IN THE CHANCERY COURT OF LAFAYETTE COUNTY, MISSISSIPPI

ROBERT SULLIVANT, SR.	**PLAINTIFF**
VS.	**CAUSE NO. 2021-612 (W)**
ROBERT SULLIVANT, JR.	**DEFENDANT**
VS.	
EVELYN STEVENS	**THIRD PARTY DEFENDANT**

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT ROBERT SULLIVANT, JR.'S MOTION TO RECUSE

COMES NOW Plaintiff, Robert Sullivant, Sr. ("Sullivant, Sr."), by and through undersigned counsel, and files his *Plaintiff's Response in Opposition to Defendant Robert Sullivant, Jr.'s Motion to Recuse* against Defendant, Robert Sullivant, Jr. ("Sullivant, Jr."), and in support thereof would state as follows:

Standard of Review.

The decision whether or not to recuse oneself is left solely to the discretion of the trial judge. *Hill v. Mills*, 26 So.3d 322, 327 (Miss. 2010). A judge must disqualify himself if "a reasonable person, knowing all of the circumstances, would harbor doubt's about the judge's impartiality." *See e.g.*, *J.N.W.E. v. W.D.W.*, 922 So.2d 12, 14 (Miss. 2005). A presumption exists that a judge, "sworn to administer impartial justice, is qualified and unbiased. . . ." *Steiner v. Steiner*, 788 So.2d 771, 775 (Miss. 2001).

The standards surrounding a review of a judge's decision with respect to a motion to recuse have been succinctly described by this Court in *Kinney v. Southern Mississippi Planning and Development District, Inc.*, 202 So. 3d 187, 194 (Miss. 2016): "[T]his Court presumes that a judge, sworn to administer impartial justice, is qualified and unbiased." *Turner v. State*, 573 So.2d 657,678 (Miss.1990) (emphasis added). For a party to overcome the presumption, the party must

produce evidence of a reasonable doubt about the validity of the presumption. *Id.* Reasonable doubt may be found when there is a question of whether "a reasonable person, knowing all of the circumstances, would harbor doubts about the [judge's] impartiality." *Id.* (citations omitted). Said another way, "[t]he presumption is overcome only by showing beyond a reasonable doubt that the judge was biased or unqualified." *Hathcock v. Southern Farm Bureau Cas. Ins. Co.*, 912 So.2d 844, 848 (if 9) (Miss.2005) (citing Upton v. McKenzie, 761 So.2d 167, 172 (Miss.2000)). "This Court reviews a judge's refusal to recuse himself using the manifest error standard." *Bredemeier v. Jackson*, 689 So.2d 770, 774 (Miss.1997) (citing *Davis v. Neshoba Cnty. Gen. Hosp.*, 611 So.2d 904, 905 (Miss.1992)).

Timeliness of Jr.'s Motion.

Uniform Chancery Rule 1.11 states:

> "Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted."

Jr. filed his Motion to Recuse on June 21, 2023, which was **167** days after the January 12, 2023 hearing, **147** days after the January 25, 2023 hearing and **43** days after the May 9, 2023 hearing all subject to his Motion.

Such a wait and see approach has been repeatedly denounced by the Mississippi Supreme Court. In *Buchanan v. Buchanan*, wherein the litigant similarly waited until after receiving an adverse ruling to file a motion to recuse, the Supreme Court commented:

> There is an additional point, having to do with the matters of timing and diligence. Minor did not move that Judge Dunnam recuse himself until after the merits had been decided adversely to him, and in such a context **we have, over the years, been quick to point out that we will not allow a party to take his chances with a judge about whom he knows of grounds for recusal and then, after he loses, file his motion**. Where the party knew of the grounds for the motion or with the

> exercise of reasonable diligence may have discovered those grounds, and where that party does not move timely prior to trial, the point will be deemed waived. *Ryals v. Pigott*, 580 So. 2d 1140, 1175–76 (Miss. 1990); *City of Biloxi v. Cawley*, 332 So. 2d 749, 750 (Miss. 1976); *McCune v. Commercial Publishing Co.*, 148 Miss. 164, 172, 114 So. 268, 269 (1927).

Buchanan v. Buchanan, 587 So. 2d 892, 897 (Miss. 1991) (emphasis added). In the case of *Yarborough v. Singing River Health Sys.* the motion for recusal was not filed until over 78 after the trial and well after the judgment was entered and the Mississippi Court of Appeals found that the "***motion failed to meet the required time requirement and is therefore waived.***" No.2021-CA-00668-COA, page 18 (Miss. App. 2023) (emphasis added.) Accordingly, in the present case, in addition to a complete lack of merit as no reasonable person would question Judge Whitwell's impartiality, and Jr.'s Motion should be denied for a blatant disregard of the UCRCCC.

Argument.

Due to the redundancy of some of Jr.'s arguments, Sr. will address and respond to some issues presented together.

1. Sullivant Jr.'s Claim that Your Honor Testified as a Character Witness Against Jr. at the Hearing on May 9, 2023 and the Summary Judgment Hearing on January 25, 2023.

Jr. states that Judge Whitwell violated Cannon 2(B) of the Code of Judicial Conduct due to certain comments made by Judge Whitwell and that Judge Whitwell became a character witness. There is no requirement that a trial judge be a "silent observer." *Copeland v. Copeland*, 904 So.2d 1066, 1074 (Miss. 2004). In the case of *Bumpus v. State*, the Mississippi Supreme Court made a point to say:

> "In passing, we will say that the statute invoked does not place the judge in a strait-jacket nor prevent him from having anything to say during the progress of a trial. Of course, he should keep off of the province of the jury, and not try to influence their verdict.... he has the right to give such reasons if he so desires, and to show why, in his opinion, the reasons advanced for a contrary ruling are unsound."
> 166 Miss. 276, 144 So. 897 (Miss. 1932)

Instead, pursuant to Miss. R. Evid. 614(b), a chancery court even has the right to "interrogate witnesses, whether called by itself or by a party" and a chancellor's power to question witnesses is broader than those of a Circuit Judge. *Copeland v. Copeland*, supra, 904 So.2d at 1074. The trial judge also has the right to clarify testimony and develop facts. *Jones v. State*, 79 So.2d 273,276 (Miss. 1995). Judge Whitwell was well within its authority to make comments and give its reasons for ruling as it did.

In the case of *Oliver v. Oliver (In re Estate of Oliver)*, one of the parties referenced certain quotes from the final hearing as examples of the chancellor's "grudge" against her. The Mississippi Court of Appeals found that the chancellor, at most, was "expressing frustration with the parties' inability to reach an agreement on any detail, including what half of the property they wanted ("I was hoping y'all could at least agree on one thing, but obviously y'all cannot agree on whether the sun is shining outside or not.")." P.111, (Miss. App. 2019). That same party went on to quote from a later hearing that she claimed "demonstrates the chancellor's alleged animosity towards her," including exchanges such as the chancellor telling her that "[i]f you have a problem with my ruling, appeal it[;]" and the chancellor's admonishment to her to "be careful[,]" stated in the context of her representing herself. *Id.* at P.112. The Mississippi Court of Appeals said "[t]hese statements, ***particularly when read in context***, are nowhere near the "combative, antagonistic, discourteous, and adversarial" conduct that would lead a reasonable person to conclude that [she] did not receive a fair hearing." *Id.* (emphasis added.)

Jr.'s alleges that Judge Whitwell's comments referring to the "PIN" for Sr.'s Ameritrade account were "unknown testimony" and "false." It is apparent that Judge Whitwell is simply referring to the "login" and "password" for Sr.'s Ameritrade account (referred to as "credentials" in Sr.'s Response in Opposition to Jr.'s Motion for Summary Judgment) and it is in fact true that

until the filing of his lawsuit, Sr. did not know this information as Jr. was the only one with the credentials. None of these issues were discussed ex parte between Mr. Alford and Judge Whitwell.

2. Your Honor Failed to Act When put on Notice of Mr. Alford's Malfeasance, but Admonished Jr. in Court for a Completely Harmless Error. Your Honor Also Refused to Hear a Motion to Disqualify Mr. Alford on the Sole Basis of Public Presence.

6. Your Honor Would Not Allow a Proper Cross-Examination of Dr. Frank Perkins and Allowed His Testimony With No Notice to JR.

Jr. argues that Judge Whitwell refused to hear his Motion to Disqualify due to "public presence." Judge Whitwell simply stated to Jr. was "not going to get into in front of all this crowd your allegations against Mr. Alford, but the trial setting can be put off far enough." This comment was actually related to Jr.'s Motion for Continuance for a trial that wasn't even set yet. Judge Whitwell actually found the motion to be premature and dismissed it without prejudice stating "[i]f the Bar rules some way that would make it important for me to hear that, then you can bring it back to my attention. You can refile that motion." Jr. is not prejudiced by Judge Whitwell not proceeding on the Motion to Disqualify at this time.

Jr. stated that Judge Whitwell defended Mr. Alford when discussing the delay of a hearing by saying "I," meaning Judge Whitwell, may not have been available. Judge Whitwell actually said "*he*," meaning Mr. Alford may not have been available. (See Jr.'s Bates No. 117).

Jr. also states that Judge Whitwell allowed Mr. Alford to call certain witnesses over his objections. Again, this is simply not true. Jr. does not object one time to Sr. and/or Dr. Perkins testifying at the May 9, 2023 hearing. Stating that you were not prepared for certain witnesses and objecting to them testifying are two very different things. In fact, Jr. stated "I haven't really had a chance to prepare to cross-examine [Dr. Perkins], I did have some questions I did want to ask him." (Sullivant Transcript pg. 21) Jr. then went on to ask Dr. Perkins a series of questions unrelated to the issue of the Motion before the Court which was Sr. competent to execute a Will.

The parties entered into an Agreed Order on January 10, 2023, appointing Dr. Perkins to perform an Independent Medical Exam on Sr. In Sr.'s discovery responses he lists himself as a possible witness. It is baffling that Jr. argues that these witnesses were not disclosed to him. In the case of *Sullivan v. Sullivan,* the Husband failed to designate a certain Doctor as an expert witness and the Wife objected to his testimony solely based on the fact he wasn't designated. The Mississippi Court of Appeals stated "[Wife's] attorney stated at the hearing that he knew about [Doctor] and had contacted his office, but he had decided not to call [Doctor] as a witness. Given that the exclusion of evidence should only be employed as a last resort and the fact that [Wife's] attorney knew about [Doctor], the chancery court did not err in admitting his testimony."

In response to Jr.'s contention that Dr. Perkins had been evading communications with him, Judge Whitwell told Jr. "[i]f you were having trouble with Mr. Alford getting a date, you would come to me and file a motion to require it if you wanted a deposition and he wasn't cooperative." (Sullivant Transcript pg. 33). The truth is Dr. Perkins contacted undersigned counsel regarding Jr.'s request to depose him and, on March 2, 2023, undersigned counsel sent correspondence to Jr. stating he was not aware of Jr's request to depose Dr. Perkins and then explained Dr. Perkins' fees and costs for the deposition. See attached *Email from Swayze Alford to Robert Sullivant Jr.* attached hereto as Exhibit A.

Throughout his Motion, Jr. misconstrues the Court's statement that Dr. Perkins is a court-appointed expert. The parties each chose an expert for the IME with Jr. choosing Dr. Thomas and Sr. choosing Dr. Perkins. Each of these appointments were memorialized in court order thereby making them "court appointed experts." Additionally, upon information and belief, Jr. paid the retainer to Dr. Thomas, his chosen expert.

4. Your Honor Has Demonstrated Overt Bias in Favor of Mr. Alford by Either Willfully or Negligently Misinterpreting the Law in Plaintiff's Favor.

7. "The Appearance of Impropriety" is Clearly Present, and a Reasonable Person *Might* Harbor Doubts About Your Honor's Impartiality.

Judge Whitwell previously denied Jr.'s Motion for Summary Judgment. Jr. then filed an Interlocutory Appeal which was subsequently denied by the Mississippi Supreme Court. Judge Whitwell then denied Jr.'s request to be appointed as Sr.'s conservator. There has not even been a final trial in this matter.

5. Your Honor and Mr. Alford Have Engaged in Prejudicial Ex-Parte Communications.

Jr.'s argument alleging an ex parte communication between Judge Whitwell and counsel for Sr. is without merit. Improper ex parte communications are defined in Code of Judicial Conduct Canon 3(B)(7) as "communications … concerning a pending or impending proceeding." The Official Commentary to Canon 3(B)(7) acknowledges and confirms this definition by the language of its first sentence which reads, "The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted."

It is undisputed that no improper ex parte communications occurred between Judge Whitwell and Mr. Alford. Sr.'s Response in Opposition of Jr.'s Motion for Summary Judgment clearly references the fact that only Jr. knew the "credentials" to Sr.'s Ameritrade account. Judge Whitwell simply calls the credentials a "PIN" instead. See *Affidavit of Swayze Alford* attached hereto as Exhibit B.

WHEREFORE PREMISES CONSIDERED, Robert Sullivant, Sr., respectfully move this Court to enter its order denying Sullivant Jr.'s *Motion to Recuse* and requiring Sullivant, Jr. to pay

all attorney's fees and costs associated with defending this Motion. Robert Sullivant, Sr. further request such other relief to which they may be entitled.

RESPECTFULLY SUBMITTED this 6 day of July, 2023.

ROBERT SULLIVANT, SR., Plaintiff

BY: Swayze Alford
SWAYZE ALFORD (MSB #8642)
KAYLA WARE (MSB #104241)

OF COUNSEL:

SWAYZE ALFORD
Attorney at Law
1221 Madison Avenue
Post Office Box 1820
Oxford, Mississippi 38655
(662) 234-2025 phone
(662) 234-2198 fax

Counsel for Robert Sullivant, Sr.

CERTIFICATE OF SERVICE

I, Swayze Alford, attorney for Robert Sullivant Sr., do hereby certify that I have this day forwarded, via email, a true and correct copy of the above and foregoing *Plaintiff's Response in Opposition to the Defendant's Motion to Recuse* to the following:

Robert Sullivant, Jr.
robert@steelandbarn.com

SO CERTIFIED, this the 6 day of July, 2023.

Swayze Alford
SWAYZE ALFORD (MSB #8642)

Kayla Ware

From: Swayze Alford
Sent: Thursday, March 2, 2023 1:40 PM
To: Robert Sullivant
Cc: Lacey Whitaker
Subject: Dr. Perkins

Robert,
It is my understanding that you have contacted Dr. Perkins's office about taking his deposition. I was not aware of your desire to take his deposition. I think that we need to ccordinate available dates for everyone in order to schedule a convenient time and date. Dr. Perkins charges $600 an hour for his time to prep for and attend the deposition and $200 an hour for travel. You will be responsible for the cost. Thanks.

Swayze Alford, Esq.
Swayze Alford Attorney At Law
Post Office Box 1820
1221 Madison Avenue
Oxford, Mississippi 38655
(662) 234-2025 phone
(662) 234-2198 fax
swayzealford.com

Exhibit "A"

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ROBERT SULLIVANT, SR. **PLAINTIFF**

VS. **CAUSE NO. 2021-612 (W)**

ROBERT SULLIVANT, JR. **DEFENDANT**

AFFIDAVIT OF SWAYZE ALFORD

STATE OF MISSISSIPPI
COUNTY OF LAFAYETTE

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the county and state aforesaid, the within named Swayze Alford, who, being duly sworn by me, did state upon his oath as follows:

1. My name is Swayze Alford. I am over the age of 21 and am an adult resident citizen of Washington County, Mississippi.

2. I am competent to testify regarding the matters as set forth in this Affidavit. I have personal knowledge of the facts set forth herein, and said facts are true and correct.

3. I am licensed to practice law in the State of Mississippi. I am one of the attorneys of record for Robert Sullivant, Sr., the Plaintiff in this action.

4. At no time have I had any ex parte communications concerning the proceedings or in any way dealing with substantive matters or issues on the merits related to the proceeding with Judge Robert Q. Whitwell regarding any aspect of this case.

AND FURTHER AFFIANT SAYETH NOT.

Swayze Alford
SWAYZE ALFORD

STATE OF MISSISSIPPI NOTARY PUBLIC ID # 89563 KAYLA F. WARE Commission Expires March 2, 2027 PANOLA COUNTY

SWORN TO AND SUBSCRIBED BEFORE ME this, the 10 day of July, 2023.

Kayla Ware
NOTARY PUBLIC

Exhibit "B"