IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH BRILL, M.D. and WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC,

Appellants,

v.

KIMBERLY TAYLOR,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT CASE NO.
84492 & 84881

On Appeal from the Eighth Judicial District Court
Clark County, Nevada, Department III, Hon. Monica Trujillo, Presiding

MOTION TO DISQUALIFY JUSTICE DOUGLAS HERNDON

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MOTION TO DISQUALIFY JUSTICE DOUGLAS HERNDON

Preliminarily, the Supreme Court should be notified that these consolidated appeals, i.e. *Brill, M.D. v. Taylor* Case Nos. 84492 & 84881 (which concern post-judgment decisions on costs and fees) are related to *Taylor v. Brill, M.D.* Case No. 83847 (appeal of the verdict). In the related appeal, on or about October 18, 2022 Justice Herndon voluntarily disclosed a fact that would appear to require him to disqualify himself, as explained below. This disclosure was not filed in these related consolidated appeals, *Brill, M.D. v. Taylor* Case Nos. 84492 & 84881, and it could not be ascertained whether these appeals were also assigned to the full court or a panel including Justice Herndon. In an abundance of caution and out of a desire to promptly raise the issue in all appeals concerning this case, Taylor now files this duplicate Motion to Disqualify in these consolidated appeals which except for this paragraph is identical to the Motion filed in the related but unconsolidated appeal, *Taylor v. Brill, M.D.* Case No. 83847.

Appellant Kimberly Taylor hereby moves to disqualify Justice Douglas Herndon from participating in the decision of this matter pursuant to the Nevada Code of Judicial Conduct § 2.11(6)(d), which is part of the Nevada Supreme Court Rules. The rule addressing the unique situation presented in this appeal contains a per se disqualification of Justice Herndon.

As set forth in various briefs before the Court, this matter is a medical

malpractice action originating from the Eighth Judicial District Court which was appealed following a defense trial verdict. The appellate matter is presently fully briefed and pending a decision from the Supreme Court.

On October 18, 2022 the Court issued a "Notice of Voluntary Disclosure" wherein Justice Douglas Herndon noted that although he had not been the presiding judge when this matter when to trial, he had previously served as District Court Judge in the Eighth Judicial District and this matter had been assigned to him as presiding judge in that court from September 2020 through December 31, 2020. At that time, the matter was transferred to another district court judge and Justice Herndon was made a member of the Supreme Court, taking office in January of 2021. Although it does not affect the outcome of this motion, Taylor's current counsel wishes to note that he did not substitute in as counsel until January 12, 2021, which is *after* the time period the matter was assigned to Judge Herndon. Therefore, Taylor's current counsel was unaware of this issue until Judge Herndon made this voluntary disclosure that he was previously the presiding District Court judge assigned to Taylor's case.

Disqualification of a judge in this circumstance is governed by the Nevada Code of Judicial Conduct § 2.11(6)(d), which is part of the Nevada Supreme Court Rules. This Rule states the following:

> *(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.

A few points are to be made about this rule. First, the rule uses the mandatory "shall" language which denotes a lack of discretion. NRS § 0.025(1)(d) ("'[s]hall' imposes a duty to act."); *Washoe Med. Ctr. v. Dist. Ct.*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006) ("'shall' is mandatory and does not denote judicial discretion."). Second, Comment 2 to this section states that the judge's duty to disqualify "applies regardless of whether a motion to disqualify is filed." Therefore, disqualification of Justice Herndon is mandated here regardless of whether any party moves for it, but Taylor moves for disqualification now. Third, the rule contains no exceptions or further inquiry past determining that the concerned judge was previously the presiding judge in the matter in another court. It is a mechanical rule under which the outcome is certain. Although the Voluntary Disclosure from Justice Herndon notes that the matter never appeared on his calendar while the case was assigned to him and that he never reviewed any pleadings or other trial court documents in the case outside of the current appeal, these facts are immaterial because the Code of Judicial Conduct contains a per se rule of disqualification. The rule deems these circumstances as one under which the judge's impartiality might reasonably be questioned. Indeed, if you look at the structure of the rule, it states a

general rule that a judge should disqualify himself/herself "in any proceeding in which the judge's impartiality might reasonably be questioned" and then proceeds to give six specific subsections that have a per se rule of disqualification because they are clear circumstances under which impartiality might be reasonably questioned, either by a party or the general public. Previously serving as the presiding judge on the case is one such per se condition. One might worry that even if Justice Herndon was not the presiding judge at the time of trial that he knows the trial judge, is concerned about statistics of cases on which he presided later being overturned, or is concerned about a perception of the lower court of which he was a member being overturned. The rule simply deems this situation as one where the judge's impartiality could be reasonably questioned.

The rule does not allow for a di minimis exception nor an inquiry into whether the judge was actually familiar with the case previously. This structure to the rule was simply a decision by the rule drafters that there are a few situations that just inherently would look suspicious to parties and the public that the judiciary was not impartial. It should be remembered that the rule serves also to protect the perceptions of the public at large and not merely the parties involved in the case. The per se rule of disqualification serves to eliminate any suspicions or quibbling over how much involvement the judge may or may not have had with the case. Indeed, the predictability of the rule is sacrosanct. A Pandora's Box would be

opened if the judge involved or the non-moving party were allowed to contest disqualification. Evidentiary hearings might have to be set as what the former presiding judge—or even his/her staff—knew or did not know about the case and facts might be disputed. The dispute could then evolve into a proceeding where it was the litigant versus the judge in a fight over disqualification, which inherently leads to a perception of bias. The very purpose of the bright-line rule is to eliminate such proceedings so disqualification is quickly applied and the parties can move forward with another judicial officer. The rule in a way acknowledges that Nevada has many well-qualified judges; therefore, there is no need to seed doubt or mistrust in the impartiality of the judiciary by letting a judge preside twice over the same case. The rule specifically uses the term "preside" rather than verbiage requiring the judicial officer at issue to have actually made a ruling in the case when it was previously assigned to the judge.

In terms of case law, Taylor's counsel did some research to determine whether other states have had an opportunity to interpret this Cannon under similar circumstances. In *Ferguson v. State*, 498 S.W.3d 733 (Ark. 2016), the Arkansas Supreme Court reversed a criminal child abuse conviction after the presiding judge refused to disqualify herself despite objection that she previously served as the judge for the related, earlier juvenile dependency-neglect proceeding. However, in that case the court found that technically the two proceedings were not the same "matter."

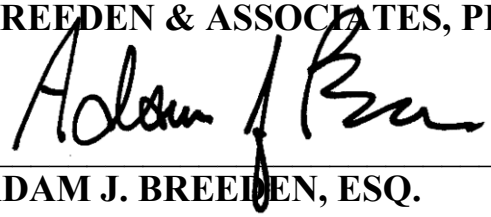
Therefore, while the general appearance of potential bias required disqualification regardless, Cannon 2.11(6)(d) was not directly invoked. In *Harvest Land Co-op, Inc. v. Hora (In re Tucker)*, 167 Ohio St. 3d 1237, 1238, 193 N.E.3d 593 (2022) the Ohio Supreme Court noted that its analogous rule "requires" disqualification when the judge at issue previously presided over the case in another court. That case did involve an appellate court judge that had previously sat in the lower district court and had involvement with the case at that level. However, in that particular case the judge had served as the chief administrative judge for the district and merely signed an order transferring the case from one judge to another but was never the "presiding" judge himself, therefore there was no disqualification as the "presiding" term was not met in the first instance. This is clearly different from the facts in this case where Justice Herndon was, in fact, the presiding judicial officer of this case for months at the district court level. In another Ohio case, *State v. Gordon (In re Teodosio)*, 153 Ohio St. 3d 1228, 105 N.E.3d 1258 (2017), the Ohio Supreme Court noted in passing that a disqualification affidavit was properly filed against one appellate judge because he previously served as trial court judge in the matter (the exact scenario presented in this appeal). However, that judge had already disqualified himself based on Ohio's analogous judicial conduct rule "requiring" disqualification under those circumstances. In the research performed, Taylor's counsel has found no caselaw nor any comment to the Cannon that says there must

be prior involvement of the judge as the presiding judge *plus* some other factor such as a ruling on a disputed proceeding or substantial knowledge of the case while the judge was the presiding judge. Reading such an additional requirement into the rule which does not actually exist would violate one of the fundamental tenents of statutory construction, i.e. "when a statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007). Instead, all analysis interpreting the rule begins and ends with the simple inquiry as to whether the judge "previously presided as a judge over the matter in another court."

Therefore, with due respect to Justice Herndon, Appellant Taylor believes he is per se disqualified from participating in this appeal and that she need not present nor argue any actual or implied bias as the rule contains a per se rule of disqualification. On this basis, Taylor moves to disqualify Justice Herndon from all further proceedings related to this appeal.

Dated this 24th day of October, 2022.

BREEDEN & ASSOCIATES, PLLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October 2022, I served a copy of the foregoing legal document entitled **RESPONDENT'S MOTION TO DISQUALIFY** via the method indicated below:

X	Pursuant to NRAP 25(c), by electronically serving all counsel and e-mails registered to this matter on the Supreme Court Electronic Filing System.
	Pursuant to NRCP 5, by placing a copy in the US mail, postage pre-paid to the following counsel of record or parties in proper person:
	Via receipt of copy (proof of service to follow)

An Attorney or Employee of the firm:

/s/ Adam J. Breeden
BREEDEN & ASSOCIATES PLLC