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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 16, 2022

THOMAS D. DENNEY, EX REL. DOGHOUSE COMPUTERS, INC. v. CHRISTOPHER TAYLOR RATHER

Appeal from the Chancery Court for Montgomery County
No. CD-22-9 Ben Dean, Chancellor

No. M2022-01743-COA-T10B-CV

This is an accelerated interlocutory appeal as of right pursuant to Rule 10B of the Rules of the Supreme Court of Tennessee from the chancery court's denial of a motion to recuse. A new chancellor, during the course of a judicial election and shortly after the election was held, made extremely critical comments regarding the personal and professional character of his opponent, the incumbent chancellor. The challenger won the election, and the former chancellor, who has returned to practice, is now representing a party before the new chancellor. The former chancellor moved for the new chancellor's recusal in cases in which the former chancellor is appearing as counsel as well as recusal from cases involving the law firm which the former chancellor joined after losing the judicial election. The new chancellor denied the motion. On appeal, we conclude that, even in the absence of actual bias, based upon concern about the appearance of bias toward the former chancellor, recusal is warranted. This concern does not extend to the law firm the former chancellor has joined. Accordingly, we reverse the denial of recusal insofar as it concerns the former chancellor but affirm the denial of recusal insofar as it concerns the law firm.

Tenn. Sup. Ct. R. 10B Accelerated Interlocutory Appeal; Judgment of the Chancery Court Affirmed in Part; Reversed in Part; Case Remanded

JEFFREY USMAN, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and ARNOLD B. GOLDIN, J., joined.

Laurence M. McMillan, Jr., Clarksville, Tennessee, for the appellant, Thomas D. Denney, ex rel. Doghouse Computers, Inc.

Taylor R. Dahl, Clarksville, Tennessee, for the appellee, Christopher Taylor Rather.

OPINION

I.

Candidates for judicial office running in contested elections are in a position in which distinguishing themselves from opponents may prove to be a significant, or even critical, aspect of assisting voters to make an informed determination as to who should earn their vote. In drawing distinctions in contested elections, character has stood as a perennial issue in American campaigns for office, including for judicial office. The present appeal does not take this court into the free-speech and democratic-accountability churned waters of contested campaigns for judicial office. Though a campaign for judicial office has significant similarities to legislative and executive races, the nature of a judicial office has enough differences from the other branches that divergent complications may arise in the wake of a campaign. This appeal wades through that wake, the backwash from a contentious campaign after the votes have been tabulated, results announced, and a judge sworn into office, with the unsuccessful candidate now appearing as an advocate in a courtroom before the victorious candidate.

At the epicenter of this appeal of a denial of a motion to recuse are comments made by the prevailing judicial candidate, Chancellor Ben Dean, about his opponent, former Chancellor Laurence M. McMillan, Jr., during and shortly after their contested judicial election. From January 2005 until August 2022, Mr. McMillan served as the Chancellor for Tennessee's 19th Judicial District. Then-attorney now-Chancellor Ben Dean ran against Mr. McMillan and defeated him in the August 2022 election. Mr. McMillan asserts that, during the course of the election, Chancellor Dean made extremely derogatory remarks about his character through public Facebook postings and that these remarks warrant recusal under Tennessee Supreme Court Rule 10B.[1]

As an illustration, Mr. McMillan notes that during the campaign, when drawing a sharp distinction between the candidates over the question of character, the "Committee to Elect Ben Dean Chancery Judge" posted the following:

> . . . My opponent keeps saying the mantra "Experience Matters," yet he has little to nothing to say or show about anything positive he has accomplished professionally or personally in 18 years as Chancellor.

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[1] Among the materials submitted to this court, Mr. McMillan has included a copy of a complaint against Chancellor Dean that he submitted to the Tennessee Board of Judicial Conduct, which raises a variety of concerns with actions and statements made by then-candidate Chancellor Dean. This complaint was dismissed by the Board without need or request of a response from Chancellor Dean. His action in filing this complaint is not the focus of Mr. McMillan's argument on appeal in challenging the denial of the motion to recuse.

> Let me tell you my mantra: "Character Matters!" More importantly, how you treat people matters. All the experience in the world means nothing if you can't be nice and kind to people or if you are a morally bankrupt soul….

(Emphasis added.)

Similarly, after Mr. Dean won the election, Mr. McMillan's stepson posted on Facebook that the politicization of the race was "a loss for the moral integrity" of the court. The "Committee to Elect Ben Dean Chancery Judge" responded:

> Surely you are not suggesting his loss will result in the loss of the moral integrity of the judiciary in these two counties. I haven't broadcasted or laid bare his many past moral failings and deep character flaws, and ran a fairly positive campaign with an actual platform of change versus attacking him and telling all the sordid details of his own personal failings. The voters have spoken and character matters!

(Emphasis added.)

Mr. McMillan, as counsel for plaintiff Thomas Denney who has a case before Chancellor Dean, moved for recusal citing the above-stated language and other comments made by Chancellor Dean about Mr. McMillan.[2] In seeking recusal, Mr. McMillan argued that Chancellor Dean's impartiality might reasonably be questioned. Mr. McMillan sought permanent recusal and disqualification of Chancellor Dean from any action in which either Mr. McMillan or the firm that he has joined serves as counsel.

Chancellor Dean denied the motion. The Chancellor's order does not dispute that Chancellor Dean made these comments under the username "Committee to Elect Ben Dean Chancery Judge" or that the comments were made regarding Mr. McMillan. The order notes that the complaint filed by Mr. McMillan with the Tennessee Board of Judicial Conduct regarding his campaign-connected speech was summarily dismissed and that the filing of a judicial complaint does not in and of itself warrant recusal. Chancellor Dean also found that his comments during the campaign did not create a reasonable basis for questioning his impartiality and declared that "[t]he Court holds no ill will, personal bias or prejudice against Attorney McMillan." Chancellor Dean further found that the facts did not warrant recusal from cases involving Mr. McMillan's law firm because no purported bias could be perceived by a reasonable person to extend to the law firm. The Chancellor

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[2] Given the nature of the alleged bias (toward counsel) and relief sought (ordering permanent recusal from any cases in which Mr. McMillan or the firm that he has joined appear as counsel), we reference the arguments in a shorthand form as being advanced by Mr. McMillan rather than the more cumbersome reference to Mr. McMillan as counsel for and on behalf of the appellant Thomas Denney, ex rel. Doghouse Computers, Inc.

also noted the logistical difficulties that would be inherent in recusal from a large slew of approximately 192 cases and cited the fact that then-Chancellor McMillan had not employed a blanket recusal from all matters handled by his wife's law firm. In a footnote, the court noted that Rule 1.12 of the Rules of Professional Conduct could require disqualification of the firm for certain matters in which Mr. McMillan had acted as chancellor, adding to potential disqualification issues. *See* Tenn. Sup. Ct. R. 8, RPC 1.12.

On behalf of his client, Mr. McMillan filed an appeal of Chancellor Dean's denial of the motion to recuse. On appeal, Mr. McMillan asserts that the record supports recusal in all matters involving Mr. McMillan and the law firm he has joined upon leaving the bench. Mr. McMillan also requested a stay pending the outcome of the appeal. This court granted the stay, ordered Christopher Rather, who is the respondent and Defendant in the underlying action, to file an answer, and permitted further briefing. *See* Tenn. Sup. Ct. R. 10B, §§ 2.04, 2.05.

In support of Chancellor Dean's denial of the motion to recuse, Mr. Rather asserts that ordering recusal after the filing of a judicial complaint would encourage filing such complaints as a method of forum shopping. He contends that ordering recusal would also create a precedent ensuring that no candidate could hear an opponent's cases after an election, thereby encouraging campaigns against judges for the purposes of seeking to recuse a particular judge in future cases. Mr. Rather also argues that recusal from cases involving the law firm would burden the judicial system.

In further briefing, Mr. McMillan notes that the filing of the complaint with the Tennessee Board of Judicial Conduct was not the basis for his seeking recusal. He instead indicates that the underlying comments made by Chancellor Dean about him were the basis of his motion to recuse. Mr. McMillan also cites to the trial court's order as evidence of a "metastasizing cancer of bias" against the firm that he has joined, asserting the trial court considered extraneous material and made a "veiled threat" against the firm.

II.

Under section 2.01 of Rule 10B of the Tennessee Supreme Court, a party is entitled to "an accelerated interlocutory appeal as of right" of an order denying a motion to recuse. This court conducts a de novo review of the ruling on the motion to recuse. Tenn. Sup. Ct. R. 10B § 2.01; *Duke v. Duke*, 398 S.W.3d 665, 668 n.2 (Tenn. Ct. App. 2012) (noting that the Rule has altered the standard of review of recusal motions).

"Litigants in Tennessee have a fundamental right to a fair trial before an impartial tribunal." *State v. Griffin*, 610 S.W.3d 752, 757 (Tenn. 2020) (internal citations omitted). Under Tennessee Supreme Court Rule 10, Canon 2, Rule 2.11(A)(1), "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," including circumstances in which "[t]he judge has a personal

bias or prejudice concerning a party or a party's lawyer. . ..." The public's confidence in the neutrality and impartiality of the judiciary is a significant interest, *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009), and "[i]f the public is to maintain confidence in our system of justice, a litigant must be afforded . . . the 'cold neutrality of an impartial court,'" *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008) (quoting *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001)).

"[T]he test for recusal requires a judge to disqualify himself or herself in any proceeding in which '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.'" *Griffin*, 610 S.W.3d at 758 (quoting *Cannon*, 254 S.W.3d at 307). This test is objective rather than subjective because the appearance of bias harms the integrity of the court system as much as actual bias. *Cannon*, 254 S.W.3d at 307. When a judge's impartiality might reasonably be questioned, recusal is warranted "[e]ven if a judge believes he [or she] can be fair and impartial." *Bean*, 280 S.W.3d at 805. The party moving for recusal bears the burden of presenting evidence that would prompt a reasonable, disinterested person to believe that there is a reasonable basis for questioning the judge's impartiality. *Duke*, 398 S.W.3d at 671.

In *Bean v. Bailey*, the Tennessee Supreme Court considered a "past acrimonious relationship" between a judge and a lawyer and his firm in reviewing the denial of a motion to recuse. 280 S.W.3d at 805. The trial court in that case had found that it could be fair and impartial toward the attorney but failed to consider whether a person of ordinary prudence in the judge's position would find a reasonable basis to question his impartiality. *Id.* The Supreme Court concluded that a lengthy history of strife between the attorney and the judge, including the judge's multiple requests for the Tennessee Bureau of Investigation to investigate the attorney and his firm, his filing of a complaint for professional misconduct, and numerous hostile meetings, warranted recusal. *Id.* at 805-06. In reaching this conclusion, the court also noted that the public was aware of the animosity between the attorney and the judge. *Id.* at 806.

In ruling on the motion to recuse in this case, Chancellor Dean declared he held "no ill will, personal bias or prejudice against Attorney McMillan." We do not doubt either the sincerity or accuracy of Chancellor Dean's declaration. In other words, in considering this appeal, we do not conclude that Chancellor Dean is actually biased against Mr. McMillan and do not doubt that he would be impartial in any matter in which Mr. McMillan served as counsel. The standard, however, directs courts to consider appearances and whether a reasonable, disinterested person would believe that there is a reasonable basis for questioning the judge's impartiality. *Duke*, 398 S.W.3d at 671. 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).

In support of the Chancellor's denial of the motion to recuse, Defendant Rather raises as a concern that requiring recusal would encourage parties to engage in forum shopping by filing a judicial complaint. We do not understand the act of filing of the judicial complaint itself with the Tennessee Board of Judicial Conduct to be the basis of Mr. McMillan's motion to recuse; rather, Chancellor Dean's comments regarding Mr. McMillan provide the animating basis for seeking recusal. Additionally, recusal is not required simply because a party has filed a complaint against a judge. *See State v. Parton*, 817 S.W.2d 28, 30 (Tenn. Crim. App. 1991) (there was no evidence of bias based on the defendant's filing a complaint with the board of judicial conduct); *Salas v. Rosdeutscher*, No. M2021-00157-COA-T10B-CV, 2021 WL 830009, at *3 (Tenn. Ct. App. Mar. 4, 2021) (noting that "the judicial disqualification standards do not require recusal simply because the person seeking recusal has filed some type of complaint against the judge"); *In re Adison P.*, No. W2015-00393-COA-T10B-CV, 2015 WL 1869456, at *6 n.7 (Tenn. Ct. App. Apr. 21, 2015); *see also Moncier v. Bd. of Prof'l Responsibility*, 406 S.W.3d 139, 162 (Tenn. 2013) (collecting cases in which recusal was not required when a litigant sued a judge). Accordingly, we find Mr. Rather's concern on this point to be misplaced.

Also, in support of the decision to decline to recuse, Mr. Rather adds that a ruling requiring recusal in the present case would invite abuse in the form of lawyers running for judicial office merely to force the recusal of a judge. We find this concern to be misplaced. "[A] party may lose the right to challenge a judge's impartiality by engaging in strategic conduct," including a "manipulation of the impartiality issue to gain procedural advantage." *Duke*, 398 S.W.3d at 670. Furthermore, Mr. Rather's concerns about lawyers running for judicial office, making negative comments about judges in order to seek to generate a basis for recusal is simply inapposite to the present case. The comments in this case were not made as part of some type of quixotic attempt to force recusal of a judge through disparaging remarks but instead were comments made by the elected judge as to whom recusal is being sought. In other words, the appeal in this case does not present a matter of a challenger running for judicial office merely seeking to force recusal by a judge, but instead comments by the person elected to a judicial office. Accordingly, we fail to see how the type of abuse feared by Mr. Rather is relevant to the circumstances of the present case.

Mr. Rather also contends, again in support of decision to not recuse, that requiring recusal in the present case would mean a prevailing candidate could not preside over a case in which an opponent for judicial office was acting as counsel. We find this concern to be vastly overstated. In the rough-and-tumble of a hotly contested election, a candidate for judicial office may use strong language which does not tend toward respectful debate with his or her opponent. Cutting statements or sharp criticisms of an opponent uttered during a campaign for judicial office do not necessarily require recusal. Significantly, the statements made by Chancellor Dean are of a personal character, they are directed at the

attorney Mr. McMillan, and they stem from an extrajudicial source.[3] *See Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994); *see also*, *e.g.*, *Green v. Green*, No. E2022-01518-COA-T10B-CV, 2022 WL 17346229, at *5 (Tenn. Ct. App. Dec. 1, 2022) (indicating in a case involving a recusal motion based upon alleged bias toward a litigant that to "merit disqualification, the prejudice must be of a personal character, directed at the litigant, and stem from an extrajudicial source resulting in an opinion on the merits on some basis other than what the judge learned from participation in the case" (quoting *Neamtu v. Neamtu*, No. M2019-00409-COA-T10B-CV, 2019 WL 2849432, at *3 (Tenn. Ct. App. July 2, 2019))).[4] When the "bias is alleged to stem from events occurring in the course of the litigation of a case, the party seeking a judge's recusal has a greater burden to show that recusal is required." *In re Est. of Dorning*, No. M2020-00787-COA-T10B-CV, 2020 WL 3481538, at *2 (Tenn. Ct. App. June 25, 2020). The alleged bias in the present case does not arise from such transactions; thus, this heightened burden is inapplicable in the present case. Also in accord with the conclusion that a heightened burden for finding recusal is inapplicable in the present case, the comments were not made in connection with the new Chancellor overseeing ongoing litigation or courtroom administration, nor were they based purely upon an assessment of observed professional comportment of the former Chancellor in that role either in a present case or past cases.[5] For extrajudicial comments, where a

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[3] *C.D.B. v. A.B.*, No. M2018-00532-COA-T10B-CV, 2018 WL 1976119, at *6 (Tenn. Ct. App. Apr. 26, 2018) (noting in the context of considering an appeal of a denial of a motion to recuse that "[t]he term extrajudicial is defined as '[o]utside court' or 'out-of-court'" and concluding that comments related to various pre-trial filings were not extrajudicial).

[4] *See Pearson v. Koczera*, No. E2017-00258-COA-R3-CV, 2018 WL 2095276, at *7 (Tenn. Ct. App. May 7, 2018) (rejecting a claim that a trial judge should have recused because "[s]tatements of fact based upon the trial judge's observations in court did not indicate any bias toward Ms. Dry on any extrajudicial information").

[5] Regarding the importance of the origin of critical comments, this court has stated:

> [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." . . .
>
> [A] 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.

McKenzie v. McKenzie, No. M2014-00010-COA-T10B-CV, 2014 WL 575908, at *4-5 (Tenn. Ct. App. Feb. 11, 2014) (quoting *United States v. Adams*, 722 F.3d 788, 837 (6th Cir. 2013)); *see also Groves v.*

comparatively lower standard is applicable, recusal may be warranted where the judge's comments raise reasonable questions about the judge's impartiality. *See Stark v. Stark*, No. W2019-00901-COA-T10B-CV, 2019 WL 2515925, at *7 (Tenn. Ct. App. June 18, 2019); *C.D.B. v. A.B.*, 2018 WL 1976119, at *6; *Groves v. Ernst-W. Corp.*, No. M2016-01529-COA-T10B-CV, 2016 WL 5181687, at *5 (Tenn. Ct. App. Sept. 16, 2016).

There are some critiques of Mr. McMillan contained in the materials submitted to this court that amount to little more than disagreements raised in the campaign over how Mr. McMillan performed his role as Chancellor or a noting of Mr. McMillan's perceived foibles. The criticism ultimately, however, cuts much deeper and into the domain of the personal in terms of both the source of the views expressed by new Chancellor Dean and the scope of his critique of Mr. McMillan. Our concern with the statements is enhanced by the intersection of a deeply personal critique, "a morally bankrupt soul," with the importance, in general, of a court's trust in counsel's character in performance of his or her role as an officer of the court. Furthermore, these derogatory statements were made publicly; accordingly, the public is aware of this view of Mr. McMillan expressed by Chancellor Dean. *See Bean*, 280 S.W.3d at 806.

Many critiques, even sharp and cutting critiques of an opponent in a campaign for judicial office, will not require recusal, but here, given the nature of the comments, a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, could find a reasonable basis for questioning the judge's impartiality as to Mr. McMillan. *See Griffin*, 610 S.W.3d at 758; Tenn. Sup. Ct. R. 10, Canon 2, Rule 2.11. The circumstances here warrant a concern with the appearance of impartiality, as a reasonable observer could reasonably question the impartiality of a judge who has publicly, in an extrajudicial series of statements, proclaimed an attorney to be "a morally bankrupt soul" with "deep character flaws" whose "moral failings" and "personal failings" can be demonstrated in "sordid details."

In drawing a distinction between himself and his opponent in order to inform the voters, Chancellor Dean cut to the quick of his opponent's personal character, the nature of his very soul. This opinion does not step into the waters of assessing that campaign decision; rather, the opinion, as noted at the outset, is instead wading through backwash created thereby. Simply stated, viewed through an objective lens, the statements made by Chancellor Dean regarding Mr. McMillan, which are extrajudicial both in source and scope, raise a reasonable question as to the appearance of impartiality. Accordingly, we conclude that the court erred in denying the motion to recuse as it pertains to Mr. McMillan. This court's decision applies to recusal in the present case, but the reasoning set forth above

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Ernst-W. Corp., No. M2016-01529-COA-T10B-CV, 2016 WL 5181687, at *5 (Tenn. Ct. App. Sept. 16, 2016) (citations omitted) ("Forming an opinion . . . based on what is learned in the course of judicial proceedings is necessary to a judge's role in the judicial system. . .. As such, an opinion formed on the basis of what a judge properly learns during judicial proceedings, and comments that reveal that opinion, are not disqualifying unless they are so extreme that they reflect an utter incapacity to be fair.").

should be borne in mind in considering future issues of recusal arising in cases involving Chancellor Dean and Mr. McMillan. *See Bean*, 280 S.W.3d at 805.

We come to the opposite conclusion, however, regarding the recusal of Chancellor Dean in cases involving Mr. McMillan's law firm. The motion for recusal itself contains no specific allegations of bias with regard to Mr. McMillan's law firm; it merely proceeds on a theory of taint by association. On appeal, Mr. McMillan cites to the trial court's order as evidence of a "metastasizing cancer of bias" against the firm, asserting the trial court considered extraneous material and made a "veiled threat." However, the record contains no objective evidence from which bias or appearance of bias against the law firm could be reasonably inferred. Having reviewed the materials appended to the motion to recuse, we conclude there is simply nothing in the record to support an inference of bias against the law firm. *Compare Bean*, 280 S.W.3d at 801, 806 (the judge called the attorney's partner "the worst excuse for a lawyer that there has ever been" and requested an investigation of members of the law firm for alleged criminal conduct). Accordingly, we affirm Chancellor Dean's denial of the motion to recuse with respect to Mr. McMillan's law firm.

III.

For the reasons discussed above, we affirm in part and reverse in part the judgment of the Chancery Court for Montgomery County. Costs of the appeal are taxed equally between the appellant, Thomas Denney, ex rel. Doghouse Computers, Inc., and the appellee, Christopher Taylor Rather, for which execution may issue if necessary. The case is remanded for such further proceedings as may be necessary and consistent with this opinion.

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JEFFREY USMAN, JUDGE