

SUPREME COURT OF ARIZONA

PLANNED PARENTHOOD ARIZONA, INC.,) Arizona Supreme Court
SUCCESSOR-IN-INTEREST TO) No. CV-23-0005-PR
PLANNED PARENTHOOD CENTER OF)
TUCSON, INC.; LAURA CONOVER,) Court of Appeals
PIMA COUNTY ATTORNEY,) Division Two
) No. 2 CA-CV 22-0116
Appellants,)
) Pima County
v.) Superior Court
) No. C127867
KRISTIN K MAYES, ATTORNEY)
GENERAL OF THE STATE OF ARIZONA,)
)
Appellee,)
)
and)
)
ERIC HAZELRIGG, M.D., AS)
GUARDIAN AD LITEM OF UNBORN)
CHILD OF PLAINTIFF JANE ROE AND)
ALL OTHER UNBORN INFANTS)
SIMILARLY SITUATED,)
)
Intervenor.) **FILED 11/22/2023**
)
_____)

O R D E R

On October 26, 2023, Plaintiff-Appellant Planned Parenthood Arizona, Inc. ("Appellant") filed a "Motion for Recusal," pursuant to Arizona Rule of Civil Procedure 6(a)(1) and Rules of the Arizona Code of Judicial Conduct 1.2 and 2.11(A)(1). Although Rule 6(a)(1) provides that "[a] party may apply for an order or other relief by filing a motion," it is not a substantive rule for the disqualification or recusal of a judicial officer. Compare Ariz. R. Civ. App. P Rule 6(a)(1) with Ariz. R. Civ. P. 42.2; Ariz. R. Crim. P. 10.1; and A.R.S. § 12-409. Regardless, Appellant has raised concerns that call for a careful review and analysis of the cited Rules of Judicial Conduct.

I.

Appellant's argument "rests exclusively on" statements made six and eight years ago, respectively. The first statement set forth in Appellant's motion is from a Facebook post in 2017: "Planned Parenthood is responsible for the greatest generational genocide known to man." Howard Fischer, *Arizona Justice: 'Genocide' Comment Irrelevant to Hearing Abortion Case*, Ariz. Daily Star (Oct. 23, 2023). A story from 2019 providing a screenshot of the Facebook post is also cited. Meg O'Connor, *Bill Montgomery in '17: Planned Parenthood Caused 'Genocide,'* Phoenix New Times (Sep. 19, 2019). The second statement dates from 2015: "The profit-driven atrocities must end." Alex N. D'Angelo, *Supporters, Opponents Rally at Planned Parenthood Sites in Arizona, U.S.*, Ariz. Republic (Aug. 22, 2015). Appellant concludes that "reasonable minds" would perceive each statement as "reflecting adversely on [Justice Montgomery's] impartiality in a case where [Appellant] is a party" and that recusal is required under Rules 1.2 and 2.11(A) (1).

A. Rule 1.2

Rule 1.2 provides that "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

Appellant further cites to Comment 5 to Rule 1.2:

The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. An appearance of impropriety does not exist merely because a judge has previously rendered a decision on a similar issue, has a general opinion about a legal matter that relates to the case before him or her, or may have personal views that are not in harmony with the views or objectives of either party.

Of course, when each of the statements were made in 2015 and 2017, I was not a member of the judiciary nor was I a candidate for judicial office. Therefore, the Code of Judicial Conduct did not apply, including Rule 1.2.

B. Rule 2.11(A) (1)

Rule 2.11(A) (1) provides:

(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:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

Appellant concludes that "'reasonable minds' would perceive" the two statements "as reflecting adversely on his impartiality in a case where [Appellant] is a party." But that is not the standard for recusal under Rule 2.11(A)(1). Instead, the standard is "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought . . . would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir. 1985).

The Arizona Supreme Court Judicial Ethics Advisory Committee discussed this standard in Advisory Opinion 96-14 (Nov. 21, 1996):

Canon 3E(1)¹ requires that "a judge disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." There is both a subjective and objective component to this requirement. If a judge believes that he or she cannot act fairly, disqualification is required. The more difficult assessment is the objective one, whether one external to the case might reasonably question the judge's impartiality. Understandably, judges tend to err on the side of safety and to judge the reasonableness of questioned impartiality from the standpoint of the most darkly suspicious member of the public. That is not the

¹ Canon 3(E)(1), adopted June 15, 1993, is substantially similar to rule 2.11(A)(1), adopted June 2, 2009:

E. Disqualification.

(1) A judge shall disqualify himself for herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.

test. Rather, it is "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought . . . would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir. 1985).

See also Advisory Opinion 98-02 (Mar. 24, 1998) ("[T]he test is whether an objective, disinterested, fully informed observer would reasonably question the impartiality of the judge.").

II.

With respect to the subjective part of the test, I firmly believe that I can be fair and impartial consistent with my oath of office in determining the issues in this matter based on the law and the facts and without regard to who the parties are, including Appellant. Nevertheless, with respect to the objective standard, "the judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue." *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995).

Important to determining whether Rule 2.11(A)(1) requires recusal is the need for the "objective, disinterested observer [to be] fully informed of the facts underlying the grounds on which recusal is sought." The inquiry is "made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000). The facts are "as they existed, and not as they were surmised or reported." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913 (2004). And they include "all of the facts known to the judge." E. Wayne Thode, *The Code of Judicial Conduct? The First Five Years in the Courts*, 1977 UTAH L. REV. 395, 402.

A. Statements

1. 2015 Statement and surrounding facts and circumstances

The context for the statement relied on in Appellant's motion arose from reporting concerning the sale of body parts from abortion procedures.² Similar events occurred across the valley and around the country. The remarks to the media specifically focused on a call for Congress to end federal funding of Planned Parenthood. I made no

² There are no reported cases of a judicial determination that such sales occurred.

allegations as to Appellant's specific facilities nor did I call for investigating or prosecuting Appellant criminally or civilly.

2. 2017 Statement

It is apparent from the screenshot in Appellant's motion and from the September 19, 2019, story that the 2017 statement dates from a February 28, 2017, Facebook post. The post shared a video of interviews with Planned Parenthood employees addressing the use of sales goals to increase the number of abortions performed by Planned Parenthood facilities. No specific mention is made in the video or in the post of Appellant's facilities in Arizona. The post containing the statement—and the Facebook page itself—does not relate to prosecution. The assertion that the statement was made by me "as a prosecutor" is misleading at best.³

B. Additional Facts And Circumstances

1. Records review

Around mid-2015, individuals responsible for cleaning building space vacated by Appellant came across several dozen boxes of materials.⁴ Concerned that the boxes may contain medical records of patients, the individuals tried to turn them in to local law enforcement, which declined to accept the boxes. The individuals then brought them to the Maricopa County Attorney's Office ("MCAO"). I authorized receipt of the boxes and directed that they be secured. I thereafter engaged a local law firm to review the boxes to determine what the records consisted of, whether there was evidence of any criminal, civil, or administrative wrongdoing, and assess any ethical issues that would preclude MCAO from conducting a criminal review of the records, if warranted.

The review finished in early 2016 and concluded that the boxes contained some lists of donors and records of contributions but no medical records of any patients or any other significant materials. There was no evidence of any wrongdoing. After the review was complete, I directed that the boxes be disposed of to protect any personal information that might have been contained within the donor

³ The remaining assertions in the October 23 story regarding positions or actions taken while I served as the Maricopa County Attorney are likewise misleading, leave out important facts, or both.

⁴ There was confusion over whether the exact location was in Phoenix or Glendale.

records. And to reiterate the point, there was no evidence of any wrongdoing.

Until addressing Appellant's motion required it, I never made any information regarding the finding of the boxes or the review of the records public. In fact, I specifically provided direction that MCAO would not treat the boxes as "evidence" or characterize the review as a criminal investigation unless and until a determination had first been made as to the nature of what was found. The purpose for taking this approach was to avoid creating public records that could be used to insinuate or suggest Appellant had engaged in any criminal activity. That the records could easily have been used for political gain during 2016 or otherwise used to the detriment of Appellant was never discussed or contemplated. Appellant was treated fairly and impartially.

2. Issue presented in present case

The legal issue currently before the Court concerns whether the Arizona Legislature repealed or otherwise limited A.R.S. § 13-3603, enacted in 1971 as § 13-211, by later enacting SB 1164. Thus, the present legal issue addresses two sequential acts of the legislature. I have offered no public comment whatsoever on either the 1971 or 2022 statutes. Additionally, I have made no public comment regarding Appellant or about any political issue during my tenure on the Court.

3. Judicial independence

As set forth in *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986), there are two distinct policies involved in the determination of whether a judge's impartiality might reasonably be questioned:

The first is that courts must not only be, but must seem to be, free of bias or prejudice A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation. If this occurred the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges.

See also Timothy J. Goodson, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. Rev. 181, 189-90 (2005) ("A judge whose participation is subject to unjustified removal by the parties or the press cannot be said to be neutral.").

With respect to the first policy, it is important to recognize that:

Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 266 . . . (1995) (STEVENS, J., dissenting), neutrally applying legal principles, and, when necessary, "stand[ing] up to what is generally supreme in a democracy: the popular will," Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989).

Republican Party of Minnesota v. White, 536 U.S. 765, 803-04 (2002) (Ginsburg, J. dissenting); see also Rule of Judicial Conduct 2.4 (prohibiting a judge from being "swayed by partisan interests, public clamor, or fear of criticism" and precluding influence on a judge's conduct or judgment by "family, social, political, financial, or other interests or relationships").

Related to the second policy is the fact that, although this Court has a process by which a judge of the court of appeals may sit in the stead of a Justice who recuses from a case, it is otherwise my duty to serve in the office I was appointed to by the Governor of Arizona and retained by the people of Arizona. *Moore v. United States*, No. 22-800, 2023 WL 5807533 (U.S. Sept. 8, 2023) (concluding that "when there is no sound reason for a Justice to recuse, the Justice has a duty to sit"); *Perry v. Schwarzenegger*, 630 F.3d 909, 916 (9th Cir. 2011) ("It is, indeed, important that judges be and appear to be impartial. It is also important, however, that judges not recuse themselves unless required to do so, or it would be too easy for those who seek judges favorable to their case to disqualify those that they perceive to be unsympathetic merely by publicly questioning their impartiality.").

III.

The statements exclusively relied on by Appellant are remote in time while I was not a member of the judiciary and there is no evidence since I took office as a Justice on the Arizona Supreme Court of any bias towards Appellant. See *Racetrack Supermarket, LLC v. Mayor*, 459 N.J. Super. 197, 209-12 (2018) (reviewing the proximity in time of statements relied on as evidence of a personal bias and considering "the presence or absence of evidence of a continuous bias

as an important, but not determinative, factor to be considered in assessing whether a reasonable, fully-informed person would have doubts about the judge's impartiality"). When faced with a circumstance directly involving Appellant and the fair and impartial administration of justice, I acted without any bias or prejudice. *Melendres v. Arpaio*, CV-07-2513-PHX-MHM, 2009 WL 2132693, at *8 (D. Ariz. July 15, 2009) (discussing previous favorable treatment of party in considering motion for recusal); *Mayor*, 459 N.J.Super. at 213 (observing that "[w]here, as here, a judge's recusal is sought due to an appearance of impropriety based on claims of personal bias, it is also reasonable to examine and consider, where available, any prior history of actual dealings between the parties"). And I have made no statements concerning the matter before us. Lastly, "a blast of largely inaccurate and uninformed opinion cannot determine the recusal question." *Cheney*, 541 US at 924. "Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information published as fact in the newspapers." *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

Given all the foregoing, an objective, disinterested observer would not entertain a significant doubt that justice will be done in this case. Recusal is not warranted. Therefore,

IT IS ORDERED that the Motion for Recusal is denied.

DATED this 22nd day of November, 2023.

/s/
WILLIAM G. MONTGOMERY
Duty Justice

To:

D Andrew Gaona
Diana O Salgado
Austin C Yost
Laura Winsky Conover
Samuel Emiliano Brown
Jonathan Laurence Pinkney
Aadika Singh
Joshua Rosenthal
Joshua D. Bendor
Alexander W Samuels
Luci Danielle Davis
Kevin Theriot
John J Bursch
Denise M Harle
Jacob Paul Warner
Joshua W Carden
Kevin L Beckwith
Olivia F Summers
Roberta S Livesay
Parker C. Fox
Hannah L Templin
Kory A Langhofer
Thomas J Basile
Andrew Lishko
Samuel D Green
Timothy D Ducar
Douglas Jeffery Newborn
Abigail Joy Mills
David J Euchner
Lauren Beall
Susan Caroline Salmon
Joy Herr-Cardillo
Orlando Economos
Benjamin Seel
Alexis E Danneman
Jean-Jacques Cabou
Sambo Dul
Neta Borshansky
Noah Gabrielsen
Bruce E Samuels
Lauren Ann Crawford
Hannah Dolski
Anita R Rocha
Timothy J Berg
Emily Ayn Ward

Christopher D Thomas
Karin Aldama
Kristine J Beaudoin
J Stanley Martineau
Samuel D Green
Steven H Aden
Alberto Rodriguez
Nicole Saharsky