he can be fair and impartial, the judge should disqualify himself when '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.' . . . In making his decision, Judge Wilson failed to consider whether a person of ordinary prudence in his position would find a reasonable basis to question his impartiality in light of the acrimonious history recounted above. In considering only his own belief that he could be fair and impartial and that he had no bias or prejudice, Judge Wilson erred.

- Because the trial judge had a previous acrimonious relationship with plaintiff's counsel, there was a "reasonable factual basis for doubting [the judge's] impartiality." Specifically, among other things, "Judge Wilson requested twice that the T.B.I. investigate [the attorney] for criminal conduct and accused [the attorney] and members of his firm of tampering with political polls and having knowledge of a wiretap on Judge Wilson's phone. Both Judge Wilson and [the attorney] filed claims for misconduct against one another." Thus, recusal was warranted.

Procedure for Disqualification
Tennessee Supreme Court Rule 10B

- Party seeking recusal must file a timely written motion. Judge is to take no action in case until motion is disposed of.
  - After a motion for disqualification has been lodged, judge must grant or deny recusal motion by written order. If denying the motion, the court must state the grounds for denying the motion. If granting the motion, no written grounds are required.
- If the judge denies the recusal motion, the moving party has the right to an accelerated interlocutory appeal pursuant to Tennessee Supreme Court Rule 10B, Section 2.01.

    - Although the movant has a right to an interlocutory appeal, the failure to take one does not waive the issue of the judge's failure to recuse in any later Rule 3 appeal (appeal from a final judgment)
    - Have 21 days to file accelerated appeal from time when judge filed written order denying recusal motion
        - Appeal goes to Court that would have jurisdiction over underlying issues.
        - No automatic stay, but either the trial court or the appellate court may grant one.
        - If you do not meet the 21 day deadline, the appellate court does not have jurisdiction over the immediate appeal; you have to wait for a final judgment to appeal the failure to recuse.
    - Appeal is decided on an expedited basis.
        - Court can order additional briefing after the filing of the petition and supporting documents, or can act summarily, without oral argument or additional briefing.
- Judge's decision to remain on the case is reviewed under a de novo standard of review regardless of whether the recusal issue is raised in an accelerated appeal or in an appeal from a final judgment.
    - (**NOTE:** <u>This is a change from the previous abuse of discretion standard</u>).
    - Essentially same process when seeking recusal of an appellate judge.

Cook v. State, 606 S.W.3d 247 (Tenn. 2020).

- This case involved a petition for post-conviction relief. During the hearing on the motion, the trial court made several remarks that were derogatory toward post-conviction relief, post-conviction relief petitioners and attorneys, and in favor of the petitioner's prior attorneys. The trial court denied the petition, and the petitioner appealed, raising for the first time that the judge should have recused. The Court of Criminal Appeals affirmed in a split decision. Judge Williams, the dissenter, concluded that "the post-conviction judge's comments at the conclusion of the hearing were so egregious that the judge's impartiality might reasonably be questioned[.]"
- The Tennessee Supreme Court reversed, holding that Rule 2.11 of the Rules of Judicial Conduct required that the judge recuse regardless of a motion being filed. The court noted that while Rule 2.11 enumerates several circumstances in which no recusal motion is necessary, that list is not exhaustive. Instead, Rule 2.11 states that "[a] judge *shall* disqualify himself or herself in *any* proceeding in which the judge's impartiality might reasonably be questioned[.]"

- The court noted that while none of the trial judge's actions standing alone, warranted recusal, consideration of the entire record was necessary due to the trial court's comments at the conclusion of the hearing. Responding to the State's waiver argument, the court stated that "the post-conviction judge chose to make remarks that were not only egregious but also global in nature, expressing disdain for the entire class of proceedings he was charged with conducting. Under these unique circumstances, no recusal motion was required; the post-conviction judge should have known that the remarks compelled him to recuse himself."
- The court, however, declined to recuse the trial judge from all future post-conviction proceedings. As the court explained:

> We stop short of reaching the broader question *implicitly* presented by this appeal, which is: whether the post-conviction judge's inappropriate comments in this case call his impartiality into reasonable question and require his disqualification from all future post-conviction cases. An argument certainly can be made for answering this question in the affirmative. However, we decline to do so at this time. First, this decision should serve as an unmistakable admonition to this judge, and all other Tennessee judges, to refrain from such inappropriate comments in future cases. It also should serve as a crystal-clear reminder to this judge, and every other Tennessee judge, of the obligation to recuse without any motion in any proceeding in which the judge's impartiality might reasonably be questioned. We have no reason to doubt that Judge Coffee will fulfill these obligations in future cases in compliance with the oath he has taken as a judge. We decline to deny to judges the presumption that is applied to all other public officials in Tennessee.
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> Nevertheless, we take seriously this Court's obligation to ensure that justice in Tennessee remains impartial both in fact and in appearance. As a result, if, in a future case, this Court determines that a judge has habitually made inappropriate comments that call into reasonable question the judge's impartiality in a particular category of cases, this Court will not hesitate to hold, in the exercise of its supervisory power over the Judicial Department, that the judge is disqualified from hearing all future cases in that category. The circumstances of this appeal placed it only inches away from the threshold that must be crossed for this Court to invoke that extraordinary remedy.

(Citations omitted).

Social Media

Clay Cnty. v. Purdue Pharma L.P., No. E2022-00349-COA-T10B-CV, 2022 WL 1161056, at *1 (Tenn. Ct. App. Apr. 20, 2022).

- This case involved claims against the manufacturers of opioid medication. During a hearing concerning discovery sanctions, the trial judge stated that he would hold the defendant in default and that their former counsel "might be going to jail with or without their toothbrush" "if they had . . . show[n] up" at the hearing. The judge then gave an interview to an online law magazine in which he characterized the discovery violations as "the worst case of document hiding that I've ever seen. It was like a plot out of a John Grisham movie, except that it was even worse than what he could dream up."
- The judge also posted on his own Facebook page that "Why is it that national news outlets are contacting my office about a case I preside over and the local news is not interested." Screenshots of the trial judge's Facebook page reveal that the page appears to be devoted in part to a re-election effort given a "Re-Elect" picture banner next to his name.
- Then after one commenter stated that "You're not trying to ban drunken bridesmaids on peddle carts," the trial judge responded, "[N]ope. Opioids." The commenter then followed up by stating, "I don't know if you're going to get the help or platform you need from those with power/deep pockets. Many of Tennessee's powerful have ties to pharmaceuticals." The trial judge specifically "liked" this comment. The judge then went to criticize the news media.
- The defendants filed a motion to recuse. While the motion was pending, the judge issued sanctions against the defendants. The judge then denied the motion to recuse.
- The Court of Appeals reversed. With regard to the Facebook posts, the court held that the comments "can reasonably be construed to suggest that the trial judge has a specific agenda that is antagonistic to the interests of those in the pharmaceutical industry." Moreover,

> This perception is enhanced when considered alongside the trial judge's ready participation in the Law360.com article and apparent desire, as expressed on his Facebook page, for more local media coverage. The trial judge appears to us to be motivated to garner interest in this case and draw attention to his stated opposition to opioids within a community that he noted had been "rocked with that drug." Regardless of the specific motivation, however, it is clear here to us that the trial judge's comments and social media activity about this case are easily construable as indicating partiality against entities such as the Endo Defendants. For this reason, and to promote confidence in our judiciary, we conclude that the trial judge

erred in refusing to recuse himself from the case. We therefore reverse the trial court's order denying the Endo Defendants' motion for recusal and remand the case to the Presiding Judge of the Thirteenth Judicial District for transfer to a different judge.

- The court therefore reversed the denial of the recusal motion and vacated the order granted while the motion was pending.

Frazier v. Frazier, No. E2016-01476-COA-T10B-CV, 2016 WL 4498320 (Tenn. Ct. App. Aug. 26, 2016).

- Wife found the trial judge's Instagram profile, which was marked "private." Wife made a request to follow the trial judge, and the request was immediately accepted. She began to look at the pictures and saw pictures of the trial judge and Husband's counsel at a football game. She "screenshotted" the pictures, but the pictures had been deleted within a few hours of her discovery.
- The first picture was a group picture, which included the trial judge and the opposing counsel at the football game. The second picture was "the kind of self-portrait taken with a cellular telephone commonly referred to as a 'selfie.'"
- The photos were dated September 5, 2015; on September 30, 2015, the parties divorce case was filed in the circuit court.
- Wife filed a motion to recuse upon her belief that the activities depicted in these pictures would appear to a reasonable person to undermine the Judge's independence, integrity, and impartiality.
- The Court of Appeals held that recusal was necessary:

  It is clear from the record in this case that Judge Angel maintained a private account on Instagram which required him to approve all "follow" requests before the photographs posted by him on the account could be seen. It is also clear from the record that the photographs of the social interactions between Judge Angel and [Father's counsel], taken from Judge Angel's Instagram account and relied on in support of the motion seeking his recusal, depict a closeness to their friendship that undermined Wife's confidence in Judge Angel's ability to remain independent and impartial, as stated by her in the affidavit filed in support of her motion. While we do not suggest that Judge Angel is unable to put his personal friendship with [Father's counsel] aside in order to fulfill his role as an impartial judge, we do conclude that the photographs Judge Angel allowed Wife to view on his account, by accepting her "follow" request, would lead "a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge," to "find a reasonable basis for questioning the judge's impartiality." . . . The Court notes that the effect of Judge Angel's action in accepting Wife's "follow" request was to initiate an ex parte online communication with a litigant whose case was then

pending before him, which is expressly prohibited by Rule 2.9(A) of the Code of Judicial Conduct.

State v. Madden, No. M2012-02473-CCA-R3-CD, 2014 WL 931031, at *1 (Tenn. Crim. App. Mar. 11, 2014).

- The defendant filed a motion to recuse the trial court on the basis that the trial judge had a substantial connection to Middle Tennessee State University ("MTSU"), where the victim was a star basketball player. In support, the defendant noted that the trial judge had 205 Facebook connections to individuals at MTSU and was "Facebook friends" with the MTSU basketball coach, an expected witness. According to the defendant, there were numerous comments about the victim on the coach's page, that the trial court had made numerous comments about men's MTSU basketball, and that following the motion to recuse, the trial court had unfriended several people connected to MTSU.
- The trial court denied the motion, indicating that he initially believed that defense counsel hacked his account because he did not know that it was public. The trial court also admitted into evidence an affidavit from the coach, who said he was not "friends" with the trial court judge.
- The Court of Criminal Appeals affirmed the denial of the recusal motion. The Court first noted that the trial judge's contact with multiple MTSU individuals could not be denied, nor could the trial judge's angry temperament throughout the proceedings. Nevertheless, the court concluded that recusal was not required because the defendant failed to show that she was disadvantaged by any bias of the trial court. According to the court, the fact that the trial judge is acquainted with a participant in a case, without more, was insufficient to necessitate recusal.
    - NOTE: This case was decided under the old abuse of discretion standard. It could be different under the current de novo standard.

Groves v. Ernst-Western Corp., No. M2016-01529-COA-T10B-CV, 2016 WL 5181687 (Tenn. Ct. App. Sept. 16, 2016).

- Plaintiffs claimed many reasons for recusal, the most interesting one is regarding social media.
- Plaintiff's claim that trial judge's tweet created a reasonable appearance of judicial bias against Plaintiff's attorneys because of their age and inexperience.
- Trial judge tweeted a blog post that contained the article "Why people under 35 are so unhappy." The attorneys were in the age group described in the tweet.
- "Though Plaintiffs' attorneys are in the age group described in the blog post, there is nothing to suggest that it was somehow directed at them personally. Moreover, the judge did not write the blog post, nor did his tweet expressly endorse all of its contents. The tweet states only that the blog post is a "[v]ery interesting read" that

ends with "very good advice." In any event, the blog post itself, though written in a sarcastic tone, is not wholly critical of individuals in that age group. It merely suggests those individuals would benefit from tempering their expectations and refrain from measuring themselves against others. As such, it does not constitute a reasonable basis for questioning the judge's impartiality."

In re Charles R., No. M2017-02387-COA-R3-PT, 2018 WL 3583307 (Tenn. Ct. App. July 25, 2018), *perm. appeal denied* (Tenn. Oct. 3, 2018).

- A parent in a termination of parental rights case appealed the denial of her recusal motion on the basis that the trial judge and foster mother were "Facebook friends" creating a "risk" of extrajudicial communications or knowledge of the case.
- The Court of Appeals affirmed the denial of the motion, as the trial court denied seeing any posts regarding the child, explained that the community was small and close-knit, and his interaction with foster mother on Facebook was limited to birthday salutations.

State v. Forguson, No. M2013-00257-CCA-R3-CD, 2014 WL 631246 (Tenn. Crim. App. Feb. 18, 2014).

- Defendant filed a motion to recuse the trial judge on the basis that the judge and the confidential informant were "friends" on social media. The trial judge denied the motion on the basis that "[i]f I recused myself on every case that I either knew a witness or was friends with a witness, I couldn't try cases in Stewart County."
- The Court of Criminal Appeals affirmed, concluding that the simple fact that the judge and informant were friends on Facebook was not sufficient to show an appearance of impropriety. The court specifically pointed out the lack of proof as to "the length of the Facebook relationship between the trial court and the confidential informant, the extent of their internet interaction or the nature of the interactions."
- Judge Curwood Witt filed a concurring opinion, however, cautioning judges that

> [T]he opinion in my view should not stand for the proposition that a judge's Facebook relationship with a litigant or a key witness for a litigant poses no ground for disqualification. I accept and agree with the trial judge's commentary that one cannot reasonably expect a trial judge living in a small community to recuse himself or herself because he or she is acquainted with a litigant or a key witness. When a judge shares a Facebook "friendship" with such a person, however, the aggrieved party may be able to show that this "social media" relationship is more active, regular, or intimate than mere incidental community propinquity might suggest. For instance, how intentional is the relationship? Who initiated it and when? How do the participants use the medium? What type of information is shared? What is the frequency of the communications?

Certainly, I could envision a properly presented Rule 10B motion that, upon proof, evinces at least an appearance of impropriety.

Campaign Contributions

Tenn. Code Ann. § 2-10-313.

- Notwithstanding any law to the contrary, a judicial candidate may personally solicit and accept campaign contributions.").
- *See also* Tenn. Jud. Ethics Op. 22-01 (opining that judges may personally solicit campaign contributions).

Tenn. R. Sup. Ct. 10, Rule 2.11, cmt. 7.

- The fact that a lawyer in a proceeding, or a litigant, contributed to the judge's campaign, or supported the judge in his or her election does not of itself disqualify the judge. Absent other facts, campaign contributions within the limits of the "Campaign Contributions Limits Act of 1995," Tennessee Code Annotated Title 2, Chapter 10, Part 3, or similar law should not result in disqualification. However, campaign contributions or support a judicial candidate receives may give rise to disqualification if the judge's impartiality might reasonably be questioned.
- In determining whether a judge's impartiality might reasonably be questioned for this reason, a judge should consider the following factors among others:
    - (1) The level of support or contributions given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge's campaign and to the total amount spent by all candidates for that judgeship;
    - (2) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
    - (3) The timing of the support or contributions in relation to the case for which disqualification is sought; and
    - (4) If the supporter or contributor is not a litigant, the relationship, if any, between the supporter or contributor and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate or opponent, and (iv) the total support received by the judicial candidate or opponent and the total support received by all candidates for that judgeship.

In re Gabriel V., No. M2014-01298-COA-T10B-CV**,** 2014 WL 3808916 (Tenn. Ct. App. July 31, 2014).

- Party sought disqualification of the judge on the basis that the opposing party's lawyer had publicly supported the trial judge's recent campaign. The trial judge denied the motion. This Court affirmed, explaining:

> 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:
> > (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has made contributions or given such support to the judge's campaign that the judge's impartiality might reasonably be questioned.
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> Tenn. S.Ct. R. 10, RJC 2.11.
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> However, Comment 7 to Rule 2.11 clarifies that a lawyer's contribution to or support of a judge's campaign, absent other facts, does not require recusal.
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> The fact that a lawyer in a proceeding, or a litigant, contributed to the judge's campaign, or supported the judge in his or her election does not of itself disqualify the judge. Absent other facts, campaign contributions within the limits of the "Campaign Contributions Limits Act of 1995," Tennessee Code Annotated Title 2, Chapter 10, Part 3, or similar law should not result in disqualification. However, campaign contributions or support a judicial candidate receives may give rise to disqualification if the judge's impartiality might reasonably be questioned.

- The Court then set forth several factors to consider in order to determine whether the judge's impartiality could reasonably be questioned, including: (1) the level of support and whether it was directly or indirectly given, compared to the total support received; (2) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question; (3) the timing of the support; (4) if the supporter is not a litigant, the relationship between the supporter and the parties or issues before the court. Based on these factors, the Court opined:

> Thus the fact that an attorney has contributed to a judge's campaign, has endorsed a judge's candidacy, or has been listed on a judge's campaign committee will not require automatic disqualification of the judge. However, recusal may be required if an attorney is more actively involved in the judge's campaign or serves in a leadership role. ***Collier v. Griffith***,

App. No. 01-A-01-9109-CV-00339, 1992 WL 44893 at *6 (Tenn. Ct. App. Mar. 11, 1992).

In this case, Father asserts Mother's counsel contributed $200 to the judge's campaign and $250 to another campaign that then contributed to the judge's campaign. These donations must be considered relative to the roughly $80,000 in total donations received by the judge's campaign. Viewed in light of the total donations received, counsel's donations were modest and do not mandate recusal.

Father also asserts Mother's counsel was listed in the judge's campaign literature as a "friend" of the judge and as a host of some campaign events. Again, counsel's support must be viewed in light of the total support received by the judge. Counsel's name is listed in the literature along with the names of numerous other attorneys. Over 150 other attorneys were listed as supporting the trial judge in some literature. Father has not shown that counsel was active in the campaign or held a leadership role. Indeed, the trial judge specifically found that counsel did not hold any position or leadership role in the campaign and did not participate in any campaign meetings, financial meetings or volunteer events. Counsel's involvement was thus limited to being named as a supporter in campaign literature along with numerous other attorneys. Such limited support is sanctioned by Tenn. S.Ct. R. 10, RJC 2.11 Comment 7 and does not require recusal. ***Collier v. Griffith***, 1992 WL 44893 at *6.

- Accordingly, the Court held that recusal was not required.
- *See also* ***Tarver v. Tarver***, No. W2022-00343-COA-T10B-CV, 2022 WL 1115016, at *4 (Tenn. Ct. App. Apr. 14, 2022) (holding that recusal was not warranted when the respondent's attorneys are members of a law firm that co-sponsored a campaign event for the judge).

Does the Judge Have a Duty to Disclose that a Lawyer or Litigant Contributed to His or Her Campaign?

Collier v. Griffith, No. 01-A-019109CV00339, 1992 WL 44893, at *6 (Tenn. Ct. App. Mar. 11, 1992).

- The information [concerning the opposing lawyer's contribution to the judge's campaign] was not of the type that Mr. Collier or any other lawyer should necessarily have known or discovered. As far as the record shows, Mr. Collier resided in Nashville during these proceedings, not in the Twenty-third Judicial Circuit. He should not be expected to be intimately familiar with the composition of campaign committees in another judicial circuit or to have consulted the records

of the Registry of Election Finance or the Coordinator of Elections in order to discover this information.

Recommendation Letter for Application to Appellate Court

Hamilton v. Methodist Healthcare Memphis Hosps., No. W2019-01501-COA-T10B-CV, 2019 WL 4235000 (Tenn. Ct. App. Sept. 6, 2019).

- In this healthcare liability action, the plaintiff filed a motion to recuse on the basis that an attorney at the law firm representing defendant was provided a letter of recommendation in support of the trial judge's candidacy for an open appellate court position. The plaintiff contended that the trial judge failed to disclose the "extrajudicial relationship" between herself and the law firm. The trial court denied the motion and the plaintiff filed an immediate appeal.
- The Court of Appeals first noted that the relevant portion of the judicial code of conduct states that a trial judge's partiality may reasonably be questioned when the judge knows that "a party, a party's lawyer, or the law firm of a party's lawyer has made contributions or given such support to the judge's campaign that the judge's impartiality might reasonably be questioned." Tenn. Sup. Ct. R. 10, RJC 2.11(A)(4). The court noted, however, that an application for an appellate court vacancy is not a campaign and there were no allegations of financial contributions sought or received between the trial judge and defendant's law firm. Moreover, the lawyer who provided the recommendation was not involved in the case-at-bar, but merely a member of the law firm to which defendant's lawyers belong. Additionally, the trial judge's application indicated that her relationship with the lawyer was professional only and included no information about the law firm.
- Finally, the court found appropriate the judge's explanation that disclosure of this contact was not required. In particular, the judge correctly noted that disclosure is only necessary when the judge believes the lawyers or parties might reasonably consider the matter relevant to disqualification and properly concluded that reasonable litigants and attorneys would not find this information relevant to disqualification given the limited nature of the contact and relevance to the underlying litigation.

Campaign Boasts

State v. Griffin, 610 S.W.3d 752 (Tenn. 2020).

- The trial judge served as Deputy District Attorney General, in which he had broad and general supervisory authority, including at the time that the defendant was indicted. The question on appeal was whether this supervisory authority amounted to the trial judge participating "personally and substantially" in this case such that his impartiality might reasonably be questioned.
- Generally mere employment as a DA alone is not grounds for recusal. And being a DA during a time that a defendant was indicted and convicted on earlier charges is not sufficient to require recusal on later unrelated charges.
- In cases involving a supervisor, however, the proper test is "(1) whether the trial judge had direct supervisory authority over the assistant district attorney in the case; and (2) whether the trial judge had any direct involvement in the case."
- In this case, the judge's campaign material specifically stated that he had supervised "all criminal prosecutions in Knox County, a jurisdiction where up to 60,000 new criminal cases arise every year."." But in denying the recusal, the judge state that he was not the direct supervisor of the ADA that had originally prosecuted the defendant. And the court held this was a credible explanation despite his campaign advertisements because persons should not believe a campaign statement that a lawyer had supervised 60,000 cases a year. So the denial of the recusal motion was upheld.
- *See also* ***State v. Styles***, 610 S.W.3d 746 (Tenn. 2020) (same); ***State v. Clark***, 610 S.W.3d 739 (Tenn. 2020) (same).

Other Recusal Cases of Interest

What Constitutes Personal Knowledge?

Holsclaw v. Ivy Hall Nursing Home, Inc., 530 S.W.3d 65 (Tenn. 2017).

- Before the trial court was a motion for the plaintiff in a retaliatory discharge case to be examined by a certified rehabilitation counselor ("CRC"). The trial court offered to appoint an independent expert on the issue and noted that she had called a professor at the University of Tennessee to learn "what the program, the certification is, what these guys do and don't do, you know, enough for me to at least conclude that this is the type of certification for a person that I might let testify as an expert." Less than a month later, the defendant filed a motion to recuse the trial judge on the basis that the judge "did not constrain itself to consideration of the facts presented by the parties"; "conducted an independent investigation"; and "acquired knowledge from an extra-judicial source." The trial court denied the motion and the Court of Appeals reversed in a split decision.

- The Tennessee Supreme Court reversed the Court of Appeals and concluded that recusal was not warranted. First, the court concluded that the trial court did not gain personal knowledge despite its independent investigation of the facts before it. Personal knowledge of the facts of the case is generally sufficient to necessitate recusal. In reaching this result, the court adopted the Minnesota definition of personal knowledge, which is limited to "knowledge that arises out of a judge's private, individual connection to particular facts" and not including information that a judge learns "in the course of her general judicial capacity or as a result of her day-to-day life as a citizen." Because the trial judge had no personal connection to the facts of this case, the information that she gained from her independent investigation did not constitute personal knowledge.
- The court conceded, however, that the trial judge had engaged in an ex parte communication, that is, a communication concerning a pending proceeding (other than something administrative). Still, the court concluded that engaging in such a communication does not require recusal unless the communication leads to the conclusion that the trial court's impartiality might reasonably be questioned. The court concluded that the trial judge's impartiality could not reasonably be questioned because she had been open and honest with the litigants and her questions were generalized, rather than directed at defendant's specific expert.
- DISSENT: Justice Page dissented, finding that the trial court undertook an independent investigation of the facts in dispute in the case. According to Justice Page, the issue was exacerbated by the fact that the conversation took place off the record and the parties did not know the full content of exactly what was said. As such, Justice Page concluded that an appearance of impropriety was created in this case regardless of whether the trial judge gained an actual bias against a party.

Generational Knowledge

In re Destiny C., No. M2021-00533-COA-R3-PT, 2022 WL 2287022, at *8 (Tenn. Ct. App. June 24, 2022).

- In a termination of parental rights case, the mother argued that the trial judge should have recused because he presided over juvenile cases involving her when she was a juvenile and used her negative family history against her.
- The Court of Appeals affirmed the denial of the motion noting that much of the prior proceedings involving the mother occurred before the judge was on the bench and that prior knowledge of the existence of prior proceedings or prior knowledge about the facts of a case is not sufficient to mandate recusal.
- (The Court also affirmed the denial of the recusal motion even though the grounds for the denial were stated orally and not incorporated into the order).

Equivocation about Granting New Trial

Buckley v. Elephant Sanctuary in Tennessee, Inc., -- S.W.3d --, 2020 WL 3980437 (Tenn. Ct. App. July 14, 2020).

- Following a jury trial, the trial court granted a new trial, but declined on multiple occasions to state the reasons for the decision. As such, the plaintiff filed a motion to recuse under Rule 59.06 ("If the trial court grants a new trial because the verdict is contrary to the weight of the evidence, upon the request of either party the new trial shall be conducted by a different circuit judge or chancellor."). In denying the motion to recuse, the trial court explained that its decision was based on "very egregious" comments made by plaintiff's attorney during closing arguments. The trial court explained that it did not explain the ruling earlier out of respect for the attorney.
- The Court of Appeals reversed the decision of the trial court. First, the court noted that in the absence of an explanation for granting a new trial, Rule 59.06 required the trial judge to recuse itself. The court further held that by choosing not to explain the ruling, a presumption was created that the trial court granted the motion for new trial because the weight of the evidence was against the verdict. And the trial court only provided the new basis for its ruling after the recusal motion was filed.
- Under these circumstances, the court held that the trial court's action "give the impression that the court's decision to belatedly provide a reason for granting a new trial was to avoid disqualification[.]" This effort, the court held, would lead a reasonable person to question the judge's impartiality.

No Accelerated Interlocutory Appeal to COA of Magistrate's Denial of Motion

In re Haven-Lee S., No. W2022-00124-COA-T10B-CV, 2022 WL 468124, at *1 (Tenn. Ct. App. Feb. 16, 2022).

- Appellants filed a motion to recuse the juvenile court magistrate who was presiding over a dependency and neglect matter. The magistrate denied the order and Appellants filed a notice of appeal to the Tennessee Court of Appeals under Rule 10B.
- The Court of Appeals dismissed the appeal and transferred the matter back to juvenile court. Under Rule 10B, there is no right to an accelerated interlocutory appeal from a magistrate's decision denying recusal. Rather, judicial review of the denial of a motion to recuse under § 4 "depends on the forum in which the motion is made and is governed by the law applicable to that forum." The explanatory comments to Rule 10B offer the following guidance:

> [R]ulings of some judicial officers (e.g., a magistrate, referee or master) can be subject to the approval or review of a judge of a court of record. These examples are provided to illustrate that, in the

> various proceedings covered by this section, review of a judge's or other judicial officer's denial of a motion for disqualification should be sought in accordance with the appeal procedure generally available for review of the judge's or judicial officer's other rulings.

- Under Tenn. Code Ann. § 37-1-107(d), a party may appeal the ruling of a magistrate within ten days to the juvenile judge. Thus, the juvenile judge is the proper person to hear an appeal from the denial of a motion to recuse by a juvenile magistrate.

No Evidentiary Hearing Necessary on Rule 10B Motion

Neuman v. Phillips, No. M2021-01162-COA-T10B-CV, 2021 WL 6055923, at *3 (Tenn. Ct. App. Dec. 21, 2021).

- This case originated over an effort to modify a parenting plan in part due to the COVID-19 pandemic. Eventually, Plaintiff filed a motion to recuse the trial court, on the basis of opinions held by the judge's spouse and an alleged animosity toward the plaintiff. The trial court denied summarily without the benefit of an evidentiary hearing. Plaintiff argued that this was an error because it prevented her from making a complete record.
- The Court of Appeals held that there was no error in ruling on the motion to recuse without an evidentiary hearing. As the court explained, "conducting such a hearing would run counter to our supreme court's directive that, when presented with a recusal motion, a trial judge must 'act promptly by written order and either grant or deny the motion.'" Tenn. Sup. Ct. R. 10B § 1.03. Moreover, in arguing that the record provided ample reason to justify recusal, the plaintiff "all but acknowledges a lack of prejudice" in the decision to rule on the motion absent an evidentiary hearing. Indeed, the recusal motion's two main factual allegations were evident without the need for an evidentiary hearing.
- As for the allegation that the judge may share her husband's well-known anti-mask opinions, the Court held that the spouse's views were "irrelevant," as the issue in the case was not whether masks should be mandated in schools. Instead, the only issues were modification of the parenting plan and contempt.
- As the second basis for recusal, the Court of Appeals agreed with Mother that the trial judge was "not justified" in finding that her recusal motion was filed in bad faith. As the Court of Appeals explained, nothing in the record supported this finding and the finding was not well-explained by the trial court. But the court concluded that this was not support for recusal of the trial judge, as it alone does not raise a reasonable question as to the judge's impartiality.
- *See also* ***Primary Residential Mortg., Inc. v. Baker***, No. M2016-01786-COA-R3-CV, 2018 WL 3530835, at *4 (Tenn. Ct. App. July 23, 2018) (reaching the same conclusion as to the necessity of a hearing).

Rule 63 Compliance and Delays

Dougherty v. Dougherty, No. W2021-01014-COA-T10B-CV, 2021 WL 4449649, at *4 (Tenn. Ct. App. Sept. 29, 2021).

- A hearing was held on a petition to modify a parenting plan by Chancellor William Cole. The matter was continued before resolution. On November 5, 2021, Chancellor Cole recused. On November 17, 2020, Chancellor Martha Brasfield was appointed to preside over the matter.
- In January/February, the trial judge reviewed the transcript from the prior hearing. The remainder of the hearing was then set for August 16, 2021. The trial judge also denied a motion by Father to retry the entire case.
- On August 6, 2021, Father filed a motion to recuse the trial judge because she had not timely complied with Rule 63 of the Tennessee Rules of Civil Procedure ("If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties."). The trial judge denied the motion.
- The Court of Appeals affirmed, holding that the trial court's delay in certification under Rule 63 was not evidence of bias: "Although every judge should strive to discharge his or her duties in a competent, prompt, and efficient manner, a judge's failure to do so does not, *ipso facto*, demonstrate that the judge holds a bias or prejudice against a litigant." Because nothing in Father's motion indicated that the trial judge could not conduct a fair and impartial trial, the motion to recuse was properly denied.

Ruling on Matters While A Recusal Motion is Pending

Adkins v. Adkins, No. M2021-00384-COA-T10B-CV, 2021 WL 2882491, at *8 (Tenn. Ct. App. July 9, 2021).

- This case involves a multitude of issues raised by Wife over three separate recusal motions. One issue involved the trial court entering a written order on a substantive issue while the third recusal motion was pending.
- Under Rule 10B, while a motion to recuse is pending, "the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken." Tenn. Sup. Ct. R. 10B § 1.02.
- In this case, however, the trial judge had orally made a ruling as to the matter several days prior to the third motion to recuse being filed. Although the written order was entered following the filing of the third motion to recuse, "entry of the order was purely administrative and did not violate section 1.02 of Tennessee Supreme Court Rule 10B."

- *See also* ***Dougherty v. Dougherty***, No. W2020-01606-COA-T10B-CV, 2020 WL 7334388, at *3 (Tenn. Ct. App. Dec. 14, 2020) (involving a case where the trial court denied a recusal motion, but then sua sponte recused in the same order; vacating orders entered by the trial judge entered after the sua sponte recusal).

Sitting By Interchange Procedure

In re Estate of Ellis, No. W2019-02121-COA-R3-CV, 2020 WL 7334392, at *5 (Tenn. Ct. App. Dec. 14, 2020).

- A conservatorship case and a later estate case were initially filed in Shelby County Probate Court, Judge Kathleen Gomes presiding. Eventually, Judge Gomes entered an order recusing herself from the conservatorship matter and transferring the matter to circuit court, Judge Gina Higgins presiding. Judge Gomes also entered an order transferring the "Estate File" as "a companion file" to Judge Higgins. Parties to the estate filed a motion to transfer the matter back to probate court, which other parties opposed on the basis that Judge Higgins was properly sitting by interchange pursuant to Rule 10B.
- Judge Higgins eventually entered an order allowing a law firm to intervene in the case, which was the subject of the instant appeal. See Tenn. R. Civ. P. 24.05 (allowing an appeal of an order granting a motion to intervene).
- The Court of Appeals did not reach the merits of that decision, however, because the circuit court lacked jurisdiction over the appeal. According to the court, circuit courts in Shelby County do not have probate jurisdiction.
- Moreover, the case had not been properly interchanged. A case is interchanged by a judge sitting in a court to which he or she is not elected, not the transfer of the case from a court with jurisdiction to a court lacking jurisdiction. As such, the orders entered by Judge Higgins were vacated.

Judge as Material Witness

Hawthorne v. Morgan & Morgan Nashville PLLC, No. W2020-01495-COA-T10B-CV, 2020 WL 7395918, at *4 (Tenn. Ct. App. Dec. 17, 2020).

- The plaintiffs filed a proposed class action case against a cemetery, presided over by Judge Jim Kyle. The plaintiffs then filed a second proposed class against their attorneys in the first case, alleging they failed to communicate settlement offers. The second case was also assigned to Judge Kyle. The plaintiffs then filed a motion to recuse Judge Kyle on the basis that he has personal knowledge of facts in dispute and was likely to be a witness. The trial judge denied the motion.
- On appeal, the theory of the plaintiffs was that because any settlement in the first case would have to have been approved by Judge Kyle, he would be required to testify as to what would have been reasonable proposed settlements that he would have accepted.

- But the Court concluded that the theory of malpractice resolved around extrajudicial settlement offers, not anything that occurred at trial. Moreover, in the malpractice action, the question of whether any proposed settlements would have been approved by the court is for the court, rather than the jury, to make. The trial judge therefore need not testify as to what he would or would not accept.

Board Complaint

Salas v. Rosdeutscher, No. M2021-00157-COA-T10B-CV, 2021 WL 830009, at *3 (Tenn. Ct. App. Mar. 4, 2021).

- In a case involving sanctions against an attorney, the attorney filed a motion to recuse the trial judge on the sole basis that the attorney had previously filed a complaint with the Board of Judicial Conduct against the presiding judge.
- Although the Court of Appeals confirmed that the attorney had standing to file the recusal motion because of the request for sanctions against him personally, the Court held that there was no basis for recusal. According to the court, the judicial disqualification standards do not require recusal simply because the person seeking recusal has filed some type of complaint against the judge. *See* ***Moncier v. Bd. of Prof'l Responsibility***, 406 S.W.3d 139, 162 (Tenn. 2013) (collecting cases). Without a showing of bias or prejudice, the fact that a litigant has filed a Board complaint against a judge is not sufficient to warrant recusal.

10B Procedure

Marcum v. Caruana, No. M2012-01827-COA-10B-CV, 2012 WL 3984631 (Tenn. Ct. App. Sept. 11, 2012).

- Breach of contract complaint was filed in 2001. In 2007, Plaintiff filed a motion for a writ of attachment, seeking to attach funds held by the clerk in a condemnation case. The trial court entered an order releasing the funds. Defendant filed a motion to quash the attachment and to disqualify Plaintiff's counsel. The trial court deferred ruling until an evidentiary hearing could take place. No hearing ever occurred.
- Plaintiff filed a motion to set the case for trial. Defendant filed a motion opposing setting the case for trial, citing a similar federal case between the parties that would require considerable time and expense to prepare for and also filed a motion to recuse the trial judge.
- The trial court denied the recusal motion and set the case for trial. Defendant filed a motion to continue, citing scheduling conflicts. Defendant then filed an immediate appeal of the trial court's refusal to withdraw pursuant to Tennessee Supreme Court Rule 10B, together with a motion to stay the proceedings in the trial court.

- The Court of Appeals first explained the "accelerated interlocutory appeal" process of Rule 10B, stating

  > The appeal is [a]ffected by filing a "petition for recusal appeal" with the appropriate appellate court. Tenn. S.Ct. R. 10B, § 2.02. In civil cases other than worker's compensation cases, this court is the appropriate appellate court. If this court, based on the petition and supporting documents, determines that no answer is needed, we may act summarily on the appeal. Tenn. S.Ct. R. 10B, § 2.05. Otherwise, this court may order an answer and may also order further briefing by the parties. In addition, Tenn. S.Ct. R. 10B, § 2.06 grants this court the discretion to decide the appeal without oral argument.

- The Court concluded that nothing in the record suggested that the trial judge had any actual bias against the Defendant or that "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." The Court notes that:

  > The majority of factual allegations Mr. Caruana makes in support of his claims of bias are, actually, rulings of the trial court or, the failure to rule. Essentially, [Plaintiff] asserts that because the trial judge did not grant the relief he requested, the trial judge must be biased. Indeed, the petition argues that bias is obvious from the rulings, e.g., "Appellant certainly is justified in believing that bias appears to be the only reason for the trial judge to ignore or misconstrue appellant's legal arguments." The argument in the appeal petition is replete with questions asking "why else," other than bias, would the court have taken the action it did. Many of the arguments go more to the merits of the decisions rather than the bias of the judge.

- The Court noted that "the mere fact that a judge has ruled adversely to a party or witness is not grounds for recusal." ***State v. Hines***, 919 S.W.2d 573, 578 (Tenn. 1995). Looking at the various rulings, the Court concluded that none of the adverse rulings showed that the trial court had any bias toward Defendant. Indeed, the Court concluded that it was not unusual to require counsel to appear for a hearing to present evidence as to disputed facts and the trial court even encouraged the parties to stipulate to as many facts as possible to cut down on court time.
- The Court further held that any allegations of ex parte communications were waived because no motion to recuse was filed timely after Defendant learned of the communications.
- Finally, the Court held that the trial judge's statement that he found Defendant's counsel "abrasive" was not sufficient to require recusal, as trial judges are not

required to withdraw merely because they have formed opinions regarding the counsel involved.

Ordering a Mental Examination of Party Based upon Pleadings

C.D.B. v. A.B., No. M2018-00532-COA-T10B-CV, 2018 WL 1976119 (Tenn. Ct. App. Apr. 26, 2018).

- In this post-divorce custody dispute, the parties' pleadings raised allegations of sexual abuse by Father, as well as allegations that Mother had made numerous such unfounded allegations in the past. On the day of trial, the trial court appeared and made a sua sponte motion for Mother to undergo a mental evaluation to determine if she was engaging in parental alienation by her repeated allegations. The trial court allowed the parties to appear the next day to argue the motion. Mother did not appear, choosing instead to work on a written response, which was ultimately filed following the conclusion of the hearing. As such, the trial court entered a written order requiring Mother to undergo the evaluation at her expense.
- Mother thereafter filed a motion to recuse the trial judge, arguing that the trial judge's consideration of the pleadings meant that he considered extrajudicial sources. Where a judge's bias allegedly stems from extrajudicial sources, the burden to show that recusal is warranted is lower than when the bias stems from the proceedings.
- The Court of Appeals concluded that although the trial court did not have evidence before it, the parties' pleadings did not constitute extrajudicial sources for purposes of the recusal analysis. The Court also concluded that a trial court's decision to order a mental evaluation based upon the pleadings, which in this case included several admissions by Mother concerning her prior allegations, was insufficient to show a pervasive bias sufficient to necessitate recusal.
    - NOTE: This opinion also includes some discussion of whether the correctness of a trial court's rulings should be considered in determining recusal and cites some cases coming to disparate conclusions on this issue. Generally, the correctness of the trial court's rulings are not a basis for recusal, but have been cited as significant enough to warrant recusal when coupled with numerous fundamental errors such as lack of notice and the improper disqualification of a party's attorney that evidenced a pervasive bias. *See* ***Hoalcraft v. Smithson***, No. M2000-01347-COA-R10-CV, 2001 WL 775602, at *16 (Tenn. Ct. App. July 10, 2001). *But see* ***Eldridge v. Eldridge***, 137 S.W.3d 1, 7 (Tenn. Ct. App. 2002) (expressing some disagreement with the rule set forth in ***Hoalcraft***).

Alleged Repeated Misapplication of Fundamental, Rudimentary Legal Principles

Nelson v. Justice, No. E2017-00895-COA-R3-CV, 2019 WL 337040, at *12 (Tenn. Ct. App. Jan. 25, 2019).

- Father filed two motions to recuse the trial judge on the basis that "his rulings contain repeated misapplications of 'fundamental, rudimentary legal principles' that favored Mother 'substantively and procedurally.'"
- The Court noted that generally adverse rulings are not sufficient to show bias, but one case has used "repeated misapplication of fundamental, rudimentary legal principles" as a ground for recusal. *See* ***Hoalcraft v. Smithson***, No. M2000-01347-COA-R10-CV, 2001 WL 775602, at *16-17 (Tenn. Ct. App. July 10, 2001). Here, the court found no such fundamental repeated errors: father alleged only two significant errors by the trial judge that were either not supported by the record or not properly briefed on appeal. As such, the trial court's denial of the recusal motion was affirmed.

Unsubstantiated Allegations

Watson v. City of Jackson, 448 S.W.3d 919 (Tenn. Ct. App. Feb. 13, 2014).

- Plaintiff filed a premises liability suit against the City for injuries she sustained while working in a City-owned building. After a bench trial, the trial court found Plaintiff more than 50% at fault for her injuries and denied recovery. While Plaintiff's appeal was pending, the parties engaged in a dispute over the record. Specifically, Plaintiff prepared a Statement of the Evidence, despite the fact that a court reporter was present at the trial, which included Plaintiff's internal dialogue regarding the proceedings, including her alleged pain while testifying. The City objected and the trial court ruled that Plaintiff's Statement of the Evidence did not comply with Rule 24 of the Tennessee Rules of Appellate Procedure.
- Thereafter, Plaintiff sought to disqualify the trial judge on the basis of partiality and bias. The trial court denied the motion and this Court affirmed. According to this Court:

> Ms. Watson asserts in her Petition to this Court that the trial judge should have withdrawn from presiding over the preparation of the record because the trial judge's refusal to approve Ms. Watson's Statement of Proceedings evidences that the trial judge was biased against her. Specifically, Ms. Watson asserts that: (1) the trial judge granted the Motion to Strike her Statement of Proceedings because it exposed the trial judge's illegal conduct; and (2) the court reporter colluded with the trial judge to remove evidence of discrimination from the transcript because the court reporter has a bias against those on public assistance. Thus, the basis of Ms.

Watson's Petition in this Court is that the trial judge's partiality is evidenced by his refusal to accept Ms. Watson's Statement of Proceedings.

* * *

Tennessee Supreme Court Rule 10, Code of Judicial Conduct Rule 2.11 provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned [.]" It is well-settled that "'[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)). Article VI, § 11 of the Tennessee Constitution, Tennessee Code Annotated § 17-2-101, and the Code of Judicial Conduct prohibit a judge from presiding over a matter in which the judge has an interest in the outcome or where the judge is connected to either party. The purpose of the prohibition is 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 [ ] reached a prejudged conclusion because of interest, partiality, or favor." ***State v. Austin***, 87 S.W.3d 447, 470 (Tenn. 2002) (citation omitted). Additionally, we have emphasized that "the preservation 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) (citations omitted). Accordingly, even in cases wherein a judge sincerely believes that she can preside over a matter fairly and impartially, the judge nevertheless should recuse herself in cases where a reasonable person "'in the judge's position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.'" ***Davis v. Liberty Mut. Ins. Co.,*** 38 S.W.3d 560, 564–65 (Tenn. 2001) (quoting ***Alley v. State***, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994)). It is an objective test designed to avoid actual bias and the appearance of bias, "since the appearance of bias is as injurious to the integrity of the judicial system as actual bias." ***Davis***, 38 S.W.3d at 565 (citation omitted).

Adverse rulings and "the mere fact that a witness takes offense at the court's assessment of the witness" do not provide grounds for recusal, however, in light of the "adversarial nature of litigation." ***Id.*** Further, although "bias" and "prejudice" are terms that usually refer to "a state of mind or attitude that works to predispose a judge for or against a party.... Not every bias, partiality or prejudice merits recusal." ***Alley v. State***, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994). Rather, "[t]o disqualify, prejudice must be of a personal character, directed at the litigant, [and] '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.*** (quoting ***State ex rel. Wesolich v. Goeke***, 794 S.W.2d 692, 697 (Mo. Ct. App. 1990)). We review the trial court's denial of a motion for recusal under a de novo standard of review. Tenn. S.Ct. R. 10B, § 2.06.

- Because Ms. Watson included only unsupported allegations of bias in her motion, which allegations were not substantiated by the trial transcript provided by the City, Ms. Watson failed to show that the trial court's behavior led to the appearance of impropriety.
- Further, the trial court's decision to strike Ms. Watson's Statement of the Evidence was not sufficient evidence of bias because Ms. Watson's Statement clearly failed to comply with Rule 24 of the Tennessee Rules of Appellate Procedure.
- Finally, as explained by the Court:

> Ms. Watson has simply not submitted any evidence that the trial judge's actions in this case were the result of bias, prejudice, impropriety, or harassment. Although we are cognizant of the fact that the trial judge declined to grant any of Ms. Watson's *pro se* post-trial motions, it is well-settled that "[a]dverse rulings by a trial judge ... are not usually sufficient to establish bias." ***Ingram v. Sohr,*** No. M2012-00782-COA-R3-CV, 2013 WL 3968155, at *31 (Tenn. Ct. App. July 31, 2013) (citing ***State v. Cannon,*** 254 S.W.3d 287, 308 (Tenn. 2008)). Rulings of a trial judge, even if erroneous, numerous and continuous, do not, without more, justify disqualification. ***Duke v. Duke,*** 398 S.W.3d 665, 671 (Tenn. Ct. App. 2012) (citing ***Alley v. State,*** 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994)). Respectfully, Ms. Watson has failed to show the "more" required by this Court in ***Duke*** to justify recusal of the trial judge in this case.
>
> Further, even if Ms. Watson's unsupported allegations regarding the demeanor of the trial court are correct, there is nothing to suggest that recusal is the appropriate remedy in this case. As previously discussed, to warrant recusal, any alleged bias or prejudice "must come from an extrajudicial source, and must not be based upon what the judge sees or hears during the [t]rial." ***Neuenschwander v. Neuenschwander,*** No. E2001-00306-COA-R3-CV, 2001 WL 1613880, at *1 (Tenn. Ct. App. Dec. 18, 2001) (citing ***Wilson v. Wilson,*** 987 S.W.2d 555 (Tenn. Ct. App. 1998)). 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." ***Neuenschwander,*** 2001 WL 1613880, at *1. As this Court 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). There is simply nothing in the record that: (1) shows that the trial judge exhibited an improper demeanor or bias against Ms. Watson; or (2) shows that any alleged improper demeanor on the part of the trial judge was the result of an "extrajudicial source." ***Neuenschwander,*** 2001 WL 1613880, at *1. Instead, Ms. Watson simply has failed to satisfy her burden to show that there is "a reasonable basis for questioning the judge's impartiality." ***Davis,*** 38 S.W.3d at 565 (citation omitted).

- *See also* ***Carney v. Santander Consumer USA***, No. M2010-01401-COA-R3-CV, 2015 WL 3407256 (Tenn. Ct. App. May 28, 2015) (discussed in detail below).

Timing of Recusal Motion

State v. Rogers, No. E2013-00909-CCA-R3-CD, 2014 WL 1423241 (Tenn. Crim. App. Apr. 11, 2014).

- A party filed a recusal motion after the conclusion of the proceedings. The trial court denied the motion and the Court of Appeals affirmed on the basis that the issue was waived, explaining:

> Section 1.01 of Rule 10B also mandates that a motion for recusal must be timely filed. As the Court of Appeals recently recognized in addressing a Rule 10B motion for recusal:
>
> > It is also important to recognize that a party may lose the right to challenge a judge's impartiality by engaging in strategic conduct. ***Kinard v. Kinard,*** 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998). Further, our "[c]ourts frown upon the manipulation of the impartiality issue to gain procedural advantage and will not permit litigants to refrain from asserting known grounds for disqualification in order 'to experiment with the court . . . and raise the objection later when the result of the trial is unfavorable.'" ***Id.*** (quoting ***Holmes v. Eason,*** 76 Tenn. 754 (Tenn.1882)); ***Gotwald v. Gotwald,*** 768 S.W.2d 689, 694 (Tenn. Ct. App. 1988). "Thus, recusal motions must be filed promptly after the facts forming the basis for the motion become known, and the failure to assert them in a timely manner results in a waiver of a party's right to question a judge's impartiality." *Id.* (internal citations omitted).

***Kathryn A. Duke v. Harold W. Duke**, III,* No. M2012-01964-COA-10B-CV, 2012 WL 4513613, at *3 (Tenn. Ct. App., at Nashville, Oct. 2, 2012), *perm. app. denied,* (Tenn. Feb. 26, 2013).

There are multiple procedural issues with Appellant's "Petition for Appeal" assuming it is to be taken as a motion for recusal of the trial judge. The motion was not timely since it was not filed until the proceedings were over, it was not accompanied by an affidavit, and Appellant was represented by counsel at the time he filed it. All these facts are contrary to the requirements under Section 1.01 of Rule 10B. For this reason, this issue is waived.

- Thus, recusal issues may be waived when a party delays filing a recusal motion in order to gain a strategic advantage.

Opinions Formed During Proceedings

McKenzie v. McKenzie, No. M2014-00010-COA-T10B-CV, 2014 WL 575908 (Tenn. Ct. App. Feb. 11, 2014).

- The movant sought disqualification of the trial judge on the basis of an alleged bias exhibited by the judge during the proceedings. The judge denied the motion and the movant appealed. In affirming the denial of the recusal motion, the Court of Appeals explained:

> [O]pinions of a judge based upon events that occur during the litigation of a case are not extrajudicial and do not arise from outside or from personal bias. Consequently, "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." ***United States v. Adams**,* 722 F.3d at 837 (quoting ***Liteky v. United States**,* 510 U.S. 540, 555 (1994)); ***Albuquerque Bernalillo Cnty. Water Utility Authority**,* 229 P.3d at 511.
>
> The rule makes common sense. The Tennessee Supreme Court explained in ***Davis v. Liberty Mut. Ins. Co.**,* 38 S.W.3d at 565, that if parties and counsel could demand recusal on the basis of rulings, "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."
>
> The same danger of manipulation in order to require a change of judge exists where the basis for recusal is criticism or irritation directed at an attorney. A rule that allowed an attorney to have his case transferred to

another judge by quarreling with the court is not in the interest of justice. If every time a judge criticized the conduct of an attorney in the trial of a case, no matter how much it was warranted, a ground for recusal might exist, it would allow for the kind of forum shopping and cause for delay that is disfavored.

Recusal is not required because a judge has formed an opinion that a particular counsel is abrasive or has a litigation strategy that might include delay as a tactic. ***Marcum v. Caruana***, 2012 WL 3984631, at *7 (Tenn. Ct. App. Sept. 11, 2012); ***In re D.C.,*** 49 S.W.3d 694, 698 (Mo. Ct. App. 2001) (a judge's possession of views about the conduct of a party or of the party's counsel does not constitute disqualifying prejudice).

A judge's irritation or exasperation with counsel, criticism of counsel for perceived delays or failures to follow rules, friction occurring during litigation, or even sanctions and contempt charges do not establish the objective personal bias that would prevent a fair assessment of the merits of the case. *See, e.g.,* ***Rhodes v. McDannel,*** 945 F.2d 117, 120 (6th Cir.1991); ***People v. Smith,*** 410 N.E.2d 973, 978–79 (Ill. App. Ct. 1980); ***Blacknell v. State,*** 502 N.E.2d 899, 904 (Ind. 1987); ***McKinley v. Iowa Dist. Court for Polk Cnty.,*** 542 N.W.2d 822, 827 (Iowa 1996).

- *See also* ***Slotnik v. Slotnik***, No. M2022-00645-COA-T10B-CV, 2022 WL 2046527, at *6 (Tenn. Ct. App. June 7, 2022) (involving the trial court's critical comments about a parent that were formed during the proceedings).

Trial Court Former Patient of Expert

Hall v. Randolph, No. W2013-02571-COA-T10B-CV, 2014 WL 127313 (Tenn. Ct. App. Jan. 14, 2014).

- The trial court denied Defendant physician's motion to recuse following the trial judge's disclosure of an earlier patient-physician relationship with Defendant's expert witness. The Court of Appeals reversed, concluding that the situation created an appearance of impropriety.
- The Court first concluded that a recusal motion's success was not predicated on the party that filed the motion or the fact that a party may later utilize recusal as a trial strategy:

> We turn first to Dr. Randolph's assertion that the trial judge should have granted Dr. Randolph's motion for recusal on the ground that, in light of Ms. Hall's past conduct, Ms. Hall may use a motion to recuse strategically to avoid a negative ruling as this matter proceeds to trial. This argument is without merit. Whether the trial judge can preside without bias or prejudice

in light of her former doctor-patient relationship with Dr. DeWane is not predicated on which party files a motion to recuse. An opposing party's potential trial strategy does not provide a ground for recusal.

- The Court further concluded that the fact that the judge's prior relationship with the expert was of a confidential nature, standing alone, was not a sufficient basis for recusal:

> We next turn to Dr. Randolph's assertion that the confidentiality of the trial judge's medical records prevents the parties and this Court from fully knowing the extent of the judge's relationship with Dr. DeWane, thus obscuring whether real or perceived bias exists. There is no suggestion in this case that the trial judge's physician-patient relationship with Dr. DeWane extended beyond that disclosed by the trial judge. In her order denying recusal, the trial judge characterized her relationship with Dr. DeWane as "long past." Further, the trial judge noted that she underwent a surgical procedure performed by Dr. DeWane in 2005, before this matter was transferred to her court; that the surgery was "uneventful, uncomplicated and served its purpose"; that she had no further contact with him since released from post-surgery care in early 2006; and that she likely would not recognize Dr. DeWane "were he to walk through the door." Although, as Dr. Randolph asserts, the exact nature of the procedure performed by Dr. DeWane is not contained in the trial judge's disclosure, there is nothing to suggest that the trial judge's relationship with Dr. DeWane was other than as characterized by the trial judge. This argument also is without merit.

- The Court finally concluded that "trial judge's relationship as a former surgical patient of Dr. DeWane may give rise to actual or perceived bias in light of the trial judges' role as thirteenth juror." According to the Court:

> The trial judge must independently weigh the evidence, and the judge's assessment of witness credibility affects the weight given to the testimony of a particular witness. ***Michelsen v. Stanley,*** 893 S.W.2d 941, 945 (Tenn. Ct. App. 1993). "The trial judge cannot make an independent evaluation of the evidence without assessing the credibility of witnesses." *Id.* Thus, as Dr. Randolph asserts, the trial court must assess the credibility of Dr. DeWane's expert testimony with respect to the standard of care as the thirteenth juror in this matter.
>
> We observe that actions alleging medical malpractice often present the jury with a "battle of the experts" in which the jurors must decide which expert to believe. *See, e.g.,* ***Bearden v. Lanford,*** No. M2012-02073-COA-

R3-CV, 2013 WL 6908938 (Tenn. Ct. App. Dec. 30, 2013) *(no perm. app. filed);* ***Burchfield v. Renfree****,* No. E2012-01582-COA-R3-CV, 2013 WL 5676268 (Tenn. Ct. App. Oct. 18, 2013) *(no perm. app. filed);* ***Farley v. Oak Ridge Med. Imaging, P. C.****,* No. E2008-01731-COA-R3-CV, 2009 WL 2474742 (Tenn. Ct. App. Aug. 13, 2009). In this case, Dr. DeWane is Dr. Randolph's expert witness with respect to the standard of care, a pivotal issue in this matter, and it is undisputed that the trial judge underwent surgery performed by Dr. DeWane during the pendency of this litigation. Although the trial judge was not presiding over the matter in 2005 or 2006, when she was a patient of Dr. DeWane, it is objectively reasonable to believe that the trial judge's credibility assessment with respect to the standard of care may be impacted-positively or negatively, as the case may be-by her personal knowledge and experience as a former patient of the expert witness. At the very least, an appearance of partiality arises where the trial judge was a patient of a key expert witness in a medical malpractice action during the pendency of the action in the court, albeit in a different division.

- Thus, the Court ruled that the trial court erred in denying the recusal motion.

Counsel Formerly Employed as Law Clerk

In re Conservatorship of Patton, No. M2012-01878-COA-10B-CV, 2012 WL 4086151 (Tenn. Ct. App. Sept. 17, 2012).

- Daughter in a conservatorship case filed a motion seeking recusal of the trial judge, arguing that "the trial judge is biased and prejudiced against her, her husband, and the ward, and is 'always siding with the adverse party.'" The trial court denied the motion and the Daughter immediately appealed pursuant to Tennessee Supreme Court Rule 10B.
- On appeal, Daughter argued that there was an appearance of impropriety because opposing counsel served as the trial court's law clerk several years prior. Pursuant to the de novo standard of review, the Court concluded:

> We find these circumstances, without more, to be inadequate to establish an appearance of impropriety. Moreover, a judge is not required to recuse himself or herself from every case in which counsel of record is a former law clerk or is viewed as a mentor or friend by the law clerk. *See* ***Rath v. Melens***, 789 N.Y.S.2d 575 (N.Y. App. Div. 2005) (stating recusal not required where attorney was a former law clerk for the trial judge); *see also* ***Cannon***, 254 S.W.3d at 308 ("The mere existence of a friendship between a judge and an attorney is not sufficient, standing alone, to mandate recusal"); ***Kinard v. Kinard***, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998)

("The fact that a judge was once professionally associated with a lawyer for one of the parties in a case is not, without more, grounds for disqualification").

- The Court then concluded that all other alleged conflicts concerned the conservator rather than the trial court, and thus were not subject to immediate appeal.

Litigant Attempting to Force Recusal

Bishop v. Bishop, No. E2008-01854-COA-R10-CV, 2009 WL 1260233 (Tenn. Ct. App. May 7, 2009).

- Wife was represented by a number of attorneys in a law firm, including attorney Egli. After years of voluminous litigation in the trial court, Judge Bill Swann presiding, Wife fired the law firm, citing the fact that they allowed young, inexperienced attorneys such as Egli to work on the case.
- Egli subsequently left the firm to start his own business, where he initiated a case against Judge Swann on behalf of his wife.
- After several adverse rulings in her divorce case, Wife rehired Egli and immediately filed a motion to recuse Judge Swann on the basis of the pending lawsuit filed by Egli's wife, whom Egli was representing. Judge Swann denied the motion, finding that because Wife had previously expressed discontent with Egli's representation:

> She is barred from asserting any flaw in Mr. Egli before this Court today. She is barred from asserting any reason that would compel this judge to withdraw from the case because she is engaging, as the case law says, in cynical gamesmanship.... What reason, indeed, would there be for [Wife] to hire Mr. Egli after dismissing him, the firm and the associates earlier for cause other than gamesmanship? She's filed an affidavit that is critical of the associates in this cause and in this litigation, and now she is estopped to raise the issue of Mr. Egli's representation of her.
>
> This is a shifting of positions to suit a party. She is estopped to do that. It is fundamentally unfair. It attacks the integrity of the litigation process.... The Court cannot allow an abuse of judicial process by cynical gamesmanship. The motion to recuse . . . is denied.

- On appeal, the Court of Appeals affirmed, explaining:

> Judge Swann correctly stated that it is a "no-brainer" that, at a minimum, his impartiality might reasonably be questioned. *See* Tenn. Sup.Ct. R. 10, Canon 3(E)(1). But this does not end our inquiry because

Judge Swann further found that Wife's re-retention of Egli was solely for an improper purpose, i.e., to create a conflict of interest so a new judge would be appointed to the case. While we have not summarized all of the pleadings filed in this litigation because many of them have no direct bearing on the recusal issue, we did note that there were several post-trial rulings that were adverse to Wife. These rulings by the Trial Court lead us to conclude that, before Egli reemerged in this case, Wife likely was not pleased with Judge's Swann's recent rulings.

Wife filed an affidavit expressing her displeasure with the legal services performed by the "associates" at Lockridge & Valone, PLLC, of which there were only two: Egli and Sammi Mayfair. It was this displeasure that formed the basis for Wife terminating Lockridge & Valone, PLLC, two days before an important hearing, thereby creating Wife's need for a continuance, which she received. Wife then rehired Egli, with whom she has expressed under oath her displeasure, following several adverse rulings by Judge Swann. Wife's second affidavit wherein she claimed she did not intend to include Egli as one of the attorneys with whom she was displeased and his inclusion in her first affidavit was merely a typo is disingenuous at best.

We conclude that the evidence does not preponderate against the Trial Court's finding that the reason Wife rehired Egli was solely to create a conflict of interest, force Judge Swann to recuse himself, and obtain a new judge who might well be more favorable to Wife. The issue then becomes whether a party who, very late in the lawsuit, intentionally creates a clear conflict of interest for the sole purpose of obtaining a new trial judge can successfully assert that conflict of interest and have the original trial judge removed. We conclude that she cannot. Such activity is nothing short of legal gamesmanship, as correctly pointed out by Judge Swann. This result is even more appropriate when, as here, the party asserting the conflict has successfully taken an inconsistent position earlier in the litigation. At the very least, we cannot conclude that Judge Swann "abused his discretion"[2] when he denied the motion to recuse for this reason. *See* ***Bean,*** 2009 WL 792770, at *6.

Comments by Trial Judge

Cullum v. Baptist Hosp. System, Inc., No. M2014-01905-COA-T10B-CV, 2014 WL 5511472 (Tenn. Ct. App. Oct. 31, 2014).

[2] NOTE: The standard of review of a trial court's decision to deny a recusal motion is no longer an abuse of discretion. Instead, pursuant to Rule 10B of the Tennessee Supreme Court Rules, the applicable standard is now de novo.

- This is the second appeal in this case. After remand back to the trial court, the defendant medical providers filed a motion to recuse the trial judge on the basis 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 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.'"
- At issue were several statements made by the trial court that indicated a bias in favor of the plaintiffs. For example:
    - With regard to admitting evidence regarding a proposed expert life care planner, the trial court refused to admit the evidence stating: "*I would love for you to be able to on a personal note, but I don't think you can—*."
        - The Court of Appeals concluded that this statement was not appropriate, but ultimately not evidence of bias, as the trial court did not admit the evidence.
    - When a witness was asked a question and counsel objected on the basis of asked and answered, the trial court directed the witness to answer. The witness responded that "My answer was going to be I don't—I think that's what I just said." The trial court replied, "*Of course it is because your attorney over there just said that.*"
        - The Court of Appeals again concluded that such statement was not sufficient evidence of bias, as it reflected frustration, but not contempt for the Defendant's counsel.
    - When a witness was called after there was considerable confusion as to whether the witness would be available, and the Plaintiffs had already rested their case in the apparent belief that the witness was unavailable, the trial court stated that counsel objected to him being permitted to testify. The trial court further stated as follows: "There's a degree of ambush, but I think y'all could have asked. *I'm upset for the Cullums* [*i.e.,* Plaintiffs], they deserve to have a trial that's final finally."
        - The Court of Appeals again concluded that the statement was not sufficient to show bias, as the trial court explained that "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."
- As the last ground for disqualification, 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. The Court concluded that this was "neither inappropriate nor a basis for recusal."

- Finally, the Court concluded that the cumulative effect of the above statement, as well as other issues not specifically discussed, did not warrant recusal of the trial judge.

Procedure and Background of Case

In re Adison P., No. W2015-00393-COA-T10B-CV, 2015 WL 1869456 (Tenn. Ct. App. Apr. 21, 2015).

- Mother repeatedly refused to follow the parties' parenting plan allowing Father visitation with the child. Father filed several petitions with the trial court, but the trial court refused to order Mother to comply with the parenting plan and refused to set Father's petition to change custody for hearing. After Father retained counsel, he filed a show cause motion to have Mother held in contempt. Father alleged that the trial court refused to hear Father's motion unless Mother consented to the hearing or Mother was personally served (Mother's current counsel had been served with the motion). Father subsequently filed a complaint for mandamus in circuit court and a complaint against the trial judge with the Board of Judicial Conduct. After the writ of mandamus was issued directing the trial judge to set Father's motion for hearing, Father filed a petition to recuse the trial judge. The trial judge denied recusal and Father appealed, but his appeal was dismissed as untimely. Father filed a second motion to recuse on different grounds, this time with regard to the trial court's decision to enter an order that was materially different than its oral ruling; the written order again declined to order Mother to comply with the parenting plan on a temporary basis pending a final determination. The trial judge again refused to recuse, citing res judicata, and Father again appealed.
- On appeal, the Court of Appeals first concluded that Father's failure to include an affidavit with his second recusal motion was not fatal to its review. The Court of Appeals next concluded that Father's argument was not *res judicata* because it involved new allegations regarding the trial judge's refusal to order Mother to comply with the parenting plan. Further, the Court concluded that the trial judge's action gave rise to a reasonable basis for questioning the trial judge's impartiality, "in light of the previous history of this case." Thus, the Court of Appeals considered "the background of the case" despite the fact that those issues were raised and adjudicated in a prior recusal motion.
- **Dissent:** Judge Gibson filed a dissenting opinion. First, Judge Gibson questioned the procedure utilized by Father in filing his appeal. Specifically, Judge Gibson indicated that Father's failure to include in his submission to the Court of Appeals a copy of the affidavit supporting his recusal motion was fatal to his appeal. Further, Judge Gibson noted that the trial court did not make sufficient findings to

support its denial of Father's second recusal motion, as it did not consider the new factual allegations raised by Father. Finally, assuming arguendo that Father properly supported his recusal motion, Judge Gibson opined that the simple fact that the trial court revised its oral ruling was insufficient to create an appearance of bias, as Father submitted no evidence that the trial court's adverse rulings were the product of extrajudicial bias or prejudice.

Administrative Ex Parte Communication

Carney v. Santander Consumer USA, No. M2010-01401-COA-R3-CV, 2015 WL 3407256 (Tenn. Ct. App. May 28, 2015).

- Respondent filed a motion to recuse the circuit court trial judge after he set aside a default judgment obtained in general sessions, finding that the judgment was obtained without proper service of process. Respondent's recusal motion was filed after the trial court denied three motions to reconsider the decision to set aside the default judgment. While the recusal motion was pending, the trial judge entered an order giving Respondent certain dates in which to file a more definite complaint. The trial court indicated that if Respondent did not comply within a certain date, her case would be dismissed with prejudice. The trial court subsequently denied Respondent's recusal motion and she appealed.
- The Court of Appeals divided Respondents claim into three categories: (1) conclusory allegations of bias; (2) erroneous rulings by the trial court; and (3) an allegation of an ex parte communication. The Court concluded that neither conclusory, unsupported allegations of bias nor multiple adverse rulings were sufficient to require recusal of a trial judge.
- Further, the Court concluded that even taking Respondent's allegation of an ex parte allegation in the light most favorable to her, the alleged communication was administrative in nature and did not in any way prejudice Respondent. According to the Court:

> Code of Judicial Conduct Rule 2.9(A)(1) makes clear that "[w]hen circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted," so long as the judge reasonably believes that no party will gain an advantage due to the communication, and the parties are notified of the substance of the communication. Tenn. R. Sup.Ct. 10, Rule 2.9(A)(1). Additionally, an ex parte communication will only serve as an appropriate ground for the recusal of a trial judge "where it creates an appearance of partiality or prejudice against a party so as to call into question the integrity of the judicial process."

- However, the Court concluded that the trial court erred in entering an order regarding scheduling deadlines while Respondent's motion to recuse was pending. Because the order indicated that a delay could be fatal to Respondent's case, and the order was entered some weeks before the trial court disposed of Respondent's recusal motion, Respondent, therefore, could have been prejudiced by the trial court's violation of Rule 1.02 of Tennessee Supreme Court Rule 10B. *See also* ***Rodgers v. Sallee***, No. E2013-02067-COA-R3-CV, 2015 WL 636740, at *5 (Tenn. Ct. App. Feb. 13, 2015) (discussed below); ***Tucker v. State***, No. M2018-01196-CCA-R3-ECN, 2019 WL 3782166 (Tenn. Crim. App. Aug. 12, 2019) (vacating denial of petition for a writ of error coram nobis because no order was ever entered on petitioner's motion to recuse filed prior to the trial court's decision on the merits).

Delay in filing Motion and Emotional Response by Trial Judge to Evidence

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).

- Defendant medical providers lodged an oral motion for the trial judge to recuse after the trial judge appeared emotional after watching a video of the decedent, in order to determine whether the video was admissible. Defendant medical providers argued that the trial court displayed too much passion to be allowed to act as thirteenth juror, should the need ever arise. The trial court orally denied the motion. Trial proceeded and a judgment was entered in favor of the defendant medical providers. Plaintiff filed a motion for a new trial based on the trial court's role as thirteenth juror. Before the trial court ruled on the motion, the defendant medical providers filed a written motion for recusal, which was denied by written order. Defendant medical providers then sought an interlocutory appeal.
- On appeal, the Court of Appeals first concluded that the defendant medical providers' first motion to recuse was a nullity because Rule 10B requires that both a recusal motion and order denying the motion be written. The Court further concluded that the defendant medical providers did not unreasonably delay in filing their written motion because until the motion for new trial was filed, there was no certainty that the trial judge would be required to act as thirteenth juror.
- Finally, the Court concluded that because the alleged bias was the result of information learned during the course of the proceedings, the defendant medical providers had the burden to show "that the bias is so pervasive that it is sufficient to deny the litigant a fair trial." The trial court, however, had yet to rule on the motion for a new trial. Accordingly, the defendant medical providers could not meet their burden to show that the trial judge reached a prejudged conclusion because of bias, or rendered an opinion on information not learned from

participation in the case. Accordingly, the Court of Appeals concluded that there was no reasonable basis to question the trial court's impartiality.

Inadequate Findings in the Order Denying Recusal

Winder v. Winder, No. E2019-01636-COA-T10B-CV, 2019 WL 4702625 (Tenn. Ct. App. Sept. 25, 2019).

- In a divorce case, the pro se wife filed a motion to recuse alleging that the trial court should recuse because husband, an attorney, regularly appeared before the trial judge and socialized outside the courtroom.
- The trial court orally denied the motion, noting that his was "a friendly courtroom" and that he did not see a need to recuse. The trial court thereafter entered an order drafted by husband's counsel denying the motion to recuse in a single sentence without a factual or legal explanation. Wife immediately appealed.
- The Court of Appeals first noted that Rule 10B requires that a trial judge denying a recusal motion do so by written order stating "the grounds upon which he or she denie[d] the motion." Tenn. Sup. Ct. R. 10B § 1.03. The Court then concluded that this requirement was not met where the trial court's oral ruling was not incorporated into the written order, the written order did not provide the ground on which the motion was denied, and even considering the oral ruling, it was "nevertheless insufficient." The Court of Appeals therefore vacated the trial court's order denying the motion to recuse and remanded for the trial court to enter a more detailed order.
- Additionally, the Court of Appeals held that two orders entered following the denial of the recusal motion should also be vacated, as Rule 10B provides that while a motion to recuse is pending, "the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken." Tenn. Sup. Ct. R. 10B § 1.02. Although the Court noted that the trial judge denied the recusal motion before ruling on the merits of the case, the order denying recusal was insufficient; as such the orders entered following the denial of the recusal motion were vacated.
- *But see* ***Prewitt v. Brown***, No. M2017-01420-COA-R3-CV, 2018 WL 2025212, at *9 (Tenn. Ct. App. Apr. 30, 2018), *perm. app. denied* (Tenn. Sept. 13, 2018) (noting that while "[t]he trial court's order denying the motion for recusal was woefully inadequate," because the court had no "uncertainty concerning whether

recusal was appropriate," the court could soldier on to determine that plaintiff's motion did not comply with Rule 10B, the plaintiff's reliance on certain law was misplaced, and plaintiff's allegations of bias stemmed only from adverse rulings and affirm the denial of the motion).

Waiver of Recusal Issues

Doe v. Davis, No. M2018-02001-COA-R3-CV, 2019 WL 4247753 (Tenn. Ct. App. Sept. 6, 2019).

- The trial court entered an order granting a default judgment against the pro se defendant and awarding sanctions. The defendant appealed pro se and a majority of the Court of Appeals dismissed his appeal based on the profound deficiencies in his appellate brief.
- DISSENT: Judge Andy Bennett concluded that issues under Rule 10B must be determined notwithstanding the defendant's briefing deficiencies. In particular, the dissent concludes that defendant did not receive an impartial trial where the trial court ruled on plaintiff's motion for sanctions while a motion to recuse was pending, in violation of Rule 10B, § 1.02. According to Judge Bennett, "[e]ntering the sanctions order tainted the judicial process." The defendant then filed a second motion to recuse, which the trial judge granted. According to Judge Bennett, "[t] he recusal allows us to infer a bias or conflict." The second trial judge then relied on the first order of sanctions, entered in violation of Rule 10B, to order additional sanctions, which "compounded the taint created by the first judge."
- Judge Bennett also concluded that the court was well within its authority to take up these issues even though they were not raised, as Rule 36(b) of the Tennessee Rules of Appellate Procedure states that issues not raised may be considered "to do substantial justice" when "an error that has affected the substantial rights of a party[.]" *See also* Tenn. R. App. P. 13(b) (noting that appellate courts have discretion to consider issues "to prevent injury to the interests of the public" or "to prevent prejudice to the judicial process"). According to Judge Bennett, the tainted orders "injure[d] the judicial process" such that these issues should be considered on appeal.
- Based on this reasoning, Judge Bennett would vacate all orders awarding sanctions.

Appearance of Impropriety against Law Firm

Young v. Dickson, No. W2019-01442-COA-T10B-CV, 2019 WL 4165237 (Tenn. Ct. App. Sept. 3, 2019).

- In a healthcare liability action, the plaintiff filed a motion to recuse the trial judge because her law firm had previously sued the trial judge's husband and professional corporation, of which the judge had been secretary. Following the filing of that case, the trial judge had recused herself from other cases in which plaintiffs were represented by the law firm. A few weeks before the ruling in the present case the judge had recused in a separate case involving the law firm, noting that she could rule fairly, but the situation would create the appearance of impropriety in the minds of reasonable people.
- A few weeks later, the trial judge, however, declined to recuse herself in the present case, finding that there was "no subjective or objective partiality." The plaintiff then appealed.
- In a short opinion, the Court of Appeals reversed. First, the court noted that prior litigation involving the law firm and the judge's husband and corporation, as well as the judge's role in the corporation. The court also noted the fact that the judge had recused under similar circumstances in prior cases. Finally, the court ruled that the appearance of impropriety created in this situation was not lessened by the fact that the judge had previously ruled in favor of the plaintiff in another litigation or her statement that she hold no ill will toward the law firm.

Encouraging Settlement and Referring to an Argument as "Ridiculous"

Neamtu v. Neamtu, No. M2019-00409-COA-T10B-CV, 2019 WL 2849432, at *1 (Tenn. Ct. App. July 2, 2019).

- In a post-divorce action to terminate alimony, Husband filed a motion to recuse the trial judge on the basis that he prejudged the case by allowing an expert to testify before reading her deposition and in encouraging the parties to settle the case after the first day of trial. The trial judge denied the motion, stating that "the court's very purpose is to form opinions based on the evidence in order to determine the merits of the case."
- The Court of Appeals affirmed, noting that the trial court had not made a specific ruling on the expert's admissibility. With regard to the trial court's comments about "possible resolution" of the case between the parties and his later comment

that a request to recuse on that basis was "ridiculous," the Court further concluded that recusal was not warranted. The court noted that "[u]sually, 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." Here, the trial court noted that it had not heard all the proof and it would reserve ruling until doing so, but noted that its initial impression of husband's position was not favorable. As the court explained, "[b]y revealing its initial thinking and advising the parties to discuss a possible resolution, the trial court simply afforded [husband] an opportunity to negotiate with [wife]."

- The Court finally "concede[ed] that while the trial court could have shown a more judicious disposition by not using "ridiculous" to describe [husband'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.'" Given the totality of the circumstances, the Court of Appeals concluded that these statements did not create an appearance of impropriety.

Timing and Affidavit Requirements for Motion to Recuse

Stark v. Stark, No. W2019-00901-COA-T10B-CV, 2019 WL 2515925 (Tenn. Ct. App. June 18, 2019).

- Wife in a divorce filed a recusal motion against the trial court on the basis of the trial court's decisions relating to a finding of contempt for wife's refusal to take down disparaging comments on social media that could harm husband's employment. The trial court denied the motion on three bases: (1) the motion was untimely; (2) the motion was not accompanied by an affidavit "on personal knowledge"; and (3) on the merits.
- The Court of Appeals first reversed the trial court's ruling that the affidavit accompanying the motion was deficient. Here, wife's motion was accompanied by a sworn affidavit that its contents were "true to the best of my knowledge." In a prior case, one panel of the Tennessee Court of Appeals concluded that similar language did not meet the requirements of Rule 10B that the affidavit be "under oath . . . on personal knowledge." *See* ***Berg v. Berg***, No. M2018-01163-COA-T10B-CV, 2018 WL 3612845 (Tenn. Ct. App. July 27, 2018). The court noted, however, that a more recent court had concluded that somewhat similar language

did meet the requirements of Rule 10B. *See* ***Beaman v. Beaman***, No. M2018-01651-COA-T10B-CV, 2018 WL 5099778 (Tenn. Ct. App. Oct. 19, 2018). Although the court noted that the language in wife's motion was more similar to that in ***Berg***, it concluded that the affidavit and recusal motion were based on her personal knowledge of pleadings and hearing where she was present. Thus, "it [was] apparent from the substance of the disputed affidavits [ ] that they [were] based on the personal knowledge of the affiants." ***Ueber v. Ueber***, No. M2018-02053-COA-T10B-CV, 2019 WL 410703, at *3 (Tenn. Ct. App. Jan. 31, 2019) (involving an affidavit "the same" as that filed in ***Berg***). Under this circumstance, the court concluded that wife's affidavit was sufficient.

- As to the timing issue, the Court of Appeals expressed some disagreement that a motion filed six weeks following the conduct at issue was untimely. The Court noted other cases where motions were untimely were usually measured in months, not weeks. Regardless, the court concluded that it had discretion to consider wife's motion notwithstanding the allegation that it was untimely.
- The court then proceeded to consider the merits of the recusal motion and ultimately affirmed the trial court's decision to deny the motion.

Holding Scheduled Hearing Without Other Party is Not Ex parte Communication

Lee v. Lee, No. E2019-00538-COA-T10B-CV, 2019 WL 2323832, at *1 (Tenn. Ct. App. May 31, 2019).

- A hearing on a motion in limine and petition to modify custody was scheduled for December 5. On December 4, mother's counsel fell ill with the "the Mother of all viruses." That afternoon his assistant sent a fax to the court advising the court of the illness and that counsel was unable to appear the next day. Although the trial court continued the trial, it heard the motion in limine and granted it in favor of father. In so doing, the court noted the fax from mother's counsel but stated that no formal request had been filed and therefore mother and her counsel were absent from court without leave.
- Eventually, mother filed a motion to recuse, alleging an ex parte communication between the trial judge and father's counsel in the motion in limine hearing, as well as the trial court's "draconian" ruling regarding the continuing that hearing based on mother's counsel's fax. The trial judge acknowledged that it heard father's motion without mother present but did not consider this conversation in

open court as scheduled an ex parte communication. As such, the trial judge denied the motion to recuse.

- The Court of Appeals affirmed the denial of the recusal motion. First, the court noted that the affidavit accompanying the motion does not explain how mother, the affiant, had personal knowledge of what was discussed at the hearing she was not present for. The Court therefore concluded that this statement was not "competent evidence of anything." As to the other alleged issues, the Court concluded that the hearing on the motion in limine was not an ex parte communication because it occurred in open court and mother had notice to attend the hearing. The Court also rejected mother's argument that the refusal to continue the hearing show a lack of impartiality, as adverse rulings are, without more, not evidence of bias.

Lack of Transcript or Statement of the Evidence

Purswani v. Purswani, No. E2018-01029-COA-R3-CV, 2019 WL 1376893, at *9 (Tenn. Ct. App. Mar. 26, 2019).

- Husband appealed the denial of his recusal motion based on exchanges that occurred between husband and the trial court that were evidence of bias.
- The Court of Appeals ruled, however, that because husband failed to provide the court with a transcript or statement of the evidence, the record contained no evidence of bias and no relief could be granted.

Oral Findings

Harcrow v. Harcrow, No. M2019-00353-COA-T10B-CV, 2019 WL 1397085 (Tenn. Ct. App. Mar. 27, 2019).

- On appeal, wife took issue with the trial court's order denying the recusal motion because the grounds for denial were stated orally and incorporated by reference into the written order.
- The Court of Appeals held that the incorporation by reference of oral findings into a written order meets the requirements of Rule 10B to state the grounds for denial in a written order.

Must File a Motion in the Trial Court

Lucchesi v. Lucchesi, No. W2017-01864-COA-R3-CV, 2019 WL 325493 (Tenn. Ct. App. Jan. 23, 2019).

- Husband raised an argument on appeal that the trial court's ruling should be reversed and the case remanded to a new trial judge, as the trial judge should have recused itself "when it became apparent that it was not able to remain impartial in these proceedings."
- The Court of Appeals found husband's argument waived, as he never filed a motion in the trial court. "[I]n the absence of a motion and ruling thereon by the court, there is nothing for this court to review."

Social Media Contact with Judge

E-mail to Judge by Litigant

In re Samuel P., No. W2016-01592-COA-T10B-CV, 2016 WL 4547543 (Tenn. Ct. App. Aug. 31, 2016).

- Father contended that Mother's counsel inappropriately contacted trial judge via email.
- Mother's attorney sent trial judge an email, but it was jointly addressed to the trial judge and Father's counsel. In the email, Mother's counsel apologized for addressing the issue, but it was necessary because there was an emergency situation involving a surgery for the minor child.
- Court found that there was no basis for recusal. Although there may have been ex parte communication, it did not require recusal:

  The Code of Judicial Conduct addresses ex parte communication in Canon 2, Rule 2.9, which provides that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter," except under certain circumstances inapplicable here. However, the Rule does not state that recusal is required if the judge receives an ex parte communication. Instead, it provides that "[i]f a judge receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." **. . .** "Generally, an ex parte communication requires recusal only where it creates an appearance of partiality or prejudice against a party so as to call into question the integrity of the judicial process." **. . .** Recusal is required when a reasonable "'person 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.'"

- Father did not argue that this communication was concealed from him, as the email clearly lists his attorney as a recipient along with the trial judge. Nor did he argue that he was not given an opportunity to respond. There was no indication that the trial judge granted the injunction sought by Mother in the email or otherwise acknowledged either email. Most importantly, the email from Mother's counsel did not create an appearance of partiality or prejudice against Father on the part of the trial judge. Accordingly, this communication provided no basis for recusal.

Meticulous Compliance with Recusal Procedure

Rothberg v. Fridrich & Assocs. Ins. Agency, Inc., No. M2022-00795-COA-T10B-CV, 2022 WL 2188998Tenn. Ct. App. June 17, 2022).

- Appellant filed an accelerated interlocutory appeal of the denial of a recusal motion, but supported the appeal with documents that were not file stamped.
- The Court of Appeals explained that this was not sufficient:

> The failure to submit file-stamped copies of the recusal filings has left us in the position of being unable to ascertain whether certain documents, as submitted to this Court, were actually filed in the trial court in the same form and manner. This, no doubt, frustrates appellate review efforts and in determining whether the trial court committed error in ruling on what was actually before it. Our Rule 10B jurisprudence has emphasized how it "is imperative that litigants file their petitions for recusal appeal in compliance with the *mandatory requirements* of Rule 10B in the first instance." ***Johnston v. Johnston***, No. E2015-00213-COA-T10B-CV, 2015 WL 739606, at *2 (Tenn. Ct. App. Feb. 20, 2015) (emphasis added). Indeed, as a result of the accelerated nature of these appeals, "meticulous compliance" with Rule 10B is required regarding the content of the record provided on appeal. ***Id.***

- The court noted, however, that it had sometimes overlooked deficiencies of this type. But because the appellant referenced other documents that he did not supply to the court, the court was unable to properly review the trial court's decision. So the court dismissed the appeal.

10B Procedure applied to Juvenile Magistrates

In re Haven-Lee S., No. W2022-00124-COA-T10B-CV, 2022 WL 468124, at *2 (Tenn. Ct. App. Feb. 16, 2022).

- The mother in a dependency and neglect proceeding filed a motion to recuse the juvenile magistrate, which was denied. The mother then appealed to the Court of Appeals.
- The Court of Appeals held that Rule 10B does not provide for an accelerated interlocutory appeal of the denial of a recusal motion by a judicial magistrate. Instead, Rule 10B provides that "review of a judge's or other judicial officer's denial of a motion for disqualification should be sought in accordance with the appeal procedure generally available for review of the judge's or judicial officer's other rulings."
- So the Court held that the proper way to appeal the denial of a motion to recuse by a juvenile magistrate was to request a de novo hearing by the juvenile court judge. *See* Tenn. Code Ann. § 37-1-107. The matter was therefore transferred to juvenile court.