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SUPREME COURT OF ARKANSAS

No. CV-21-498

Opinion Delivered: January 13, 2022

BENTONVILLE SCHOOL DISTRICT; DR. DEBBIE JONES, IN HER OFFICIAL CAPACITY; ERIC WHITE, IN HIS OFFICIAL CAPACITY; MATT BURGESS, IN HIS OFFICIAL CAPACITY; KELLY CARLSON, IN HIS OFFICIAL CAPACITY; BRENT LEAS, IN HIS OFFICIAL CAPACITY; WILLIE COWGUR, IN HIS OFFICIAL CAPACITY; JOE QUINN, IN HIS OFFICIAL CAPACITY; AND JENNIFER FADDIS, IN HER OFFICIAL CAPACITY
APPELLANTS

V.

MATT SITTON, MATTHEW BENNETT, AND ELIZABETH BENNETT
APPELLEES

APPEAL FROM THE BENTON COUNTY CIRCUIT COURT
[NO. 04CV-21-2181]

HONORABLE XOLLIE DUNCAN, JUDGE

MOTION FOR RECUSAL DENIED.

HOWARD W. BRILL, Special Associate Justice

Marshall Ney, of the Friday Eldredge & Clark law firm, representing the Bentonville School Board, has filed a motion asking me to recuse from this case.

The practice of this court has been that motions for a justice to recuse are assigned to the particular justice, because the prayer for relief is directed to the justice individually.[1] There is no reason why that practice should not be followed in the case of a Special Associate Justice as well. The underlying principle is that the decision to recuse rests in the discretion of the individual judge.

On November 11, Mr. Ney filed this motion asking me to recuse from this matter.[2] He states, "In his capacity as attorney, Justice Brill offered a professional, adverse opinion that was directed at [me]."

The facts relevant to this motion are as follows. In December 2014, an Arkansas law firm retained me to provide a professional ethics analysis of the conduct of Mr. Ney, at that time a partner in the firm. The law firm provided me a set of facts and relevant materials. I examined those materials in light of the controlling Arkansas Rules of Professional Conduct. On January 5, 2015, I submitted to the firm a confidential four-page letter containing my analysis and a possible course of action.[3] Under this specific set of circumstances, I have obtained the permission of the firm to make a limited disclosure.

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[1]*Thomas v. State*, 2019 Ark. 237 (opinion by Justice Womack denying the motion for his disqualification); *Robinson Nursing Home & Rehab. Center, LLC v. Phillips*, 2016 Ark. 388, 502 S.W.3d 519 (opinion by Justice Wood denying the motion for her disqualification).

[2]Mr. Ney is not an attorney in the companion case, *Hickey v. McClane*, 2022 Ark. ___ (CV-21-441); nor is the Bentonville School Board a party in the companion case.

[3]I subsequently was compensated for my 4.4 hours of work on the matter.

The Arkansas Code of Judicial Conduct applies to a Special Justice as it applies to an elected Justice. *See* Ark. Code Jud. Conduct, Application, § V (pro tempore part-time judge). In particular, a Special Justice is subject to Rule 2.11 (disqualification). Beyond the four specific reasons for disqualification, the Code is explicit in mandating that a judge shall recuse when "the judge's impartiality might reasonably be questioned." *Ferguson v. State*, 2016 Ark. 319, at 7, 498 S.W.3d 733, 737.[4]

Judicial recusal must be made "from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (Rehnquist, C.J.). Judges are presumed to be impartial. *Isom v. State*, 2018 Ark. 368, at 19, 563 S.W.3d 533, 546; *Porter v. Ark. Dep't of Health & Hum. Servs.*, 374 Ark. 177, 191, 286 S.W.3d 686, 697 (2008). A party seeking disqualification bears a substantial burden to overcome that presumption. *Ark. Jud. Discipline & Disability Comm'n v. Proctor*, 2010 Ark. 38, at 50, 360 S.W.3d 61, 93; *Owens v. State*, 354 Ark. 644, 655, 128 S.W.3d 445, 451 (2003).

In the absence of a valid reason to step aside, a judge has a duty to preside over a case. *Taffner v. Ark. Dep't of Hum. Servs.*, 2016 Ark. 231, at 14, 493 S.W.3d 319, 328; *DePriest v. AstraZeneca Pharms.*, 2009 Ark. 547, at 23, 351 S.W.3d 168, 180; *Perroni v. State*, 358 Ark.

[4]In the Code of Judicial Conduct, "Impartial," "impartiality," and "impartially" are defined as "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Ark. Code Jud. Conduct, Terminology.

17, 24, 186 S.W.3d 206, 210 (2004).). As Justice Womack wrote, "When it is not necessary to recuse, it is necessary not to recuse."[5]

The question of bias is a matter confined to the conscience of the judge. *Clowers v. Edwards*, 2020 Ark. 367, at 7; *DePriest*, 2009 Ark. 547, at 23, 351 S.W.3d at 180. A mere allegation that a judge's conduct has the appearance of impropriety falls short of the disqualifying standard that a judge's impartiality be reasonably questioned. *See Trammel v. Simmons First Bank of Searcy*, 345 F.3d 611 (8th Cir. 2003) (recusal not required when judge's law clerk and president of corporate defendant were friends and attended same Bible class); *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994) (judge not disqualified by son's summer job in prosecutor's office); *Register v. Oaklawn Jockey Club, Inc.*, 306 Ark. 321-J, 822 S.W.2d 391 (1992) (judge's incidental conversation with attorney not a basis for disqualification).

Disqualification is not mandated when the judge has ruled against the judge's clients previously, *Stilley v. James*, 346 Ark. 28, 53 S.W.3d 524 (2001) (per curiam), or has rejected the party's motions and objections, *Carton v. Mo. Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993). Adverse rulings standing alone demonstrate neither bias nor lack of impartiality. *Clowers*, 2020 Ark. 367, at 7; *Taffner*, 2016 Ark. 231, at 15, 493 S.W.3d at 329. Nor is disqualification required merely because a party or attorney has filed a disciplinary complaint

[5]*Thomas*, 2019 Ark. 237, at 4.

against the presiding judge, *Korolko v. Korolko*, 33 Ark. App. 194, 803 S.W.2d 948 (1991), or threatened other legal action, *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988).

My 2015 ethics opinion to the firm was similar to that of a judge issuing a judicial opinion that denies a motion or rules against a party or an attorney. The judge is not automatically disqualified when that party or that attorney next appears before the judge. A per se rule to the contrary is found neither in the Code nor in the case law.

In support of his motion, Mr. Ney has one primary case, *In the Matter of the Estate of Edens*, 2018 Ark. App. 226, 548 S.W.3d 179. There, the court of appeals concluded that the trial judge abused his discretion when he failed to disqualify himself from a case because his impartiality could reasonably be questioned. Consider the facts in that case: the attorney had filed a complaint against the judge with the Judicial Discipline and Disability Commission; during a judicial campaign, the judge and his wife had made unfavorable public comments about the attorney; the wife of the judge accused the attorney of slandering the judge, and said, "I am going to get him"; the judge made derogatory comments about the attorney at a restaurant; the judge told other attorneys how he was hurt and bothered by the attorney; the judge made known to the circuit clerk that he was mad at the attorney; the judge made known to multiple attorneys of his dislike, ill will, and hatred of the attorney; and the judge accused the attorney of prohibited ex parte communications with the court. None of those facts are present in the instant motion to recuse.

Finally, in his motion to recuse, Mr. Ney states that he is "concerned that a previously contentious and personal dispute could impact the outcome" of the instant case. At no time

have I been involved in a contentious and personal dispute with Mr. Ney. Indeed, to the best of my knowledge, I have never met him or spoken with him. In conclusion, seven years have elapsed since I wrote the opinion for the firm. No reasonable basis exists for questioning my impartiality in this matter.

Motion for recusal denied.