

SUPREME COURT OF WISCONSIN

CASE No. : 2007AP203

COMPLETE TITLE : Michael S. Polsky as receiver for Communications
Products
Corporation,
Plaintiff-Respondent-Cross-Appellant-
Petitioner,
v.
Daniel E. Virnich and Jack M. Moores,
Defendants-Appellants-Cross-
Respondents.

ORDER ON MOTION FOR RECONSIDERATION OF THE
COURT'S MARCH 2, 2011 DECISION

ORDER FILED: July 12, 2011
SUBMITTED ON BRIEFS:
ORAL ARGUMENT:

SOURCE OF APPEAL:
COURT:
COUNTY:
JUDGE:

JUSTICES:
CONCURRED:
DISSENTED: ABRAHAMSON, C. J. dissents (Opinion filed).
BRADLEY, J. AND CROOKS, J. join dissent.
NOT PARTICIPATING: ZIEGLER, J. did not participate.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2007AP203
(L.C. No. 2004CV285)

STATE OF WISCONSIN : IN SUPREME COURT

**Michael S. Polsky as receiver for
Communications Products Corporation,**

**Plaintiff-Respondent-Cross-Appellant-
Petitioner,**

v.

Daniel E. Virnich and Jack M. Moores,

**Defendants-Appellants-Cross-
Respondents.**

FILED

JUL 12, 2011

A. John Voelker
Acting Clerk of Supreme
Court

¶1 PER CURIAM. On September 22, 2010, the court granted Michael S. Polsky's petition for review. Justice Roggensack participated in the order. On February 3, 2011, oral argument was held. Justice Roggensack participated in the oral argument. On March 2, 2011, the court issued its decision that affirmed the court of appeals based on a 3:3 decision of the participating justices.¹ Polsky v. Virnich, 2011 WI 13, 332 Wis. 2d 1, __ N.W.2d __. Justice Roggensack participated in the decision.

¹ Justice Annette Kingsland Ziegler withdrew from participation after the petition for review was granted, but before oral argument was heard.

¶2 On March 14, 2011, Polsky² moved the court "for an order reconsidering the Court's March 2, 2011 per curiam opinion, or alternatively, to vacate the decision as void." As grounds for the motion, Polsky asserted that because Justice Roggensack had not participated in this case when it was certified to the court in 2008 and when the court's July 7, 2009 decision remanded the matter to the court of appeals, Polsky v. Virnich, 2009 WI 66, 318 Wis. 2d 599, 769 N.W.2d 52, she should be disqualified by the court from participation in the per curiam decision issued March 2, 2011. The per curiam decision resulted in a 3:3 affirmance of the court of appeals. Polsky asks that the court "grant his motion to reconsider the March 2, 2011 per curiam decision or otherwise declare that decision void, and a new decision be issued by qualifying justices."

¶3 In response to Polsky's motion, Daniel E. Virnich and Jack M. Moores (hereinafter Virnich), contend that Polsky's motion was not timely because Virnich waited almost six months after the petition for review had been granted, with Justice Roggensack participating; five and one-half weeks after oral argument, with Justice Roggensack participating; and until after the court's decision that affirmed the court of appeals based on a 3:3 decision of the justices then participating. Virnich also points out that Polsky has identified no basis under Wis. Stat. § 757.19 requiring Justice Roggensack to conclude that she must

² An amicus curiae, Sheet Metal Workers International Local Union No. 565, supports Polsky's motion.

withdraw and that decisions about whether to participate in any given case are for the individual justice to decide, not the court, citing State v. American TV & Appliance of Madison, Inc., 151 Wis. 2d 175, 443 N.W.2d 662 (1989).

¶4 We have concluded that this court does not have the power to remove a justice from participating in an individual proceeding, on a case-by-case basis. State v. Henley, 2011 WI 67, ¶25, ___ Wis. 2d ___, ___ N.W.2d ___. We explained that our decision in regard to the scope of the court's power when asked to remove a justice on a case-by-case basis is consistent with the court's Internal Operation Procedures, IOP II.L.1., and that it is also "mirrors the way in which the United States Supreme Court addresses motions to disqualify a Supreme Court Justice." Henley, ___ Wis. 2d ___, ¶¶26-27. We also concluded that due process is provided by the decisions of the individual justices who decide to participate in the cases presented to the court. Id., ¶¶13, 31. Accordingly, for the reasons stated more fully in Henley, we deny Polsky's motion to disqualify Justice Roggensack.

¶5 ANNETTE KINGSLAND ZIEGLER, J., did not participate.

¶6 SHIRLEY S. ABRAHAMSON, C.J. (*dissenting*). I dissent for the reasons set forth in the dissents in State v. Allen, 2010 WI 10, 322 Wis. 2d 372, 778 N.W.2d 863; in State v. Henley, 2011 WI 67, ___ Wis. 2d ___, ___ N.W.2d ___ (recusal motion); and in State v. Henley, 2011 WI 68, ___ Wis. 2d ___, ___ N.W.2d ___ (amicus reconsideration). I conclude that as a matter of federal and state constitutional due process the court must determine whether a party is denied due process when a justice refuses to recuse upon motion of a party.

¶7 I am authorized to state that Justices ANN WALSH BRADLEY and N. PATRICK CROOKS join this dissent.

