NO. COA05-1634

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

ROBERT ANDREW FULLER,
Plaintiff,

v.

Harnett County
No. 00 CVD 2097

BLAIR JOYAL FULLER,
Defendant,

v.

DANNY and wife, WINIFRED FULLER, Paternal Grandparents,
Intervenors,

v.

ROLAND and wife, YVONNE JOYAL, Maternal Grandparents,
Intervenors.

Appeal by defendant and maternal grandparent intervenors from order entered 23 May 2005 by Judge A. A. Corbett, Jr., in Harnett County District Court. Heard in the Court of Appeals 11 December 2006.

Staton, Doster, Post & Silverman, by Jonathan Silverman, for defendant and Maternal Grandparents Intervenor-appellants.

No brief filed for plaintiff appellee.

McCULLOUGH, Judge.

Defendant and maternal grandparent intervenors appeal the child custody order and the denial of their motion to recuse Judge

Corbett from the instant proceedings where he was believed to be unable to rule fairly and impartially on the issues.

On 5 December 2000, Robert Fuller ("plaintiff") filed a complaint in Harnett County District Court asserting claims for custody and child support against Blair Fuller ("defendant"). Defendant filed an answer and counterclaim seeking custody of the parties' minor children, child support and other additional claims. The maternal and paternal grandparents subsequently filed separate motions to intervene. Judge Corbett entered a temporary custody order on 22 August 2001 concluding that both plaintiff and paternal grandparent intervenors were fit and proper persons to exercise care and custody of the minor children and further that defendant and maternal grandparent intervenors were not fit and proper persons to have the care and custody of the minor children.

On 5 December 2002, a hearing was held in front of Judge Corbett in which defendant and maternal grandparent intervenors brought a motion for Judge Corbett to be recused from hearing further matters in the instant case. The following evidence was adduced at the hearing on the motion to recuse.

Plaintiff testified that he served as a bailiff for Judge Corbett for a period of time. Plaintiff ate lunch with Judge Corbett on several occasions but did not remember ever talking to the judge about anything concerning his wife, his family or his marriage. Defendant testified that plaintiff wrote her a letter in 2000 which made reference to conversations between Judge Corbett and plaintiff regarding the separation issues of plaintiff and

defendant. Plaintiff denied writing the letter, stating that the handwriting did not appear to be his and that he had no memory of writing such a letter. Upon cross-examination, defendant admitted that this letter had been in her possession since 2000 and that even though there had been other hearings in the instant case, the first time it was brought to the attention of the trial court was on 5 December 2002.

Counsel for defendant also presented evidence that Mr. Jesse Jones, plaintiff's attorney, stated at a deposition "'that this deposition is a waste of time, this custody case has already been decided by Judge Corbett, Judge Corbett found that the mother here was unfit, the grandparents were unfit and placed the custody of the child with the paternal grandparents.'" Mr. Jesse Jones admitted to making such statements but explained that the statements were inappropriate, made only because he was upset and were based on the temporary order entered by Judge Corbett in which the maternal grandparents were found to be unfit. Mr. Bo Jones, counsel for the paternal grandparent intervenors, further stated for the record that he had not spoken with Judge Corbett about the case other than in open court and that he had not engaged in any *ex parte* communications.

Judge Corbett subsequently denied the motion, stating for the record that he was able to preside over further matters pertaining to the case and that he had the ability to be fair and impartial. Judge Corbett made the following statements in open court:

> I've had no ex parte communications with Mr. Silverman or either one of [the] Mr. Jones[es] at any time nor have I talked with Mr. Fuller at any time about this case. I have an open mind about the case. The case has not been concluded. Although a temporary [o]rder has been entered, that's not the final decision in the case. Consequently, I still have an open mind about the case. As far as I'm concerned, I'm impartial and fair about it. I'll do whatever I perceive to be in the best interest of the children in the case. If either side doesn't like it, they can appeal it.

Judge Corbett thereafter entered a chid custody order granting plaintiff sole care, custody, and control of the minor children.

Defendant and maternal grandparent intervenors appeal.

Defendants and maternal grandparent intervenors contend on appeal that Judge Corbett erred in personally ruling on the motion to recuse himself from further hearings and further in denying the motion to recuse. We agree.

Both N.C. Gen. Stat. § 15A-1223 and Canon 3 of the Code of Judicial Conduct control the disqualification of a judge presiding over a trial when partiality is claimed. *State v. Fie*, 320 N.C. 626, 627-28, 359 S.E.2d 774, 775 (1987). N.C. Gen. Stat. § 15A-1223 provides in pertinent part that a judge must disqualify himself from presiding over a trial or other proceeding if he is prejudiced against the moving party or in favor of the adverse party. N.C. Gen. Stat. § 15A-1223(b)(1) (2005).

The Code of Judicial Conduct provides in pertinent part: "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bias or prejudice

concerning a party . . . .” Code of Judicial Conduct, Canon 3(C)(1)(a) (2006).

When a defendant makes a motion that a judge be recused, “‘the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.’” *Fie*, 320 N.C. at 627, 359 S.E.2d at 775 (citation omitted). The bias, prejudice, or interest which requires a trial judge to be recused from a trial has reference to the personal disposition or mental attitude of the trial judge, either favorable or unfavorable, toward a party to the action before him. *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993).

If there is sufficient force to the allegations set forth in a recusal motion “to proceed to find facts, or if a reasonable man knowing all of the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner, the trial judge should either recuse himself or refer the recusal motion to another judge.” *In re Faircloth,* 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002). Further, a trial judge should refer a recusal motion to another judge if the motion contains sufficient allegations to require findings of fact with respect to whether the judge is disqualified pursuant to Canon 3(C) of the Code of Judicial Conduct. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E.2d 375 (1976).

Here, defendant alleged that the former husband, a courtroom bailiff for Judge Corbett, had advised her orally and in a letter that he had discussed the case with the judge and warned her that she should "watch it" and that she would "never see your kids again because, you know, I know Judge Corbett and I work for the Sheriff's Department, and you go ahead and tell them what you want but it's not going to matter what you say." In addition, she alleged that her former husband's lawyer stated at a deposition in the case, and the lawyer admitted stating, "this deposition is a waste of time, this custody case has already been decided by Judge Corbett, Judge Corbett found that the mother here was unfit and placed the custody of the child with the paternal grandparents."

Such allegations, if true, would certainly raise a reasonable question as to whether Judge Corbett had a personal bias or prejudice for or against any of the parties, or whether he had personal knowledge of any disputed facts. *See* Code of Judicial Conduct, Canon 3(C)(1). In any event, defendant's assertions were of sufficient force, though denied by plaintiff and his counsel, to cause Judge Corbett to proceed to find facts with respect to the recusal motion, some of which were within his own knowledge and could not be subjected to cross-examination by defendant. In such case,

> he should have either disqualified himself or referred the matter to another judge before whom he could have filed affidavits in reply or sought permission to give oral testimony. Obviously, it was not proper for this trial judge to find facts so as to rule on his own

> qualification to preside when the record contained no evidence to support his findings.

Bank, 291 N.C. at 311, 230 S.E.2d at 380.

Based on the aforementioned ruling, we decline to address the remaining assignments of error on appeal.

Accordingly, we vacate the order of the trial court denying defendant's and maternal grandparent intervenors' motion to recuse and granting plaintiff custody of the minor children and remand for entry of an order referring the recusal motion to another judge.

Vacated and remanded.

Chief Judge MARTIN and Judge LEVINSON concur.

Report per Rule 30(e).