

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

KIMBERLY TAYLOR, AN
INDIVIDUAL,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court
Supreme Court Case No.
84492/84881

District Court Case No.: A773472

**APPELLANTS, KEITH BRILL, M.D. AND WOMEN'S HEALTH
ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC'S
OPPOSITION TO RESPONDENT'S
MOTION TO DISQUALIFY JUSTICE DOUGLAS HERNDON**

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I.

INTRODUCTION

This is an appeal from two post-judgment orders: the District Court's Order Granting in Part and Denying in Part Plaintiff's Motion to Re-Tax and Settle Costs entered on March 1, 2022 and the Order denying attorneys' fees entered on May 13, 2022. In addition to this consolidated appeal, Supreme Court Case No. 83847 was filed by Kimberly Taylor and is an appeal of the jury verdict in favor of Dr. Brill and Women's Health Associates of Southern Nevada-Martin, PLLC (hereinafter "WHASN").

As Respondent's Motion indicates, a Notice of Voluntary Disclosure was filed in Supreme Court Case No. 83847 on October 18, 2022, wherein Justice Herndon voluntarily disclosed that the District Court matter was assigned to him from September 8, 2020 to December 31, 2020. He also disclosed that: "The matter never appeared on calendar in front of me nor do I have any knowledge about the matter. I have never received any pleadings or other trial court documents in the case outside of the current appeal." *See* Notice of Voluntary Disclosure, page 1.

He further attested that: "I have no bias or prejudice as to any of the parties or issues in the litigation and do not believe that my impartiality could reasonably be questioned. However, I make this disclosure so that any person who wishes to

request my disqualification may do so by filing a motion pursuant to NRAP 35.” *Id.* at pages 1 – 2. Respondent has now moved to disqualify Justice Herndon.

Unlike counsel for Ms. Taylor, the undersigned has been counsel of record from this matter’s inception. Prior to receiving the Notice of Voluntary Disclosure, counsel for Appellants had no recollection of this matter ever being assigned to Justice Herndon when he was a sitting District Court Judge in the Eighth Judicial District Court. A review of the District Court docket demonstrates that no substantive motions were filed in this case from September 8, 2020 through December 31, 2020. No hearings were held in the District Court from September 8, 2020 through December 31, 2020. On January 4, 2021, the parties were notified of an Administrative Reassignment to Judge Monica Trujillo. Thereafter, many substantive hearings were held and Judge Trujillo presided over the September 2021 trial.

Given the facts presented, there is no basis for disqualification of Justice Herndon. Accordingly, the Motion to Disqualify should be denied.

II.

LEGAL ARGUMENT

“A judge has a duty to preside in the absence of some statute, rule of court, ethical standard or other compelling reason.” *Goldman v. Bryan*, 104 Nev. 644 (1986); *Ham v. Eighth Judicial Dist. Court*, 93 Nev. 409, 566 P.2d 2120 (1977);

Millen v. Eighth Judicial Dist. Court, 122 Nev. 1245, 148 P.3d 694 (2006). “A judge shall hear and decide matters assigned to the Judge, except when disqualification is required by Rule 2.11 or other law.” *See* NCJC Rule 2.7.

A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might be reasonably questioned. *Ybarra v. State*, 247 P.3d 269, 271 (Nev. 2011). The test for whether a judge’s impartiality might be reasonably questioned is objective and courts must decide whether a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge’s impartiality. *Id.* at 272.

The moving party bears the burden of establishing sufficient factual and legal grounds warranting disqualification. *Las Vegas Downtown Redevelopment Agency v. District Court*, 5 P.3d 1059, 1061 (Nev. 2000). A judge has a duty to preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or compelling reason otherwise. *Id.* A judge is presumed to be unbiased. *Millen v. District Court*, 148 P.3d 694, 701 (Nev. 2006). A judge is presumed to be impartial, and the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification. *Yabarra*, 247 P.3d at 272.

Disqualification is not warranted because Respondent has not established sufficient factual and legal grounds for disqualification. Respondent argues that the plain language of NCJC 2.11 requires disqualification, but the facts are that Justice

Herndon never “previously presided as a judge” over this matter. The Black’s Law Dictionary defines presiding over a court as “to preside over a court is to hold it.” By the attestation of Justice Herndon and review of the lower court docket, Justice Herndon never presided over this matter as a District Court Judge. He never held court over any matter in the litigation and never adjudicated any issue in the courtroom.

The non-binding case law cited by Respondent is easily distinguishable. In *Ferguson v. State*, 498 S.W.3d 733 (Ark. 2016), the judge presided over a criminal child abuse case and also presided over the juvenile dependency-neglect proceeding. While not the same matter, the general appearance of potential bias with the same parties/case facts required disqualification. There is no proceeding case related to any of the litigants in this case that Justice Herndon heard.

The Ohio case, *Harvest Land Co-op, Inc v. Hora (In re Tucker)*, 167 Ohio St. 3d 1237, 1238, 193 N.E.3d 593 (2022), involved an appellate judge who sat in the lower district court and was involved with that case at the level. 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. Here, Justice Herndon was never the presiding judge.

Respondent also cites to another Ohio case, *State v. Gordon (In re Teodosio)*, 153 Ohio St. 3d 1228, 105 N.E.3d 1258 (2017). That matter involved an appellate

judge who served as the trial court judge. Honorable Monica Trujillo was the trial judge in this case. Justice Herndon never heard any facts or made any rulings in this case and was most definitely not the trial court judge.

In *Canarelli v. Eighth Jud. Dist. Ct. of Nev.*, 507 P.3d 334 (2022), the Nevada Supreme Court found that the District Court erred when it disqualified Sturman because her impartiality could be questioned after she reviewed notes, produced in discovery, that were later determined to be privileged. As the alleged questionable impartiality does not arise from an extrajudicial source, they determined the disqualification standard set forth in *Kirskey v. State*, 112 Nev. 980 (1996) controls and there was no evidence that Judge Sturman formed an opinion or demonstrated favoritism or antagonism against either party. Judge Sturman was permitted to preside over this case without disqualification.

In this matter, Justice Herndon was not exposed to any evidence in the lower court and learned nothing about the facts of this matter. Using the plain definition of “preside”, Justice Herndon did not preside over this matter in District Court. There is simply no basis to disqualify him.

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III.

CONCLUSION

This Court should deny this Motion to Disqualify as it is without merit.

Dated this 4th day of November, 2022.

McBRIDE HALL

/s/ Heather S. Hall

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of November 2022, service of the foregoing **APPELLANTS, KEITH BRILL, M.D. AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN, PLLC'S REPLY TO APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE** was served electronically to all parties of interest through the Court's CM/ECF system as follows:

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