IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 14, 2023

MANI ASSOCIATES ET AL. v. APPALACHIAN UNDERWRITERS INC. ET AL.

Appeal from the Circuit Court for Blount County
No. L-18437 David Reed Duggan, Judge

No. E2023-00382-COA-T10B-CV

This accelerated interlocutory appeal is taken from the trial court's order denying appellants' motion for recusal. After considering the trial court's ruling under the Tennessee Supreme Court Rule 10B de novo standard of review, we affirm the judgment of the trial court denying recusal.

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

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

Darren V. Berg, Russell L. Egli, and Joseph Henry Smith, Knoxville, Tennessee, for the appellants, Mani Associates, Budget Inn/Royal Extended Stay, and Mani, LLC d/b/a Days Inn.

David A. Draper, Jennifer Ann Franklyn, Brad Alan Fraser, and Jared Scott Garceau, Knoxville, Tennessee, for the appellees, Appalachian Underwriters, Inc., United Specialty Insurance Company, U.S. Administrator Claims, and American Roof Coatings Manufacturing, Inc.

OPINION

I. Background

Judge David Duggan presided over the criminal case of ***State v. Aaron Dean Whitman***, wherein a jury found defendant Mr. Whitman guilty of violating the sex offender registry. On February 13, 2023, Messrs. Berg and Egli, who represent Mani Associates,

Budget Inn/Royal Extended Stay, and Mani, LLC d/b/a Days Inn (together, "Appellants") in their lawsuit against Appalachian Underwriters, *et al.*, filed an amended complaint in the federal civil rights lawsuit, ***Whitman v. Blount Co., et al.*** (the "federal lawsuit"). In the federal lawsuit, which was filed in the United States District Court for the Eastern Section of Tennessee, Mr. Whitman alleged that his civil rights were violated, *inter alia*, in connection with the state criminal case, *i.e.*, ***State v. Whitman***, over which Judge Duggan presided. As is relevant to the motion for recusal, the amended complaint in the federal lawsuit sets out the following allegations against Judge Duggan:

> 96. In furtherance of the conspiracy set forth herein, co-conspirator, Judge David Duggan (hereinafter. "Judge Duggan") was the presiding judge and knowingly violated Doe's civil rights, especially his right to a fair trial.
> 97. Judge Duggan knowingly, and in furtherance of the conspiracy, allowed the jury to see a falsified Tennessee Sexual Offender Violent Sexual Offender Registration/Verification/Tracking Form that prejudiced the jury by listing a 12-year-old female victim that Doe was never convicted of. Further. Doe had never met with Officer David Lively of the Knox County Sherriff's Office nor did he sign the form, instead the form's signature line states, upon information and belief, some form of identification number.
> 98. Upon Information and Belief, and in furtherance of the conspiracy to violate Doe's civil rights, Judge Duggan, as the thirteenth juror, unlawfully conducted his own voir dire in which he automatically recused jurists that had a possible issue with the Tennessee SOR.
> 99. In another attempt to unlawfully limit access to the courts in violation of both state and federal law, Judge Dugan would not allow Doe's sister to stay in the court room during his trial.
> 100. On November 22, 2022, Judge Duggan also revoked Doe's non-existent bond.
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> 138. . . . In this case, as the foregoing averments make demonstrably clear, every named-individual Defendant, as well as their State-overseers, conspirators and unindicted co-conspirators, such as, Judge David Duggan, acted in concert to initially violate Doe's civil rights and thereafter bury Doc with their salacious and ridiculous secondary boundary line charges.
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> 146. Further, this cannot be seriously questioned as the overseers of said officers and municipal agents have without question ratified the illegal conduct, including but not limited to the following actions of said overseers, especially co-conspirator, Judge David R. Duggan. Upon information and

> belief, fudge Duggan, working in concert with the Defendants named herein, among other violations, allowed falsified evidence to be introduced to the jury at Doe's trial in Blount County. which unlawfully prejudiced the jury and violated Doe's right to a fair trial.

On or about February 12, 2023, on behalf of the Appellants in the instant case, Messrs. Berg and Egli filed a petition for Judge Duggan's recusal. As grounds for recusal, Appellants alleged that:

> In this case, the undersigned has filed a federal action naming the Judge herein as an un-indicted co-conspirator, and therefore an actual conflict of interest exists requiring this Court to recuse from any further consideration of this case. For the sake of argument, and in the alternative, a neutral observer, especially a member of the general public, apprised of the facts herein, would without a doubt, find that an appearance of bias exists and as a result the constitutional injury which would be incurred with regard to the Plaintiff in this case should this Court fail to recuse.

By order of February 22, 2023, Judge Duggan denied Appellants' petition for recusal. Judge Duggan's specific findings are discussed below. On March 13, 2023, Appellants filed a petition for recusal appeal in this Court.

II. Issue

Under Tennessee Supreme Court Rule 10B, the only order this Court may review on appeal is the trial court's order denying a motion to recuse. ***Duke v. Duke***, 398 S.W.3d 665, 668 (Tenn. Ct. App. 2012) ("Pursuant to [Tennessee Supreme Court Rule 10B], we may not review the correctness or merits of the trial court's other rulings[.]"). Accordingly, the sole issue is whether the trial court erred in denying Appellants' motion for recusal. ***Williams by & through Rezba v. HealthSouth Rehab. Hosp. N.***, No. W2015-00639-COA-T10B-CV, 2015 WL 2258172, at *5 (Tenn. Ct. App. May 8, 2015).

III. Standard of Review

Tennessee Supreme Court Rule 10B requires appellate courts to review a trial court's ruling on a motion for recusal under a *de novo* standard of review with no presumption of correctness. Tenn. Sup. Ct. R. 10B, § 2.01. The party seeking recusal bears the burden of proof, and "any alleged bias must arise from extrajudicial sources and not from events or observations during litigation of a case." ***Williams by & through Rezba***, 2015 WL 2258172, at *5 (quoting ***McKenzie v. McKenzie***, No. M2014-00010-COA-T10B-CV, 2014 WL 575908, at *3 (Tenn. Ct. App. Feb. 11, 2014)).

IV. Analysis

We begin with a review of the applicable legal principles concerning questions of recusal. These principles are succinctly stated in ***In Re: Samuel P.***, No. W2016-01592-COA-T10B-CV, 2016 WL 4547543, at *2 (Tenn. Ct. App. Aug. 31, 2016), to-wit:

> When reviewing requests for recusal alleging bias, "it is important to keep in mind the fundamental protections that the rules of recusal are intended to provide." ***In re A.J.***, No. M2014-02287-COA-R3-JV, 2015 WL 6438671, at *6 (Tenn. Ct. App. Oct. 22, 2015), *perm. app. denied* (Tenn. Feb. 18, 2016). "The law on judicial bias is intended 'to guard against the prejudgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court had reached a prejudged conclusion because of interest, partiality, or favor.'" ***Id.*** (quoting ***Bean v. Bailey***, 280 S.W.3d 798, 803 (Tenn. 2009)).
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> The terms "bias" and "prejudice" usually refer to a state of mind or attitude that works to predispose a judge for or against a party, but not every bias, partiality, or prejudice merits recusal. ***Watson***[, 448 S.W.3d at 929] (citing ***Alley v. State***, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994)). "'Even though the judge is expected to have no bias at the beginning of the trial, he must, perforce, develop a bias at some point in the trial; for the decision at the conclusion of the trial is based upon the impressions, favorable or unfavorable, developed during the trial.'" ***Id***. at 933 (quoting ***Spain v. Connolly***, 606 S.W.2d 540, 544 (Tenn. Ct. App. 1980)). 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. ***Id***. at 929. "A trial judge's opinions of the parties or witnesses that are based on what he or she has seen at trial are not improper and 'generally do[ ] not warrant recusal.'" ***Id***. at 933 (quoting ***Neuenschwander v. Neuenschwande***r, No. E2001-00306-COA-R3-CV, 2001 WL 1613880, at *11 (Tenn. Ct. App. Dec. 18, 2001)).

In Re: Samuel P., 2016 WL 4547543, at *2.

Here, the ground for recusal asserted by Appellants is rather novel and appears to rest more with perceived bias against the Appellants' attorneys than perceived bias against the actual litigants in this lawsuit. As noted above, Judge Duggan presided over Mr. Whitman's state criminal case. Subsequently, Appellants' attorneys represented Mr. Whitman in a federal lawsuit, in which Mr. Whitman alleged civil rights violations stemming, in part, from the criminal trial. Although not named as a defendant in the federal lawsuit, as set out above, Mr. Whitman averred that Judge Duggan engaged in a civil conspiracy to deny Mr. Whitman a fair criminal trial. Now, these Appellants contend that

Judge Duggan will be biased against them in the instant lawsuit, which has nothing in common with Mr. Whitman's federal lawsuit except the involvement of Messrs. Berg and Egli. As correctly noted by the trial court in its order denying recusal, "There are no parties, issues, or facts in common between the two cases[, *i.e.*, the federal lawsuit and the instant case]. The only thing in common is the attorneys for the plaintiff(s)." Appellants' argument is more tenuous by virtue of the fact that Judge Duggan is not named as a defendant in Mr. Whitman's federal lawsuit.

Despite the rather novel posture of this case, in its order denying recusal, Judge Duggan thoroughly addressed each of Mr. Whitman's allegations in the federal lawsuit. Concerning the allegation that Judge Duggan "allowed the jury [in Mr. Whitman's criminal trial] to see a falsified Tennessee Sexual Offender Violent Sexual Offender Registration/Verification/Tracking Form that prejudiced the jury by listing a 12-year-old female victim that Doe was never convicted of," Judge Duggan explained:

> I don't know anything about any such form being "falsified." No issues were brought before the Court by defense counsel, either pre-trial or during trial, about any form being falsified. I can only say this: (a) Three sex offender registry forms were entered into evidence, Exhibits 2, 7, and 8. Only one of those forms, Exhibit 2, has a reference to a 12-year-old girl, and that form bears the handwritten notations (and I don't know whose handwriting it is), "Incorrect Age" and "No Physical Victim"; and (b) A pre-trial motion was filed—not to exclude—but to *redact* Mr. Whitman's Nevada judgment and the sex offender forms. There was no objection, however, pertaining to these forms being falsified, to a form incorrectly stating the age of the victim(s), or to the forms referencing a conviction that didn't take place. Rather, the motion offered to stipulate to the fact that Mr. Whitman had a conviction in Nevada . . . . At no time was any objection raised that any sex offender registration form was falsified, that the victim's age was incorrectly stated, or that the form reported a conviction on the offense that, in fact, Mr. Whitman had never been convicted of.

Concerning Mr. Whitman's allegation that Judge Duggan "unlawfully conducted [his] own voir dire in which [he] automatically recused jurists that had a possible issue with the Tennessee [Sex Offender Registry]," Judge Duggan explained that this allegation "is simply untrue," and stated that:

> The only voir dire I conducted was pursuant to what is standard procedure for each criminal trial. At no time did I ask any potential juror how he or she felt about the Tennessee Sex Offender Registry or whether they had any issue or objection to the sex offender registry—let alone "automatically recuse" any potential juror for having any issue with or objection to the sex offender registry.

As to Mr. Whitman's allegation that Judge Duggan "would not allow Mr. Whitman's sister to stay in the court room during trial," Judge Duggan again denied the allegation as "simply untrue." He explained that Mr. Whitman's sister asked to speak with Mr. Whitman "to ask him if he wanted to proceed to trial, whether to proceed to trial was his decision, and about her concerns about his competency." Judge Duggan noted that Mr. Whitman's "counsel said that he had met extensively with Mr. Whitman in jail over the past month, that he had spent hundreds of hours preparing for the case, that he had spoken to Mr. Whitman at length about whether he wanted to proceed to trial, and that Mr. Whitman had been unwavering in his desire to take the case to trial." Having been assured of Mr. Whitman's desire to have a trial, Judge Duggan explained, in open court, that Mr. Whitman's sister had opportunity to visit her brother during visiting hours at the jail, and Judge Duggan would not delay the case for her to meet with her brother immediately before the jury was seated. After being allowed an opportunity to rebut Judge Duggan, Mr. Whitman's sister left the courtroom, and the trial proceeded.

All of Mr. Whitman's allegations against Judge Duggan and Judge Duggan's responses to those allegations bear no relationship to the parties involved in the instant lawsuit. The federal lawsuit involves Mr. Whitman, not Mani Associates, Budget Inn/Royal Extended Stay, or Mani, LLC d/b/a Days Inn. The mere fact that Messrs. Berg and Egli represent Mr. Whitman in his federal lawsuit and now represent the Appellants in this case is the only tie that binds. However, Appellant's motion for recusal contains no indication that Judge Duggan has exhibited any prejudice or bias against Messrs. Berg and Egli because they represent Mr. Whitman in his federal lawsuit. Furthermore, there is no evidence that Judge Duggan will be biased or prejudiced against these Appellants. As such, we agree with Judge Duggan's synopsis as set out in his order:

> There is nothing in the new federal case that would give rise to any conflict of interest with me seeing this present case through to conclusion, or to anything inappropriate with respect to me continuing to preside over this case. I do not see any impropriety or appearance of impropriety, or anything that would call into question my independence, impartiality, integrity, or competence in continuing to preside over this present case.

V. Conclusion

For the foregoing reasons, we affirm the trial court's order denying the motion for recusal. The case is remanded to the trial court for such further proceedings as are necessary and consistent with this opinion. Costs of the appeal are assessed to the Appellants, Mani Associates, Budget Inn/Royal Extended Stay, and Mani, LLC d/b/a Days Inn, for all of which execution may issue if necessary.

S/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE