IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 19, 2015

JANICE NEWMAN KROHN v. KENNETH B. KROHN

Appeal from the Circuit Court for Davidson County
No. 13D3060 Joseph P. Binkley, Jr., Judge

No. M2015-01280-COA-T10B-CV – Filed September 22, 2015

This is a Tennessee Supreme Court Rule 10B interlocutory appeal as of right from the trial court's denial of a motion for recusal. The appellant contends the trial judge should be disqualified on the ground of bias, which is evident from multiple rulings that were adverse to the appellant. Having reviewed the petition for recusal appeal, we affirm the trial court's decision to deny the motion for recusal.

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

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

James Harwell Todd, Nashville, Tennessee, for the appellee, Janice Newman Krohn.

Kenneth B. Krohn, Ph.D., J.D., Cambridge, Massachusetts, Pro se.

OPINION

This interlocutory appeal arises from the circuit court judge's denial of a motion to recuse. The underlying action was initiated in the General Sessions Court of Davidson County by Janice Newman Krohn ("Plaintiff"), who is the 100-year-old mother of Kenneth B. Krohn ("Defendant"), to obtain an Order of Protection preventing Defendant from calling or otherwise communicating with her and preventing him from being in her presence. After the general sessions court issued an order of protection for the benefit of Plaintiff, Defendant appealed the judgment to the Circuit Court for Davidson County.

Circuit Court Judge Hamilton V. Gayden, Jr. initially presided over the case. During the discovery phase, Judge Gayden ruled on Plaintiff's motion to impose

restrictions on Defendant's attempts to personally conduct the deposition of Plaintiff. Based on the fact that Defendant was subject to a protective order that prohibited him from being in the presence of or communicating with Plaintiff, Judge Gayden imposed restrictions on the manner by which Defendant could depose Plaintiff, including the location and duration of the deposition. Judge Gayden also prohibited Defendant from taking any out-of-state depositions. Dissatisfied with Judge Gayden's rulings, Defendant filed a motion to recuse or disqualify Judge Gayden. In response, Judge Gayden decided to recuse himself. The case was then assigned to Circuit Court Judge Joseph P. Binkley, Jr.

Thereafter, Defendant filed a motion to vacate the order entered by Judge Gayden on July 14, 2014, which imposed restrictions on the manner by which and location where Defendant could depose Plaintiff. Defendant also propounded interrogatories to Plaintiff. Plaintiff filed her interrogatory responses on September 3, 2014. Dissatisfied with some of the discovery responses, Defendant sought to compel discovery pursuant to Tenn. R. Civ. P. 37.01. Defendant then served Plaintiff with additional interrogatories and two requests for production of documents. Plaintiff responded by filing an objection to the additional discovery and a motion seeking a protective order from additional discovery.

On February 11, 2015, Judge Binkley denied Defendant's motions and granted Plaintiff's motion for a protective order. Specifically, Judge Binkley denied Defendant's motion to vacate Judge Gayden's order regarding out-of-state depositions and the manner by which and the place where Defendant could depose Plaintiff. Additionally, Judge Binkley found the Plaintiff's previous responses to discovery were adequate. Pertinent portions of Judge Binkley's order read as follows:

> After a thorough review of the entire record of the case, including the responses and the reply to the pending motions, and the applicable case law, the Court rules as follows:
>
> 1. The Respondent's Motion to Vacate is DENIED. Decisions concerning pretrial discovery are matters within the trial court's discretion. *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22 (Tenn. 2005). There is no sharp line of demarcation which separates the field in which discovery may be freely pursued from that in which it is forbidden, and relevant considerations include: relevancy or reasonable possibility of information leading to discovery of admissible evidence; privilege; protection of privacy, property and secret matters; and protection of parties or persons from annoyance, embarrassment, oppression, or undue burden or expense. *Johnson v. Nissan North America, Inc.*, 146 S.W.3d 600 (Tenn. Ct. App. 2004). If a trial court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved,

and the procedural posture of the case. *Duncan v. Duncan*, 789 S.W.2d 557 (Tenn. Ct. App. 1990).

Based upon the limited issues in this case, the Court finds good cause to limit the scope of discovery, and not to vacate the July 15, 2014 Order limiting discovery. This is an appeal of an October 28, 2013 Order of Protection granted by the General Sessions Court. The issues, therefore, are not complex and do not require intense, costly and time-consuming written and/or oral discovery.

The Court will, however, allow the Respondent to depose the Petitioner, with the deposition occurring in the courtroom of the Firth [sic] Circuit Court, during a weekday, with all parties and/or their counsel present. Judge Binkley will be present to observe the deposition and to rule on any objections made during the deposition. The scope of the deposition will be limited only to the facts which are relevant to the Petition for an Order of Protection. After the parties have agreed upon several alternative deposition dates, the parties will contact the Court to confirm the Court's availability on those alternative dates, and a date certain will be chosen.

The Court further finds that depositions of out-of-state witnesses are not necessary to determine any issues which are relevant to the Petition for an Order of Protection.

2. The Respondent's Motion to Compel is DENIED. As stated above, the issues in this case are not complex and do not require intense, costly and time-consuming written and/or oral discovery. The Court has reviewed the Petitioner's responses to the Respondent's discovery requests and finds that the responses are not deficient and, therefore, are not sanctionable. The Petitioner has provided the Respondent with sufficient information in order to conduct the discovery deposition of the Petitioner.

3. The Petitioner's Motion for a Protective Order is GRANTED. Protective orders are intended to offer litigants a measure of privacy, while balancing the public's right to obtain information concerning judicial proceedings. *Ballard v. Herzke*, 924 S.W.2d 652 (Tenn. 1996). In considering whether to grant a protective order, the court must balance the interests of the party seeking discovery against the interests of confidentiality, privacy or other burdens of the parties and persons from whom discovery is sought. *Newsom v. Breon Laboratories Inc.*, 709 S.W.2d 559 (Tenn. 1986). The issuance of a protective order

> limiting discovery lies within the sound discretion of the trial judge. *Brown v. Brown*, 863 S.W.2d 432 (Tenn. Ct. App. 1993).
>
> Tennessee Rule of Civil Procedure 26.02(1) specifically provides that a trial court may limit the frequency or extent of the use of discovery methods "if it determines that: (i) the discovery sought is reasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision 26.03."
>
> In this case, the Court finds that the Petitioner's requested protective order is proper because the Petitioner has adequately responded to the Respondent's written discovery requests. Those prior discovery responses coupled with the deposition ordered in paragraph #1 will provide the parties and the Court with sufficient facts and information in order to proceed with the trial of this case.
>
> It is so ORDERED.

Thereafter, Defendant filed his second Rule 10B motion in the trial court, this time seeking the recusal of Judge Binkley. Defendant's recusal motion is 63 pages in length. It includes history of his relationship with his mother and family members going back as far to the 1940's, his education and professional achievements,[1] a plethora of nuanced

[1]Defendant stated in his Affidavit in support of the recusal motion that he graduated from the New England School of Law in 1996 and passed the Massachusetts Bar examination that same year, and that "I bring to this lawsuit the benefit of extensive formal and practical legal training and study extending over many decades which I believe fairly to be comparable, at least in all respects pertinent to the motion which I file herewith, to that of a moderately experienced practicing appellate or trial attorney." In addition to his legal studies, Defendant states that he "earned a Ph.D degree in applied mathematics from Harvard University (1963) as well as a M.A. degree in applied mathematics from Harvard University (1960) and a B.S. degree in physics from the Massachusetts Institute of Technology (1959)." He concludes his affidavit by stating that he made "the greatest possible effort to ensure that every single one of the motions and other papers which I have filed in the instant case, including the motion for disqualification which I file herewith, has been painstakingly and thoughtfully drafted and that every argument which I have advanced for the court's consideration is principled, logical and well-supported both by the record of this case and by citation to pertinent legal precedent or other authority as appropriate."

assertions, the vast majority of which are conclusory allegations that lack a factual foundation, and recitations of numerous legal authorities that pertain to the disqualification of judges. The grounds for recusal of Judge Binkley, as expressed in Defendant's Petition for Recusal Appeal, read: "based upon the numerous rudimentarily erroneous and/or bizarre rulings adverse to [Defendant] which Judge Binkley made in his Order of February 11, 2015, and also based upon the circumstance that those rulings appear to stem from a desire by Judge Binkley to assist his fellow judge, Hon. Hamilton V. "Kip" Gayden, Jr. . . ."

In the order denying Defendant's Motion for Disqualification, which was entered on June 24, 2015, Judge Binkley summarizes the grounds Defendant asserts for disqualification:

> (1) The Court's February 1, 2015 Order disregarded the applicable law to such an extreme degree that an impartial observer could reasonably conclude that Judge Binkley had deliberately deprived Respondent of fair and impartial legal process; (2) an impartial observer could find the rulings made in the February 11, 2015 Order were done in order to shield Judge Binkley's fellow judge – Judge Hamilton V. Gayden, Jr. – from judicial discipline for violations of the Code of Judicial Conduct made while Judge Gayden previously presided over this case; and (3) an impartial and objective observer could find a lack of impartiality on the part of Judge Binkley based on his rulings made in the February 11, 2015 Order which were substantially identical to rulings made in Judge Gayden's July 15, 2014 Order.

In his recusal order, Judge Binkley also stated the procedures required when one seeks to disqualify a judge and the relevant legal principles that apply when the ground for recusal is the allegation that the challenged judge's lack of impartiality is obviously based on numerous rulings that were adverse to the party seeking recusal.

After correctly stating that "[t]he Respondent's contentions that Judge Binkley is biased appears to stem from Judge Binkley's multiple rulings against the Respondent in the February 11, 2015 Order," Judge Binkley addressed the issues as § 1.03 of Rule 10B requires by stating:

> Even multiple adverse rulings against the Respondent, standing alone, do not establish that Judge Binkley is biased against the Respondent. *See Herrera v. Herrera*, 944 S.W.2d 379, 397 (Tenn. Ct. App. 1996) (emphasis added). The Court, therefore, finds that a reasonable, disinterested person would not believe that Judge Binkley's impartiality might reasonably be questioned based on his adverse rulings against the Respondent. The

> Respondent remains free to challenge Judge Binkley's substantive rulings in an appeal from the trial court's final order in this case.
>
> The Respondent further contends that Judge Binkley ruled in such a way as to protect Judge Gayden and to provide him with a "no harm no foul" defense for Judge Gayden's July 15, 2014 Order. The Respondent goes even further, suggesting that Judge Binkley "has abandoned his role of neutral arbiter and has become instead in this case the covert yet zealous advocate of Judge Gayden. . . ."
>
> The types of unsupported and conclusory allegations and theories of bias are not sufficient to require the recusal of Judge Binkley. *See Wiseman v. Spaulding*, 573 S.W.2d 490, 493 (Tenn. Ct. App. 1978) (affirming trial court's refusal to recuse itself where appellant's affidavit contained "nothing more than circumstances from which it might be inferred that the Trial Judge might have some reason to have a favorable or unfavorable opinion of the parties").
>
> This Court has no doubt as to its ability to preside impartially in this case. This Court has no personal bias or prejudice concerning either party. The Court is certainly not a "covert yet zealous advocate of Judge Gayden" as alleged by the Respondent.
>
> As such, the Court finds that the Respondent has failed to come forward with sufficient evidence that would prompt a reasonable, disinterested person to believe that Judge Binkley's impartiality might reasonably be questioned.
>
> It is therefore ORDRED that the Respondent's Motion for Disqualification is DENIED.

Defendant timely filed his petition for recusal appeal pursuant to Tenn. Sup. Ct. R. 10B, § 2.02 on July 13, 2015.

ISSUE

The only issue we may consider on this appeal is whether the trial court should have granted Defendant's motion to recuse. *See Duke v. Duke*, 298 S.W.3d 665, 668 (Tenn. Ct. App. 2012). A motion to recuse should be granted when judges have any doubt about their ability to preside impartially in a case or when "a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *See Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001); Tenn. Sup. Ct. R. 10, RJC 2.11(A). We review a

trial court's ruling on a motion for disqualification or recusal under a de novo standard. Tenn. Sup. Ct. R. 10B, § 2.01.

In this case, Judge Binkley had no doubt about his ability to preside impartially; accordingly, the dispositive issue is whether a person of ordinary prudence would find a reasonable basis for questioning the judge's impartiality such that the trial court should have granted Defendant's motion to recuse. *See Davis*, 38 S.W.3d at 564; Tenn. Sup. Ct. R. 10, RJC 2.11(A).

ANALYSIS

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

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

The Tennessee Supreme Court has succinctly described the importance of impartiality of a court as follows:

> Litigants, as the courts have often said, are entitled to the "cold neutrality of an impartial court." *Kinard v. Kinard*, 986 S.W.2d 220, 227 (Tenn. Ct. App. 1998). Thus, one of the core tenets of our jurisprudence is that litigants have a right to have their cases heard by fair and impartial judges. *Id*. at 228. Indeed, "it goes without saying that a trial before a biased or prejudiced fact finder is a denial of due process." *Wilson v. Wilson*, 987 S.W.2d 555, 562 (Tenn. Ct. App. 1998). Accordingly, judges must conduct themselves "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and "shall not be swayed by partisan interests, public clamor, or fear of criticism." Tenn. Sup. Ct. R. 10, Cannon [sic] 2(A), 3(B)(2). As we said many years ago, "it is of immense importance, not only that justice be administered . . . but that [the public] shall have no sound reason for supposing that it is not administered ." *In re Cameron*, 151 S.W. 64, 76 (Tenn. 1912). If the public is to maintain

> confidence in the judiciary, cases must be tried by unprejudiced and unbiased judges.
>
> Given the importance of impartiality, both in fact and appearance, decisions concerning whether recusal is warranted are addressed to the judge's discretion, which will not be reversed on appeal unless a clear abuse appears on the face of the record. *See State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995). A motion to recuse should be granted if the judge has any doubt as to his or her ability to preside impartially in the case. *See id*. at 578. However, because perception is important, recusal is also appropriate "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). Thus, even when a judge believes that he or she can hear a case fairly and impartially, the judge should grant the motion to recuse if "the judge's impartiality might reasonably be questioned." Tenn. Sup. Ct. R. 10, Canon 3(E)(1). Hence, the test is ultimately an objective one since the appearance of bias is as injurious to the integrity of the judicial system as actual bias. *See Alley*, 882 S.W.2d at 820.

Davis, 38 S.W.3d at 564-65.[2]

The relevant portions of the Rules of Judicial Conduct provide:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> > (1) The judge has a personal bias or prejudice concerning a party or party's lawyer, or personal knowledge of facts that are in dispute in the proceedings.

Tenn. Sup. Ct. R. 10, RJC 2.11.

The terms "bias" and "prejudice" generally refer to a state of mind or attitude that works to predispose a judge for or against a party; however, "[n]ot every bias, partiality, or prejudice merits recusal." *Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Crim. App.

[2] As part of a comprehensive revision of the Code of Judicial Conduct, Tennessee Supreme Court Rule 10 was amended effective July 1, 2012. *See Moncier v. Bd. of Professional Responsibility*, 406 S.W.3d 139, 159 n.16 (Tenn. 2013); *Baker v. Baker*, No. M2010-01806-COA-R3-CV, 2012 WL 764918, at *6 n.4 (Tenn. Ct. App. Mar. 9, 2012). Accordingly, references to Rule 10 in opinions issued before July 2012 do not match the current location of the corresponding provision.

1994). To merit disqualification of a trial judge, "prejudice must be of a personal character, directed at the litigant, must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from . . . participation in the case." *Id*. (citations and quotation marks omitted). However, "[i]f the bias is based upon actual observance of witnesses and evidence given during the trial, the judge's prejudice does not disqualify the judge." *Id*. (citations omitted).

Defendant argues that a person of ordinary prudence would find a reasonable basis for questioning Judge Binkley's impartiality because of (1) the egregious and rudimentary nature of the errors Judge Binkley made in the discovery order; (2) the allegation that Judge Binkley was influenced by a desire to protect Judge Gayden; and (3) one of Judge Binkley's statements in the order denying the motion to disqualify. We will address each contention in turn.

I. ADVERSE AND ERRONEOUS ORDERS

Defendant contends that Judge Binkley should have granted the motion to disqualify because the rulings in the discovery order would prompt an objective observer to have a reasonable basis for questioning Judge Binkley's impartiality. This assertion, without more, fails as a matter of law. *See State v. Cannon*, 254 S.W.3d 287, 308 (Tenn. 2008); *Davis*, 38 S.W.3d at 565; *Alley*, 882 S.W.2d at 821. "A trial judge's adverse rulings are not usually sufficient to establish bias." *Cannon*, 254 S.W.3d at 308 (citing *Alley*, 882 S.W.2d at 821). Even rulings that are "erroneous, numerous and continuous, do not, without more, justify disqualification." *Id*. (quoting *Alley*, 882 S.W.2d at 821). There is good reason for this proposition: "If the rule were otherwise, recusal would be required as a matter of course since trial courts necessarily rule against parties and witnesses in every case, and litigants could manipulate the impartiality issue for strategic advantage, which the courts frown upon." *Davis*, 38 S.W.3d at 565 (internal citations omitted).

Defendant acknowledges this precedent but asserts that the errors in Judge Binkley's rulings are so egregious that a reasonable person would question Judge Binkley's impartiality. He relies on the principal that, in rare situations, the cumulative effect of the "repeated misapplication of fundamental, rudimentary legal principles that favor[] [one party] substantively and procedurally" can be the basis for recusal. *See Hoalcraft v. Smithson*, No. M2000-01347-COA-R10-CV, 2001 WL 775602, at *16-17 (Tenn. Ct. App. July 10, 2001). Defendant contends that such errors are present here.

This argument essentially requires us to examine the discovery order itself in order to determine whether it contains "misapplication of fundamental, rudimentary legal principles." *See id.* Rule 10B affords a party an accelerated appeal as of right to seek

"review of *any issue* concerning the trial court's denial of a motion filed pursuant to this Rule." Tenn. Sup. Ct. R. 10B, § 2.01 (emphasis added).[3] As a general matter in Rule 10B appeals, we may only consider the order denying the motion to recuse and may not consider the merits of any other rulings. *See Duke*, 398 S.W.3d at 668. Here, however, Defendant has argued that Judge Binkley should have recused himself because errors in his discovery order were so egregious that they created the appearance of bias. Consequently, in order to determine whether Judge Binkley erred in denying Defendant's motion to recuse, we must examine the discovery order and determine whether it contains errors that rise to the level of "repeated misapplication[s] of fundamental, rudimentary legal principles . . . ." *See Hoalcraft*, 2001 WL 775602, at *16-17. Therefore, assessing the merits of the discovery order is an issue "concerning the trial court's denial of a motion filed pursuant to [Rule 10B]," and, in this rare circumstance, we are authorized to resolve this issue in a Rule 10B appeal. *See* Tenn. Sup. Ct. R. 10B, § 2.01.

In resolving this issue, it is important to compare the decisions in this case to the erroneous decisions in *Hoalcraft*, one of the only cases in Tennessee that has used repeated misapplications of fundamental legal principles as grounds for recusal.[4] In *Hoalcraft*, the trial court misallocated the statutorily-defined burden of proof in a child custody case; held a hearing on a pleading even though all the issues it raised had already been ruled upon by the Court of Appeals; conducted a hearing in the absence of one party's lawyer after being informed that both sides had agreed to a continuance; disqualified one party's lawyer without any objective basis; and, in one of the trial court's orders, made suggestions to one party's lawyer concerning issues and arguments that should be raised in an application to the Tennessee Supreme Court. *Id.* at 16.

Here, Defendant has not asserted that anything similar to the activity in *Hoalcraft* occurred. Instead, the errors that Defendant cites include: (1) alleged violations of the Local Rules of Davidson County; (2) the decision to deem Plaintiff's discovery responses adequate; (3) the decision to impose limits on the duration of Plaintiff's deposition; and (4) the decision to prohibit Defendant from taking any out-of-state depositions. As we explain below, these decisions are within the trial court's discretion, and there is no indication that any of these decisions constitute an abuse of discretion.

The abuse of discretion standard "reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives" and "does not permit

[3] The other method is an appeal as of right following the entry of the trial court's final judgment under Tenn. R. App. P. 3.

[4] Although Defendant has directed our attention to other cases that have cited *Hoalcraft*, *see, e.g.*, *Eldridge v. Eldridge*, 137 S.W.3d 1, 7 (Tenn. Ct. App. 2002), we are not aware of any other Tennessee case holding that a judge should have recused himself based on a "repeated misapplication of fundamental, rudimentary legal principles . . . ."

reviewing courts to second-guess the court below or to substitute their discretion for the lower court's." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (internal citations omitted). Despite this deferential standard, "[d]iscretionary decisions must take the applicable law and facts into account." *Id.* (citing *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008)). When reviewing a trial court's discretionary decisions, this court should determine "(1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court's decision was within the range of acceptable alternative dispositions." *Id.* (citing *Flautt & Mann v. Council of Memphis*, 285 S.W.3d 856, 872-73 (Tenn. Ct. App. 2008)).

Defendant contends that Judge Binkley issued his discovery order in violation of Davidson County Local Rules 22.08 and 26.11. Local Rule 22.08 states that a court "will refuse to rule on any motion related to discovery unless moving counsel files with the motion, a statement which certifies that the lawyer has conferred with opposing counsel in a good faith effort to resolve the discovery dispute and that the effort has not been successful." Local Rule 26.11(a) states: "Motions with responses shall be orally argued unless waived by agreement, excepted by order of the court, or where a prisoner proceeds pro se." Defendant notes that Plaintiff's motion for a protective order did not contain a certificate of good faith and that Judge Binkley ruled on the discovery motions without having oral argument. Defendant contends that the failure to abide by these rules is an egregious error that can serve as the basis for objective concern over Judge Binkley's impartiality. We disagree.

The Local Rules specifically allow judges to deviate from them "in exceptional cases where justice so requires." Local Rule § 1.03. Moreover, the trial court is not required to expressly state that it waived requirements of a local rule because we may infer that it did so based on the court's actions. *See Thrapp v. Thrapp*, No. E2006-00088-COA-R3-CV, 2007 WL 700963, at *9 (Tenn. Ct. App. Mar. 8, 2007). The decision to waive the application of local rules will not be reversed "absent the clearest showing of an abuse of discretion and that such waiver was the clear cause of a miscarriage of justice." *Killinger*, 620 S.W.2d at 525.

Here, we find no abuse of discretion by the trial court in waiving the requirements of Local Rules 22.08 and 26.11. After reviewing the record, it is clear Judge Binkley took the applicable law and facts into account. The record indicates that the parties were involved in several discovery disputes that persisted despite reasonable efforts at resolution. Additionally, it is clear that all of the discovery issues before Judge Binkley had been thoroughly briefed by both parties. As a result, the decision to waive the local rules is not a misapplication of fundamental, rudimentarily legal principles that can serve as the basis for recusal.

Defendant's other three errors concern the limits that Judge Binkley imposed upon the extent and frequency of discovery and the determination that Plaintiff's discovery responses were adequate and not subject to sanctions. Defendant contends that these decisions are misapplications of fundamental legal principles that can form the basis for objective concern about Judge Binkley's impartiality. Again, we disagree.

In Tennessee, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Tenn. R. Civ. P. 26.02(1). In pre-trial discovery, the phrase "relevant to the subject matter involved in the pending action" is synonymous with "germane" or "bearing on the subject matter." *West v. Schofield*, 460 S.W.3d 113, 125 (Tenn. 2015) (quoting *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 359 (Tenn. Ct. App. 1985)).

Despite the initially broad scope of pre-trial discovery, courts retain the authority to limit it. Trial courts have "broad discretion over discovery matters, including requests for sanctions, and, on appeal, that discretion will not be disturbed absent an affirmative showing that the trial court abused its discretion." *Parks v. Mid-Atlantic Finance Co., Inc.*, 343 S.W.3d 792, 802 (Tenn. Ct. App. 2011) (citing *Brooks v. United Uniform Co.*, 682 S.W.2d 913, 915 (Tenn. 1984)).

"[T]he ability to obtain relevant information presumes a proper inquiry. Discovery requests require some tailoring. If parties go too far, the courts may whittle down their discovery requests . . . ." *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith Int'l, Inc.*, No. M1998-00983-COA-R3-CV, 2002 WL 1389615, at *3 (Tenn. Ct. App. June 27, 2002). To this end, parties may file motions for protective orders, and the trial court may, for good cause shown, "make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place . . . ." Tenn. R. Civ. P. 26.03. Moreover, a trial court may act to limit discovery "upon its own initiative or pursuant to a motion" if it determines that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Tenn. R. Civ. P. 26.02(1).

Here, we find no abuse of discretion in Judge Binkley's decision to limit Defendant's use of depositions, interrogatories, and requests for production. Judge Binkley limited the scope of discovery pursuant to motions filed by the parties and based on the Rules of Civil Procedure. The discovery order clearly indicates that these limitations were "[b]ased upon the limited issues in this case . . . [because] [t]his is an appeal of an October 28, 2013 Order of Protection granted by the General Sessions Court.

The issues, therefore, are not complex and do not require intense, costly and time-consuming written and/or oral discovery." Thus, Judge Binkley considered the record before him and the matters listed in Tenn. R. Civ. P. 26.02(1) when making his discovery order.[5]

Similarly, Judge Binkley was well-within his discretion when he declined to impose sanctions on Plaintiff because he found that her discovery responses were adequate. Accordingly, the limitations Judge Binkley imposed on the frequency and extent of discovery and the decision that Plaintiff's discovery responses were adequate are not misapplications of fundamental legal principles that prompt an objective concern about his ability to remain impartial.

II. EXTRAJUDICIAL INFLUENCE

The foregoing notwithstanding, Defendant contends that recusal is appropriate because "a prudent observer could . . . quite reasonably strongly suspect" that Judge Binkley was more concerned with protecting Judge Gayden than he was with ruling impartially on the merits of the discovery issues before him. The problem with this contention is that it is lacks a factual or evidentiary foundation. This is significant for a party challenging the impartiality of a judge "must come forward *with some evidence* that would prompt a reasonable, disinterested person to believe that the judge's impartiality might reasonably be questioned." *Duke*, 398 S.W.3d at 671 (quoting *Eldridge v. Eldridge*, 137 S.W.3d 1, 7-8 (Tenn. Ct. App. 2002)) (emphasis added).

The record on appeal indicates that Judge Binkley resolved the discovery issues before him on their merits rather than on a desire to "cover for" another judge. Accordingly, Defendant's argument on this issue is both without evidentiary support and without merit.

III. STATEMENT IN THE ORDER DENYING THE MOTION TO RECUSE

Defendant also contends that Judge Binkley should be disqualified because he has "already made up his mind . . . that he will rule against [Defendant] in his final Order." In making this contention, Defendant notes that Judge Binkley stated "[Defendant] remains

[5] In his motion to disqualify Judge Binkley, Defendant argues that Judge Binkley assumed that his case was "not complex" and "limited" because it was an appeal from a general sessions court judgment. According to Defendant, Judge Binkley had no basis for this characterization because there was nothing before him that "reveal[ed] what the entire range of factual issues in this particular case is." We agree that cases appealed from general sessions may be complex and involve a number of factual issues. Here, however, the record was more developed than Defendant suggests. Defendant's briefs are particularly extensive and serve to outline much of what he contends are the factual issues in this case. Judge Binkley considered Defendant's description of the issues when he limited discovery.

free to challenge Judge Binkley's substantive rulings in an appeal from the trial court's final order in this case" in the order denying Defendant's motion to disqualify. Defendant asserts that Judge Binkley should have stated that Defendant remained free to challenge the trial court's substantive rulings *in the event that he does not prevail at trial* and that the failure to include these words indicates that Judge Binkley has already decided the outcome of this case. We find no merit to this contention.

Judicial remarks that are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases ordinarily do not support a bias or partiality challenge." *McKenzie v. McKenzie*, No. M2014-00010-COA-T10B-CV, 2014 WL 575908, at *4 (Tenn. Ct. App. Feb. 11, 2014) (quoting *U.S. v. Adams*, 722 F.3d 788, 837 (6th Cir. 2013)), *no perm. app. filed.* However, an expression of opinion on the merits of a case prior to hearing the evidence does indicate bias. *See Alley*, 882 S.W.2d at 822. Statements made by a trial court must be "construed in the context of all the facts and circumstances to determine whether a reasonable person would construe those remarks as indicating partiality on the merits of the case." *Id.*

Here, a reasonable person would not construe the statement in Judge Binkley's order as indicating that he had already made a decision about the merits of the case. In context, the statement, which occurred after Defendant received several adverse rulings, accurately states that the option to appeal both past and future adverse rulings, if any, remained available. No reasonable person would interpret this statement to mean that Judge Binkley had already decided that the final judgment in this case would adverse to Defendant. Accordingly, this statement does not indicate any partiality on the merits of the case and is not grounds for disqualification.

CONCLUSION

Many litigants are frustrated, to varying degrees, with court decisions that are adverse to them;[6] however, as discussed above, an adverse decision does not indicate

[6] This sentiment is certainly not new or unprecedented. Over 100 years ago, our Supreme Court stated:

> It is exceedingly easy for litigants and counsel to imagine that a judge is prejudiced against a party, or against his counsel, who has failed to successfully prosecute, or successfully defend, any one or more cases. It is an infirmity of human nature that counsel, whose feelings and personal interests are deeply enlisted in every important case they try, are frequently unable to attribute want of success to the inherent weakness of the case, or to their own shortcomings in the management of it. It is a matter of general knowledge among lawyers that the refuge of defeated counsel is far too often abuse of the court, referred to pithily by lawyers as "cussin' the court." When the tide turns, and success crowns the effort of previously disappointed counsel, his opinion of the intelligence, learning, and probity of the court experiences a high, upward tendency. To

(continued…)

bias. To the contrary, when a court decides a legal or factual issue it is merely doing its duty: resolving disputes between adversaries. With that said, Defendant would be well served by addressing the merits of the underlying case instead of challenging the ethics of judges who rule adversely to him.

Having reviewed the petition and supporting documents pursuant to the de novo standard as required by Tenn. Sup. Ct. R. 10B, § 2.06, we have concluded that Defendant failed to establish grounds to require recusal under the Rules of Judicial Conduct. The trial court's decision to deny the motion for recusal is affirmed and this case is remanded to the trial court for further proceedings consistent with this opinion.

Defendant Kenneth B. Krohn is taxed with costs for which execution, if necessary, may issue.

_____
FRANK G. CLEMENT, JR., JUDGE

> allow personal feelings like these on the part of counsel to determine what judge shall try a case, it seems to us, would be disastrous. The new judge selected might not meet the approval of the counsel of the other side, and he would also have to be refused, and so on, resulting in a scramble, undignified and humiliating.

In re Cameron, 151 S.W. 64, 74 (Tenn. 1912).