

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs August 21, 2019

**DIANNE HAMILTON ET AL. v. METHODIST HEALTHCARE MEMPHIS
HOSPITALS**

Appeal from the Circuit Court for Shelby County
No. CT-0531-19 Mary L. Wagner, Judge

No. W2019-01501-COA-T10B-CV

This is an accelerated interlocutory appeal as of right, pursuant to Tennessee Supreme Court Rule 10B, from the trial court's denial of a motion for recusal. The plaintiff contends the trial judge should be disqualified because a lawyer with the Lewis Thomason law firm, which represents the defendant in this action, provided a letter of recommendation on behalf of the trial judge in support of the judge's application for appointment to a vacancy on the Court of Appeals of Tennessee. Plaintiff also contends the trial judge should be disqualified because the judge failed to disclose "the extrajudicial relationship." Having reviewed the petition for recusal appeal, pursuant to the *de novo* standard as required under Rule 10B § 2.01, we find that the lawyer who provided the letter of recommendation has no involvement in this case, and that lawyer merely has a *de minimis* interest in the outcome of this case because the law firm representing the defendant is one of the larger multi-city firms in this state. Based on these facts and the relevant legal principles, we find no basis to conclude that the trial judge's impartiality might be reasonably questioned. Accordingly, we affirm the trial court's decision to deny the motion for recusal.

Tenn. Sup. Ct. R. 10B Accelerated Interlocutory Appeal;
Judgment of the Circuit Court Affirmed and Remanded

FRANK G. CLEMENT JR., P.J., M.S. delivered the opinion of the Court, in which THOMAS R. FRIERSON, II, and KENNY W. ARMSTRONG, JJ., joined.

Robert L. J. Spence, Jr., Regina Guy, and Andrew M. Horvath, Memphis, Tennessee, for the appellant, Diane Hamilton.

Kevin Baskette and Laura Deakins, Memphis, Tennessee, for the appellee, Methodist Healthcare Memphis Hospitals.

OPINION

The underlying action is brought under the Health Care Liability Act. The plaintiff Dianne Hamilton (“Plaintiff”), as Conservator on behalf of her ward, Cassie McGill, alleges that Methodist Healthcare Memphis Hospitals d/b/a Methodist LeBonheur Hospital (“Defendant”) is liable for injuries and damages her ward sustained while receiving health care services from Defendant.

This appeal arises from the trial judge’s decision to deny Plaintiff’s motion to recuse. Pursuant to Tenn. Sup. Ct. R. 10B, § 2.01, 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 perfected by filing a “petition for recusal appeal” with the appropriate appellate court. *Id.* § 2.02. The only issue we may consider in a Rule 10B appeal is whether the trial judge should have granted Plaintiff’s motion to recuse. *Duke v. Duke*, 398 S.W.3d 665, 668 (Tenn. Ct. App. 2012).

Our standard of review in a Rule 10B appeal is de novo.¹ *See* Tenn. Sup. Ct. R. 10B, § 2.01. “De novo” is defined as “anew, afresh, a second time.” *Simms Elec., Inc. v. Roberson Assocs., Inc.*, No. 01-A-01-9011CV00407, 1991 WL 44279, at *2 (Tenn. Ct. App. Apr. 3, 1991) (quoting *Black’s Law Dictionary* 392 (5th ed. 1979)). In an “appeal de novo,” “the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s rulings.” *Black’s Law Dictionary* (10th ed. 2014). Therefore, we examine the factual record anew, with no presumption of correctness, and reach our own conclusion.²

If we determine, after reviewing the petition and supporting documents, that no answer is needed, we may act summarily on the appeal. Tenn. Sup. Ct. R. 10B, § 2.05. Otherwise, this court must order an answer be filed and may order further briefing by the parties. *Id.* Section 2.06 of Rule 10B grants this court the discretion to decide the appeal without oral argument.

Based upon our review of the petition and supporting documents, we have determined that neither an answer, additional briefing, nor oral argument is necessary,

¹ Prior to the adoption of Tennessee Supreme Court Rule 10B, effective July 1, 2012, the appellate courts reviewed recusal decisions pursuant to the more deferential abuse of discretion standard. *See Duke*, 398 S.W.3d at 668 n.2 (citing *State v. Hester*, 324 S.W.3d 1, 73 (Tenn. 2010)).

² An appeal that is “de novo” is distinguishable from “the de novo standard of review,” pursuant to which the “appellate courts review factual findings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise.” *In re Carrington H.*, 483 S.W.3d 507, 524 (Tenn. 2016); *see* Tenn. R. App. P. 13(d).

and we elect to act summarily on the appeal in accordance with Rule 10B, §§ 2.05 and 2.06.

ANALYSIS

The issue, as stated by Plaintiff, is whether the trial court erred in denying her Motion for Disqualification and Recusal. The alleged ground for disqualification is bias. The disqualification of a judge for bias can be based on actual bias, the appearance of bias, or both. *See In re Bridgestone Corp.*, No. M2013-00637-COA-10BC, 2013 WL 1804084, at *2 (Tenn. Ct. App. Apr. 26, 2013) (“The first [inquiry] is whether the judge has actual bias; the second is whether his or her impartiality might reasonably be questioned, i.e., whether there may be an appearance of bias even though no actual bias exists.”). Plaintiff does not contend that Judge Wagner has “actual bias.” Therefore, we shall consider whether Judge Wagner’s impartiality might reasonably be questioned based on an appearance of bias even though no actual bias exists.

The most pertinent facts, as set forth by Plaintiff in her petition for recusal appeal, read as follows:

During the pendency of this case, at least as far back as February of 2019, and unbeknownst to Plaintiff and never disclosed by Judge Wagner, she sought, and initiated a preferential relationship with attorney Mike Keeney, Esq. (“Attorney Keeney”) of Lewis Thomason, P.C. (“Lewis Thomason”). Lewis Thomason is the law firm retained to represent Defendant Methodist Healthcare in this case. At this time, the exact nature, duration and scope and extent of Judge Wagner’s relationship with Attorney Keeney is not entirely known to Plaintiff; however, at all relevant times, Lewis Thomason represented Defendant in the pending case.

With regard to the relationship between Judge Wagner and Attorney Keeney, on or about February 10, 2019 (while the present case was pending), Judge Wagner submitted an application seeking to be promoted and elevated to the Tennessee Court of Appeals, Western Section. She was one of fourteen initial applicants vying for appointment to the vacancy occasioned by Justice Brandon O. Gibson’s retirement. The Governor’s Council for Judicial Appointments’ (“Governor’s Council”) requested invitations from applicants and on or about March 11, 2019, the Governor’s Council announced that Judge Wagner had been selected as one of three finalists for the position. Although Plaintiff and her counsel through public announcements were generally aware that Judge Wagner had both applied for the promotion and had been selected as one of the finalists, it was not then known that Judge Wagner had before, and during the application process, initiated a preferential relationship and sought the assistance of the

Lewis Thomason firm by designating Attorney Keeney as one of her three legal references in support of her purely personal professional goal. Judge Wagner described her relationship with Attorney Keeney in paragraph 5 of her August 1, 2019 Order (hereinafter referred to as the “Order”) as follows:

Mr. Keeney is familiar with the Court’s skills and abilities in the legal field and the Court’s reputation among the bar. The Court was not required to list the nature of her relationship with regard to Mr. Keeney in the application. However, Mr. Keeney’s knowledge of the Court’s legal abilities and reputation in the legal community is the extent of any “personal relationship” with the Court.

(footnote omitted).

At issue here is whether Judge Wagner’s “impartiality might reasonably be questioned” based on the fact that Mike Keeney, a lawyer in the law firm representing Defendant in this action, submitted a professional letter of recommendation in support of Judge Wagner’s application for appointment to fill a vacancy on the Court of Appeals of Tennessee. The relevant facts are that Mr. Keeney does not represent Defendant in this action and his only connection to this action is that his law firm, Lewis Thomason, which is one of the larger multi-city law firms in the state, represents Defendant. Moreover, the only lawyers in the Lewis Thomason law firm who represent Defendant in this action are Kevin Baskette and Laura Deakins. Thus, Mr. Keeney’s interest in the outcome of this case is *de minimis*.

The relevant portion of the Code of Judicial Conduct is stated in Rule 2.11(A). Subsection (A)(4) requires that a judge disqualify herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including 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) (emphasis added). Judge Wagner’s “application for appointment” to the Court of Appeals was not a “campaign,” and it is not alleged that any financial contributions were sought or received by Judge Wagner from the lawyers or law firm that represents Defendant. Further, it is not alleged that “a party’s lawyer”—Defendant’s lawyers Kevin Baskette or Laura Deakins—supported Judge Wagner in her application for appointment to the Court of Appeals, and there is no allegation that Defendant’s “law firm”—Lewis Thomason—supported Judge Wagner’s application.

Plaintiff’s contention of the appearance of bias is based on the fact that one lawyer in the law firm which represents Defendant was listed as a reference and submitted a

letter of recommendation supporting Judge's Wagner's application. Judge Wagner responded directly to this contention by explaining why she identified Michael Keeney as a "reference" in her application and the limited extent of their professional relationship. She also stated that Mr. Kenney had no involvement in this case:

In February 2019, this Court applied, along with 13 other attorneys/judges, for appointment to the Tennessee Court of Appeals. As part of that process, each applicant was required to submit an Application for Nomination to Judicial Office. In that application, the Court was required to provide names and contact information for five references. One of the five references that the Court included was Attorney Michael Keeney. Mr. Keeney is familiar with the Court's skills and abilities in the legal field and the Court's reputation among the bar. The Court was not required to list the nature of her relationship with regard to Mr. Keeney in the application. However, Mr. Keeney's knowledge of the Court's legal abilities and reputation in the legal community is the extent of any "personal relationship" with the Court. Mr. Keeney is an attorney at Lewis Thomason. Lewis Thomason is a large law firm with offices in multiple locations and many attorneys. Until Plaintiff's Motion, the Court had no knowledge of the status of management at Lewis Thomason. The Court's knowledge now is only what is contained in the motion. Mr. Keeney has not had any involvement in this case either in its current status or the previous lawsuit that was nonsuited.

Plaintiff also contends that Judge Wagner should be disqualified for her "failure to disclose" her solicitation of a recommendation from Mr. Kenney and the resulting "active support, endorsement, and recommendation." As Judge Wagner noted in her order denying the motion for recusal, the comments to Tenn. Sup. Ct. R. 10, RJC 2.11 explain that a "judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." With this rule in mind, she went on to explain:

Lawyers understanding the Judicial application process, that Mr. Keeney was listed as a reference, that he is not involved in this matter, and based on the law related to recusal would not reasonably consider this information relevant. Therefore, disclosure was not required. Therefore, the fact that this Court did not disclose that Mr. Keeney was listed as a reference on her Judicial Nomination Application does not require recusal.

Considering the allegations supporting the motion for disqualification and Judge Wagner's responses, we find the following comment to Rule 2.11 instructive: "The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the

judge is affiliated does not itself disqualify the judge.” Tenn. Sup. Ct. Rule 10, RJC 2.11, cmt. 4. Mr. Kenney is not related to Judge Wagner, and we see no reason why his affiliation with Lewis Thomason justifies disqualification when a relative’s affiliation does not. Further, comment seven to Rule 2.11 states the mere “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.” Here, Mr. Keeney is neither a lawyer in this proceeding nor a litigant, which further mitigates any appearance of bias.

A judge should recuse herself when the judge has any doubt about her 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.” *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001) (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994)); *see* Tenn. Sup. Ct. R. 10, RJC 2.11(A). Having thoroughly reviewed the record, we conclude that a person of ordinary prudence in Judge Wagner’s position, knowing all of the facts known to the judge, would not find a reasonable basis for questioning the judge’s impartiality. We also find the reasoning and explanation given by Judge Wagner concerning why she did not disclose Mr. Keeney’s “support” justify her decision to not disclose that fact.

Finding no basis for concluding that Judge Wagner erred by failing to recuse herself from this case, the judgment of the trial court is affirmed.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Plaintiff, Dianne Hamilton.

FRANK G. CLEMENT JR., P.J., M.S.