

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIMBERLY TAYLOR, AN
INDIVIDUAL,
Appellant,
vs.

KEITH BRILL, M.D., FACOG, FACS,
AN INDIVIDUAL; AND WOMEN'S
HEALTH ASSOCIATES OF
SOUTHERN NEVADA-MARTIN, PLLC,
A NEVADA PROFESSIONAL LIMITED
LIABILITY COMPANY,
Respondents.

No. 83847

FILED

NOV 04 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

RESPONSE TO MOTION TO DISQUALIFY

This matter is currently before the court on appeal from a judgment on a jury verdict in a medical malpractice action in the Eighth Judicial District Court. I previously filed, on October 18, 2022, a notice of voluntary disclosure alerting the parties to the fact that, unbeknownst to me, the case was assigned to a district court docket that I inherited during my last three months as a district court judge. Appellant has now filed a motion to disqualify me and I offer this response to further clarify my disclosure in regard to appellant's stated concerns.

The matter was filed in district court on April 25, 2018, and assigned to Judge Tierra Jones in Department 10. On September 8, 2020, Judge Jones' civil docket was reassigned to me. A little more than three months later I left the district court, effective December 31, 2020. Because of the impact of the ongoing COVID-19 pandemic and due in part, I believe, to the understanding within the bar that the civil docket I inherited was going to be reassigned again effective January 1, 2021, there was not,

22-34727

during this period, much activity in my civil caseload, including with this case. In fact, I had no knowledge at all of the existence of this case. The case never appeared on my calendar, there was no motion practice that occurred and, as such, I did not preside over any hearings either in person, remotely, or in chambers and I never reviewed anything involved with or related to the case. Thereafter, the matter was reassigned to Judge Monica Trujillo and ultimately proceeded to a jury trial in her department in October 2021.

Appellant's request for disqualification is focused on Nevada Code of Judicial Conduct (NCJC) Canon 2.11(A)(6)(d), which states in pertinent part:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

...

(6) The judge:

...

(d) previously presided as a judge over the matter in another court.

It is appellant's position that this Canon provides for a per se rule of disqualification.

While I very much appreciate appellant's concerns, NCJC Canon 2.11(A)(6)(d) must be read logically with an understanding of what occurs in courts. By its very wording, Canon 2.11(A)(6)(d) includes a discretionary decision-making aspect that a judge must engage in when deciding whether to disqualify himself or herself; specifically, do the circumstances involve something where the judge's impartiality might *reasonably* be questioned? One cannot *reasonably* question a judge's


impartiality if the judge can attest to: (1) the lack of any biases or prejudices related to the case – as I have done here in my voluntary disclosure; (2) never having presiding over anything (hearings, motions, chambers matters or any other matters) related to the case – as I have done here; (3) having never reviewed anything related to the case prior to its appeal – as I have done here; and (4) having no knowledge of the case at all prior to the instant appeal – as I have done here.

In addition, the Canon refers to a situation where a judge previously *presided over the matter*. This specific language recognizes the important distinction between cases that are simply assigned to a particular docket and the *action* of a judge in presiding over a matter. Presiding denotes judicial action and the actual exercise of control over something, that is, directing, controlling, regulating, or deciding issues in proceedings. See *Preside*, Black’s Law Dictionary (11th ed. 2019) (defining the word *preside* as “[t]o be in charge of a formal event, . . . to occupy the place of authority, esp. as a judge *during* a hearing or trial” or “[t]o exercise management or control”).

When a case is simply one of the hundreds or more cases assigned to a particular docket, especially for a short period of time, and a judge has no knowledge of the existence of the case; is never asked to review the case; and is never asked to exercise any authority, control or decision making in the case, it cannot be said that the judge has presided or otherwise engaged in any actual management or control over the matter. In short, the mere assignment of a case to a particular docket cannot be read so literally as to assume that a judge therefore engaged in conduct constituting presiding over the matter. Absent any action by a judge to actively preside over a matter at some previous time, it would again seem

that one could not *reasonably* question the judge's impartiality when the judge is asked at later time to now become involved in reviewing a matter about which he or she has no previous knowledge or involvement. *See also, In re Aubuchon*, 309 P.3d 886, 890 (Ariz. 2013) (providing that "a judge is not biased or prejudiced merely because the judge made rulings in the same or related proceedings"); *In re L.M.*, 276 P.3d 1088, 1108 (Okla. 2012) (explaining that a judge's impartiality could not be reasonably questioned in an action to terminate a father's parental rights, based partially on the father's criminal conduct, when the judge presided over the father's criminal actions, including sentencing the father pursuant to a negotiated plea agreement).

I am conscious of my duty to hear and decide cases presented before this court. *See PETA v. Bobby Berosini, Ltd.* 111 Nev. 431, 436, 894 P.2d 337, 340 (1995) (recognizing the continuing general duty of a judge to preside), *overruled on other grounds by Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 112 P.3d 1062 (2005). As I stated in my disclosure, I have no bias or prejudices as to any of the parties or issues in the litigation and do not believe that my impartiality could *reasonably* be questioned based on the actual circumstances at issue in this case. As such, I do not believe there is a basis for my disqualification, or any need for me to recuse myself, from involvement in the case.


_____, J.
Herndon

cc: Breeden & Associates, PLLC
McBride Hall