

IN THE SUPREME COURT OF FLORIDA

FILED
J. A. WILZE
NOV 27 1989
THIRD DISTRICT COURT
Deputy Clerk

MARY ANN MacKENZIE,
JUDGE, ETC.,

Petitioner,

v.

SUPER KIDS BARGAIN STORE, INC.,

Respondent.

CASE NO. 74,798
THIRD DISTRICT COURT
OF APPEAL NO. 88-2903

RESPONDENT'S BRIEF

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The attorney for SUPER KIDS, INC., DANIEL MONES, while the motion was being heard by the trial court judge, The Honorable MARY ANN MACKENZIE, announced that he would withdraw as counsel and that LEO GREENFIELD would be substituted as counsel. The trial court judge thereupon denied the Motion for Disqualification.

SUMMARY OF ARGUMENT

A TRIAL JUDGE SHOULD BE REQUIRED TO DISQUALIFY HERSELF WHEN A MOTION HAS BEEN FILED REQUESTING THIS RELIEF BASED UPON A CAMPAIGN CONTRIBUTION MADE BY OPPOSING COUNSEL.

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STATEMENT OF THE CASE AND OF THE FACTS

There has been certified by the District Court of Appeals, Third District, to the Florida Supreme Court the following question:

"Is a trial judge required to disqualify herself on motion where counsel for litigant has given a \$500.00 campaign contribution to the political campaign of the trial judge's spouse?"

Naturally, the much broader question that, of necessity, comes before the Court is whether a contribution by a lawyer to a judicial campaign fund can provide the basis for grounds for recusal by the trial court judge in a trial in which that contributing lawyer litigates before that judge.

The question now before this Honorable Court for consideration is obviously a matter of great significance. Its determination will govern the future activities of attorneys in judicial campaigns.

In the matter before this Honorable Court for consideration, Super Kids, Inc. v. Super Kids Bargain Stores, Inc., Fla. App. 3rd Dist., Case No. 88-2903, 14 FLW 2223, the appropriate motions for recusal had been filed by SUPER KIDS BARGAIN STORE, INC. in an action brought by SUPER KIDS, INC. against the Movant. The basis of the motion was the fact that DANIEL MONES, the attorney for SUPER KIDS, INC., had contributed to the campaign fund of the trial judge's husband when that judge ran for election and the Movant feared that it could not receive a fair trial before that trial court judge.

The attorney for SUPER KIDS, IMC., DANIEL MONES, while the motion was being heard by the trial court judge, The Honorable MARY ANN MacKENZIE, announced that he would withdraw as counsel and that LEO GREENFIELD would be substituted as counsel. The trial court judge thereupon denied the Motion for Disqualification.

ARGUMENT

Before engaging in a dissertation of the plethora of prior decisions that had been rendered with respect to the question now before this Honorable Court for consideration, the Respondent wishes to make the following points:

1. If one were to review a trial through the mind of a lay person where that person is aware that opposing counsel had contributed to the presiding judge's campaign but that lay person's counsel hadn't, it can readily be conceived that the lay person would have a substantial fear or concern that by virtue of same his case would not be given the same consideration as his opponent's.

2. While it is stated in Petitioner's Briefs that how many times in the practice of law has an attorney or his firm contributed to a judicial campaign, not because that attorney felt that the candidate to whom he was contributing was the most qualified, but instead, the contributing attorney and/or his firm had concern as to the ramifications of not contributing to that particular candidate's campaign.

3. The actual motivation for contributing to a judicial campaign was apparent in the Super Rids matter now before this Honorable Court for consideration since the attorney in question, DANIEL MONES, admitted that he contributed not only to the campaign of the trial court judge's spouse but to the campaign of the incumbent who was running for re-election. (TR6, App.14)

4. An attorney has a duty to actively seek to elect the most qualified judicial candidate.

In Livingston v. State, 441 So.2d 1083, (Fla. 1983), the Supreme Court stated, at page 1086 in quoting from Canon 3-C (1) of the Florida Bar Code of Judicial Conduct:

"Whenever a party files an affidavit stating that he fears he will not receive a fair trial on account of the prejudice of the judge against the applicant or in favor of the adverse party, the judge shall proceed no further but another judge shall be so designated."

In the Super Kids case, 14 FLW 2223, the District Court of Appeal, Third District, relies on such case and states, at 14 FLW, page 2224:

"The standards for disqualification 'were established to insure public confidence in the integrity of the judicial system.' "

and further stated at page 2224, in quoting from the Livingston case, at 1085-1086:

"Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned."

....

"The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would share the confidence of litigants in a fair and impartial adjudication of the issues raised."

(underscoring contained in opinion of District Court of Appeal, Third District, Case No. **88-2903.**)

The nub of the question before this Honorable Court is set forth in the Livingston case, *ibid*, on page **1086** wherein the Court stated:

"It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling."

Thus, the overall question narrows down to whether the contribution to a judicial campaign by an attorney can create a feeling of prejudice in the mind of the party moving to recuse that judge and whether this Honorable Court should consider such a feeling as one that might cause a person to reasonably question a judge's impartiality. This is not to state that the trial court judge would not be fair and impartial but whether such a contribution could create a legitimate fear that the trial court judge would not be fair and impartial.

In the Super Kids case, *ibid*, unlike the Breakstone case, Fla. App. 3rd Dist., **1989**, Case No. **88-2392**, which is concurrently

before the Court for consideration, there are two additional distinguishing factors. First, the attorney who made the contribution stated he was withdrawing from the case and that he had arranged for LEO GREENFIELD to be substituted as counsel in his place and stead. The trial court, although the first matter before it for consideration was the Motion for Recusal, then considered the withdrawal by DANIEL MONES and stated that there was no reason to recuse herself. The fact that the attorney for the Petitioner preferred to withdraw as counsel and not represent his client rather than seeing the Trial Court Judge recuse herself and the case being transferred to another judge, provides even more foundation for the fears of the Respondent that a fair trial cannot be obtained before that judge.

Secondly, as was observed by the District Court of Appeal, Third District, in the Super Kids case:

"A judge faced with a Motion for Recusal should first resolve that motion before making additional rulings in a case....(A) Recusal motion must be heard first."

....

"Super Kids motion for disqualification should have been the first matter to be considered, and as it was legally sufficient, the motion should have been granted."

As the District Court of Appeal, Third District, pointed out in its Opinion in Super Kids, on page 2226, by following the reverse procedure and granting the Motion for Withdrawal and Substitution of

Counsel prior to ruling on the recusal motion "the approach taken here creates, rather than dissipates a perception that the trial judge attempted to retain the case as an accommodation to withdrawing counsel." (underscoring supplied)

In Roudner v. MacKenzie, 536 So.2d 299 (Fla.App.3 Dist., 1988), the trial court judge, Mary Ann MacKenzie, refused to recuse herself where the counsel who appeared before her was the daughter of the incumbent Circuit Court Judge of another division in that circuit. Judge MacKenzie's spouse had been the opponent in the election of that incumbent judge. The District Court of Appeal held that these facts are sufficient to have warranted the respondent judge's entering an Order of Recusal where the attorney was the daughter of her spouse's opponent.

To indicate the emphasis that the Florida courts have placed upon a Trial Court Judge disqualifying himself rather than there being created any inference of prejudice and the inability of the petitioner to obtain a fair trial is clearly set forth in Mangina v. Cornelius, 462 So.2d 602, (Fla.App.5 Dist., 1985), wherein the court held, at page 602:

"'the judge shall not pass on the truth of the facts alleged (and) shall enter an order of disqualification.'"

where the sworn motion and supporting affidavits are legally sufficient.

In Caleffe v. Vitale, 488 So.2d 627 (Fla.App.4 Dist., 1986), the court held, at page 629:

"....that the sufficiency of the allegations depends upon the reasonable subjective belief of the petitioner and not on whether he or she has successfully established the actual existence of prejudice. The latter standard would render the motion for disqualification virtually futile and result in the sort of adversary proceedings between the judge and the petitioner that create bias or the appearance thereof even where none had existed before."

(underscoring supplied)

The Court, in Caleffe, has pointed out how circumspect the trial court judge must be in this regard. See also Mangina v. Cornelius, supra.

While it is true that the court ruled in Raybon v. Burnett, 135 So.2d 228 (Fla.2d DCA 1961) in making reference to the bar, it stated at page 230:

"It should campaign actively in support of its position for or against judicial candidates. The public should be encouraged to look to the bar for guidance in choosing among candidates."

This does not mean, however, that by virtue of a monetary contribution by a member of the bar to a judicial campaign, that same cannot cause a legitimate concern on the part of a litigant as to whether or not he can receive a fair trial as it is the question of the feeling which resides in the mind of the party that becomes the basis for the grounds for recusal.

It also should be noted that when DANIEL MONES contributed to both judicial campaigns, (TR 6, Resp. App.14) he obviously was not seeking to aid in the election of the candidate he deemed most qualified.

Petitioner cites Marexcelso Compania Naviera v. Fla. Nat. Bk., 533 So.2d 805 (Fla.App.4 Dist., 1988) in support of Petitioner's position that activity in a judicial campaign does not constitute grounds for recusal. In the Marexcelso case, supra, the grounds for the motion were that the court solicited an endorsement from one attorney but not from the other attorney. The motion was an ore tenus motion at the beginning of the trial. Marexcelso did not petition the Appellate Court for a Writ of Prohibition or otherwise seek appellate review of the denial of its Motion for Disqualification and at the end of the trial, after judgment had been entered, Marexcelso filed a Motion for Rehearing in which it failed to renew its Motion for Disqualification. Subsequently, the court, sua sponte, entered an Order of Recusal and granted a new trial. The case is clearly distinguishable from the issue presented to this Honorable Court and involved no monetary campaign contributions although the court did state, at page 807:

"We conclude that, standing alone, solicitation of an endorsement and campaign contribution from the lawyer for one of the parties in a lawsuit by the campaign staff of the trial judge does not create the existence of a reasonable basis for the other party to doubt the trial judge's impartiality."

Although a campaign contribution was solicited from Marexcelso's counsel, the question of campaign contributions was not before the court.

In order to consider the question of campaign contributions by the attorneys for one of the litigants and its effect in the minds of a litigant, great insight is provided in reviewing an analagous decision. As fair as a Judge attempts to be, they are only mere mortals coming from different backgrounds and whose reasoning is somewhat affected by their experiences in life.

In McDermott v. Grossman, 429 So.2d 93 (Fla.App.3 Dist., 1983), there is evolved a study in human nature. In McDermott, one lawyer had voiced his opposition to the elevation of a Judge to a higher position, and the Appellate Court stated, at page 393:

"....it is assumed that judge will not thereafter harbor prejudice against the lawyer affecting judge's ability to be impartial in cases in which the lawyer is involved."

In the McDermott case, the Judge learned that the attorney had opposed the Judge's selection to other judicial positions and delivered a "tirade" about his non-support of her. In the absence of this "tirade" the Appellate Court would have still labored under the assumption that a Judge would not harbor any ill feelings towards a lawyer who opposed that Judge's selection to another judicial position. But for the fact that the "tirade" was launched verbally rather than some silent retaliatory action by the Judge, no recusal ever would have taken place.

The Petitioner relies heavily on Ervin v. Collins, 85 So.2d 833 (Fla. 1956), as setting forth the standards for recusal and as authority for the position that even where the Judges are close, intimate and personal friends of the attorneys, that same does not constitute grounds for disqualification. The case, in and of itself, cannot stand as authority for this position. The attorney who had filed the suggestions for recusal conceded, in oral argument, page 833:

"...that the suggestions filed on behalf of Streets are not legally sufficient to constitute a basis for the disqualification of the Justices sought to be disqualified, but on the contrary are addressed to the conscience of the respective Justices against whom the suggestions are directed."

With the very movant so conceding, it is hard to see how the court could hold otherwise.

The strongest case cited by the Petitioner is Raybon v. Burnette, 135 So.2d 228 (D.C.A. 2d Dist., 1961). While the Raybon decision is in direct conflict with the decision of the District Court of Appeal, Third District, in the instant case, some of the language contained therein is inconsistent with the very doctrine that it applied. The court stated, at page 229:

"[1] Prejudice of a judge toward a lawyer would not necessarily extend to his client but it may be of such a degree as to adversely affect his client, and if the motion and affidavits taken as a whole are sufficient to warrant fear on the part of the movant that he will not receive a fair trial at the hands of the judge, then they are sufficient. The

courts are committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge and it is the duty of the courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice. It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can disclaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies-purity and justice. The administration of justice is the most sacred right known to the sound order of a democracy. *State ex rel Davis v. Parks, 1939, 141 Fla.516, 194 So. 613.*"

In Raybon the court ruled that the grounds raised in the motion and affidavit were insufficient to justify recusal. The lawyers for one of the litigants had supported the losing judicial candidate and were now appearing before the winning judicial candidate. The Court held that the fact that certain lawyers campaigned actively for the opposing judicial candidate was not grounds for a recusal nor was it grounds for recusal that opposing counsel's law firm had contributed money to the judge's campaign.

Obviously, in the question submitted to this Honorable Court, the holding in Raybon, supra, will either be affirmed or overturned. Under the aegis of the bar supporting the most qualified candidate, one could easily understand a campaign contribution being made to the campaign of one of two candidates. In the case before this Honorable Court, DANIEL MONES admittedly contributed to both campaigns, i.e., that of the incumbent and that of Judge MacKenzie's spouse who was running against the incumbent. Obviously, the intentions were not to support the most qualified candidate and it is more indicative of the rationale motivating such course of conduct. This Court cannot blithely ignore the effect of campaign contributions any more than it can labor under the assumption that a party opposing the elevation of a judge, as in the McDermott case, *ibid*, will receive fair and impartial consideration when appearing before the Court.

In the Amicus Curiae Brief of the Dade County Bar Association filed with the District Court of Appeal, Third District, in this cause, the Dade County Bar readily conceded that "The Dade County Bar Association is not blind to the perception of many members of the public that attorneys who have contributed financially or otherwise, to a judge's campaign may be treated differently than parties whose attorneys have not done so." (Page 3 of Brief of Dade County Bar Association, App.18) If this does not establish the fact that there is a fear that is not groundless substantiating a Motion for Recusal,

what further is needed? The Dade County Bar further stated that "Until trial judges are chosen by a merit selection/retention process, the 'perception' that undue influence will be wielded by attorneys who have assisted in a judge's campaign is an unfortunate, but necessary part of making the system function effectively." (Page 3 of Brief of Dade County Bar Association, App.18).

The Florida Bar likewise conceded in its brief, at page 5, (App.19):

"In Super Kids Bargain Stores, disqualification of the trial judge might be additionally considered in the context of the attorney-contributor's remarkable efforts at having the trial judge accept a substitute lawyer to litigate his case notwithstanding a possibly provocative request for her disqualification by opposing counsel (Super Kids Bargain Stores ..."

The Florida Bar further stated:

"In both cases" (referring to the Breakstone case as well) "these issues may arguably form a basis for judicial disqualification independent of any campaign contribution. Although this court has noted that 'one sufficient ground is all that is necessary' in a motion to disqualify [McDermott v. Grossman, 429 So.2d 393 (Fla. 3d DCA 1983)] ..."

In the Amicus Curiae Brief of the Dade County Bar Association filed with the District Court of Appeal, Third District, there is cited the case of Parsons v. Motor Homes of America, Inc., 465 So.2d 1285 Fla. 1 Dist. 1985) as authority for the proposition that even

wne a judge refuses to recuse himse f despite the fact that the lawyer appearing in his courtroom had announced his candidacy for the circuit court seat held by the trial judge, is legally insufficient grounds. The court, although it stated at page 1290:

"We find no reversible error in the trial court's refusal to recuse himself - ..."

"We reach this conclusion although we suggest that under the circumstances the preferred course may have been for the Judge to have recused himself so as to totally dispel the notion of impropriety."

Here again, the emphasis is placed upon the notion of impropriety.

If there can be a notion of impropriety, who is to say that same cannot cultivate the fear that a fair trial cannot be obtained.

While much mention has been made of the \$1,000.00 campaign limitation as a protective measure, it should also be noted that a large law firm with many partners can easily overcome this problem. This cannot help but create additional concern on the part of a litigant where he is opposed by a large law firm.

CONCLUSION

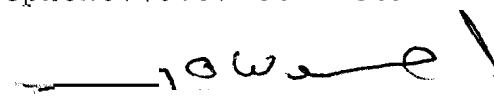
The question certified to the Florida Supreme Court should be answered in the affirmative when the issue of a campaign contribution has been raised as grounds for recusal.

It should be noted that it is not necessarily the case that in each instance counsel will file a motion for recusal if opposing counsel has contributed to that judge's campaign, but they should have the right to do so.

That even if the Court were to answer this question in the negative, the facts in the Super Kids case that distinguish itself from Breakstone justify the entry of an Order of Recusal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of
Respondent's Brief was mailed to each of the following parties
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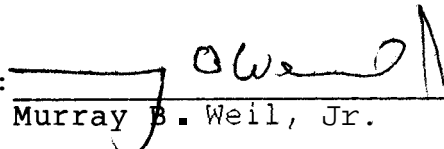
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