Supreme Court of Florida

CORRECTED OPINION

Nos. 64,237
64,251
64,252

FLORIDA PATIENT'S COMPENSATION FUND, et al., Appellants,

vs.

SUSAN ANN VON STETINA, et al., Appellees.

[August 29, 1985]

DENIAL OF SUGGESTION OF DISQUALIFICATION

EHRLICH, J.

Pursuant to procedures set forth in In re Estate of Carlton, 378 So.2d 1212 (Fla. 1979), I have considered the legal sufficiency of this suggestion of disqualification and pondered deeply the propriety of retroactively withdrawing from this case under the circumstances set forth. I decline to do so.

I am not, as a matter of law, required to disqualify myself. From the earliest time this cause was before the Court, I made known my involvement with Mathews v. Pohlman, No. 64,589 (Fla. May 2, 1985). I recused myself on that case and, because Mathews filed an amicus brief on the issue of attorneys' fees in Von Stetina, I recused myself on this case as well. The important distinction between my recusal here and the judge's recusal in Kells v. Davidson, 102 Fla. 684, 136 So. 450 (1931), on which the suggestion of disqualification relies, is subtle but conclusive.

In Kells, the judge was recused because of consanguinity with one of the defendants. After the death of that defendant, the judge "requalified" to hear the case. The Court held that a

change of circumstances could not remove an acknowledged bar to consideration of a case. The Court expressly recognized that the policy underlying that rule was to avoid even the appearance of judicial impropriety and to prevent bad-faith manipulation of cases in order to obtain a "friendly" judge.

Here, I recused for cause on only one issue of Von Stetina. That issue was legally and procedurally severable from the remaining issues. As a matter of judicial economy, I withdrew from consideration of any issue in that case. There was no legal bar to my considering issues relating to liability and damages, but my presence during argument and conference on those issues and my recusal during argument and conference on the attorneys' fees would have been awkward and inefficient. As I noted in my explanation appended to the Court's opinion in Von Stetina, there came a time when judicial economy would no longer be served by my withdrawal from consideration of issues unrelated to attorneys' fees in this case. Rather, as a matter of judicial economy, it was necessary that I consider these issues. No legal bar had been removed. There was no change in circumstances which allowed me to "requalify." I have never considered any aspect of the issue from which I was legally and ethically required to recuse myself.

Furthermore, the policy underlying the Kells decision is satisfied. There can be no appearance of impropriety because the issues on which I participated are irrelevant to the issue on which I was recused. Neither does my participation invite bad-faith manipulation of a judicial panel. Rather, allowing a severable issue to be considered and decided separately forecloses the possibility that cases will be manipulated to include issues which would require recusal of a judge perceived as hostile to a party or a result.

In considering the propriety of withdrawing, I analyzed those policies just discussed. I firmly believe it is important not only that justice be done but that justice appear to be done. For that reason, I feel compelled to address a concern expressed

in the suggestion of disqualification which is more personal than the legal issue. Appellee's counsel noted that I stood for merit retention while this case was pending before the Court. Counsel expresses concern that because of my recusal I was no longer "protectively wrapped" by my judicial role in this case and thus could be "exposed to contamination," that is, I may have been, or appeared to have been, the object of ex parte communication about this case while standing for merit retention. This fear bespeaks an imperfect understanding of my judicial oath and the Code of Judicial Conduct, by which I am bound. When I recuse myself in this or any other case, I do not step down from the bench. I remain a Justice of the Supreme Court of Florida, bound by my oath and bound by the Code of Judicial Conduct in regards to any case before this Court, whether or not I participate in its consideration. I am bound by Canon 3 A(4)&(6) which proscribe ex parte communication or public comment concerning a pending or impending proceeding. Were I, in the course of "stumping the state for reelection" to solicit or allow the kind of comment to which counsel alludes, I would be guilty of a grievous breach of judicial ethics.

Counsel states that whether or not such comment occurred, the appearance of impropriety is present. I cannot agree. I have faithfully followed my oath and the Code of Judicial Conduct. I have done only that which I was allowed by law and required by political exigency to do. If standing for merit retention raises the assumption in the eyes of the Bar and the public at large that judicial misconduct has occurred, no judge may ever ethically seek to retain his office.

I fairly and fully considered only those issues which were unrelated to the single issue requiring my recusal. I reject the suggestion that I am legally or ethically required to disqualify myself.