IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2023-M-00847

ROBERT SULLIVANT, JR., PETITIONER

VS.

ROBERT SULLIVANT, SR., RESPONDENT

On Appeal from the Chancery Court of Lafayette County, Mississippi
Cause No. 2021-612(W)
Honorable Robert Q. Whitwell

RESPONDENT SULLIVANT, SR.'S ANSWER IN OPPOSITION TO PETITION FOR INTERLOCUTORY APPEAL

Swayze Alford (MSB #8642)
Kayla Ware (MSB #104241)
ATTORNEY OF RECORD for Appellant
1221 Madison Avenue
Post Office Box 1820
Oxford, Mississippi 38655
Phone: (662) 234-2025
salford@swayzealfordlaw.com
kayla@swayzealfordlaw.com
Attorneys for Respondent, Robert Sullivant, Sr.

Sullivant, Sr., Robert Sullivant, Sr. ("Sullivant, Sr.") files this answer in opposition to the Petition for Interlocutory Appeal (the "Petition") filed herein by Sullivant, Jr., Robert Sullivant, Jr. ("Sullivant, Jr."). In support hereof, Sullivant, Sr. states the following:

Preface and Summary of Opposition

Sullivant, Jr. seeks interlocutory review of Chancellor Robert Q. Whitwell's denial of his motion to recuse. Sullivant, Jr. incorrectly references MRAP 5 in his Petition instead of referring to M.R.A.P. 48(B) which specifically outlines the process for Motions for Disqualifications of Trial Judges. The Petition should be denied because it fails to articulate a cognizable basis for this Court to order recusal of Chancellor Whitwell as there was no proven abuse of discretion.

Sullivant, Jr. states that undersigned counsel has been allowed to violate the court's orders and misappropriate the funds of the parties. This is simply not true. Judge Whitwell correctly noted in his Order that some of the money was mistakenly spent but was all put back upon undersigned counsel's being made aware of the spending. Undersigned counsel then vehemently explained how and why this happened and took responsibility. As Judge Whitwell stated in his Order, the matter was extensively discussed at the January 12, 2023 hearing and it has been addressed and resolved. The parties entered an *Agreed Order* freezing the accounts. **(Ex. 1)** Sullivant, Jr. has not requested that the Court take any action against undersigned counsel, with the exception of disqualifying him from the case, and that request was addressed by the court as untimely.

Sullivant, Sr. filed his *Motion to Appoint a Conservator* on December 5, 2022 **(Ex. 2)** The parties entered into an *Agreed Order* **(Ex. 3)** on January 10, 2023, appointing Dr. Perkins to perform an Independent Medical Exam on Sullivant, Sr. On April 21, 2023, Sullivant, Sr. filed his *Request for Permission for Robert Sullivant, Sr. to Execute a Will* **(Ex. 4)** On April 25, 2023, an *Order Setting Cause for Hearing* and a *Notice of Hearing* were filed setting these two Motions, among others, for hearing on May 9, 2023 **(Ex. 5)** Sullivant, Jr. was well aware that these two (2)

Motions would be heard on May 9, 2023 and that Dr. Perkins was appointed by the Court, per Sullivant, Jr.'s agreement, to determine Sullivant, Sr.'s mental capacity. And while Dr. Perkins' report did not say the specific words of "testamentary capacity" it did state that Sullivant, Sr. "has the awareness and ability to voice his wishes and needs but due to his impaired cognitive function does not have the capacity to consistently execute those wishes." Additionally, Sullivant, Jr. had filed his own Emergency Motion for Appointment of a Conservator.

Background Facts and Course of Proceedings

In the chancery action, Sullivant, Sr. filed his *Complaint* on October 25, 2021 and Sullivant, Jr. filed his *Answer, Affirmative Defenses and Counter-Claim* on December 9, 2021. On July 12, 2017, Sullivant, Sr. executed a General Durable Power of Attorney appointing his son, Sullivant, Jr., as his lawful agent and attorney in fact. Prior to filing his Complaint, it came to Sullivant, Sr.'s attention that Sullivant, Jr. was taking very large sums of money from Sullivant Sr.'s checking account. On or about May 19, 2021, Sullivant, Sr. opened a money market account with Regions Bank that was in his name only. That same day, Sullivant, Sr. transferred the sum of $230,000.00 from a Regions account in which Sullivant, Jr. had signature authority to his new money market account. On May 20, 2021, Sullivant, Sr. executed a Cancellation of Durable Power of Attorney, which was filed with the Panola County Chancery Clerk that same day. Sullivant, Sr. provided the Regions Bank in Batesville, Mississippi with a copy of the same. Apparently, Sullivant, Jr. went to the Regions Bank in Oxford, where he successfully withdrew and transferred the sum of $230,000.00 from Sullivant, Sr.'s new money market account to an account only in his name.

On December 8, 2022, Sullivant, Jr. moved for summary judgment in the trial court and on January 3, 2023, Sullivant, Sr. filed his Response in Opposition to Sullivant, Jr.'s Motion for Summary Judgment. The motion was set for hearing on January 25, 2023. On January 26, 2023, the Chancery Court entered an order denying Sullivant Jr.'s motion for summary judgment. On

February 10, 2023, Sullivant, Jr. filed a Petition for interlocutory appeal with this Court regarding the Chancery Court's denial of his motion for summary judgment. Sullivant, Sr. filed his response to Sullivant, Jr.'s Petition for interlocutory appeal on February 24, 2023 and this Court entered its order denying Sullivant Jr.'s Petition on March 31, 2023. On June 21, 2023, Sullivant, Jr. filed his Motion for Recusal. **(Ex. 6).** Sullivant, Sr. filed his Response in Opposition to Sullivant, Sr.'s Motion to Recuse on July 6, 2023. **(Ex. 7)** The motion was set for hearing July 7, 2023 and, pursuant to his request, the Chancery Court gave Sullivant, Jr. five (5) days to file a rebuttal to Sullivant, Sr.'s response to his motion. On July 10, 2023, On July 12, 2023, Sullivant, Jr. filed his Rebuttal. **(Ex. 8)** On July 17, 2023, the Chancery Court entered its *Order on Ore Tenus Motion by Defendant* **(Ex. 9)** its 105 page Order denying Sullivant, Jr.'s Motion to Recuse. **(Ex.10)**

Current Status of the Case

We are in the discovery phase and not ready for a trial setting as Sullivant, Jr. filed an Amended Complaint asserting additional claims.

Timeliness of Petition

Sullivant, Sr. denies that the Petition was filed within fourteen (14) days of entry of the Order denying Sullivant, Jr.'s Motion for Judge Whitwell's recusal pursuant to M.R.A.P. 48(B). This Court has found that a party **must** file their Complaint with the Supreme Court within the fourteen (14) day time limit. (See *Parks v. Parks,* 914 So.2d 337, 342 (Miss. 2005) (The appellant did not file his Complaint with the Supreme Court within the fourteen (14) day time limit allowed following the expiration of the thirty (30) days allowed for ruling.)

Related Cases

There are no other cases or petitions for interlocutory appeal pending before this Court which are related to this matter.

Sullivant, Jr. cites three (3) cases as being "related cases." The cases cited by Sullivant, Jr. are in no way related to the instant case. Additionally, Sullivant, Jr.'s citations from *Winder v. State,* 640 So.2d 893 (Miss. 1994) and *Avery v. State,* 119 So.3d 317 (Miss. 2013) are from the dissents in each of those cases and are not controlling law.

Petitioner's Motion Should be Denied

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 doubts 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 Sullivant, Jr.'s Motion in Chancery Court.

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."

Sullivant, 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.

Despite Sullivant, Jr. claiming that Judge Whitwell "took several minutes out of a hearing to embarrass and admonish him on the record," at the January 12, 2023 hearing, it still it took Sullivant, Jr. **167** days to file his Motion to Recuse.

Despite Sullivant, Jr. claiming that, at the January 25, 2023 hearing, Judge Whitwell's line of questioning regarding the revoking of Sullivant, Sr.'s POA further shows Judge Whitwell's impartiality and bias and that Judge Whitwell inferred that Sullivant, Jr. was a liar, it still took **147** days for Sullivant, Jr. to file his Motion to Recuse.

Finally, despite Sullivant, Jr. alleging that Judge Whitwell provided highly prejudicial testimony to Sullivant, Jr., did nothing about Attorney Swayze Alford being dishonest with the Court and was too worried about public presence to admonish Attorney Swayze Alford at the May 9, 2023 hearing, it still took Sullivant, Jr. **43** days to filed his Motion to Recuse. And only then did Sullivant, Jr. file his Motion after his Motion for Summary Judgment was denied.

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 days 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, Sullivant, Jr.'s Motion should be denied for a blatant disregard of the UCRCCC.

Argument.

Sullivant, Jr.'s Motion is meritless as well as untimely and undersigned counsel is hesitant to address them further to give any credence to his argument. However, in the interest of thoroughness, counsel is obligated to respond further herein below so that there can be no doubt that Sullivant, Jr.'s Motion is a disingenuous attempt to avoid an unfavorable ruling.

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

1. Sullivant Jr.'s Claim that Judge Whitwell Testified as to the Petitioner's Character, and as to Disputed Facts, Both in Favor of the Respondent.

5. Sullivant Jr.'s Claim that Judge Whitwell Repeatedly Inferred that the Petitioner was Lying to Him During Questioning.

Sullivant, 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.)

Sullivant, Jr. states that Judge Whitwell inferred to him as a liar at the January 25, 2023 hearing. In reality, Judge Whitwell simply reminded him that he was under oath. Sullivant, Jr. goes on to question why Judge Whitwell did not interrogate the defendant. Sullivant, Jr. seems to overlook the fact that while he may be acting as his own counsel, he is still a party, specifically the defendant, in the Chancery Court action and the Court is entitled to question him when he is under oath. Sullivant, Sr. was not called as a witness by Sullivant, Jr. and therefore was not accessible to questioning by Judge Whitwell.

2. Sullivant Jr.'s Claim that Judge Whitwell has Failed to Admonish Opposing Counsel for Numerous Illicit Actions but Admonished the Petitioner in Open Court for a Harmless Error.

3. Sullivant Jr.'s Claim that Judge Whitwell Refused to Hear Petitioner's Motion to Disqualify Attorney for the Respondent on the Sole Basis of Public Presence.

Sullivant, Jr. argues that Judge Whitwell refused to hear his Motion to Disqualify due to "public presence." Judge Whitwell simply stated to Sullivant, Jr. he 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 Sullivant, Jr.'s Motion for Continuance for a trial that wasn't even set yet. In truth, Judge Whitwell 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." Sullivant, Jr. was not prejudiced by Judge Whitwell not proceeding on the Motion to Disqualify on that very day.

4. Sullivant Jr.'s Claim that Judge Whitwell Refuses to Adhere to Mississippi Law and Apply Appropriate Law to the Underlying Case.

Judge Whitwell previously denied Sullivant, Jr.'s Motion for Summary Judgment. Sullivant, Jr. then filed an Interlocutory Appeal which was subsequently denied by the Mississippi Supreme Court. Judge Whitwell then denied Sullivant, Jr.'s request to be appointed as Sr.'s conservator. It was only following these denial that Sullivant, Jr. filed his Motion to Recuse. There has not even been a final trial in this matter. As previously stated "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." see *Buchanan v. Buchanan*, 587 So. 2d 892 (Miss. 1991); *City of Biloxi v. Cawley*, 332 So. 2d 749 (Miss. 1976); and *McCune v. Commercial Publishing Co.*, 148 Miss. 164, 114 So. 268, (1927).

6. Sullivant Jr.'s Claim that Judge Whitwell's Explanations Regarding the Petitioner's Allegations of Ex-Parte Communications with the Respondent is Contradictory.

Sullivant, Jr.'s alleges that Judge Whitwell's comments referring to the "PIN" for Sr.'s Ameritrade account were "unknown testimony" and "false." Sullivant, Jr. wrongfully states that, during the hearing on the Motion to Recuse held on July 7, 2023, Judge Whitwell asserts that the word "PIN" was in the record four times. What Judge Whitwell ***actually*** says is "I said the word *PIN* because in the record, it's about four times, that you set up an account, didn't give the telephone number to your dad. You didn't give the credentials to him. You set up the account in your own name." (Pages 34-35). Judge Whitwell is saying that the fact that Sullivant, Jr. set up the account and didn't give the login information to Sullivant, Sr. is what is in the record about four times. Sullivant, Jr. fails to recognize and admit that opposing counsel has never once used the term

"PIN" during a hearing or in any pleadings. All emails and correspondence used the terms credentials or login.

7. Sullivant Jr.'s Claim that Judge Whitwell was not Truthful in his Order Denying the Petition's Motion to Recuse.

Sullivant, Jr. only refers to the portion of Judge Whitwell's order where he states that Dr. Perkins' report addressed testamentary capacity. While Dr. Perkins' report did not say those specific words it did state that Sullivant, Sr. "has the awareness and ability to voice his wishes and needs but due to his impaired cognitive function does not have the capacity to consistently execute those wishes."

Conclusion.

Sullivant, Jr. fails to satisfy his burden of persuasion as to the impartiality of the Trial Court Essentially, Sullivant, Jr. fails to provide facts or evidence that support that Judge Whitwell demonstrated a "manifest abuse of discretion." There are, of course, orders and statements made at hearings by the trial court that evidence the Sullivant, Jr.'s attempt to re-litigate and re-state issues previously ruled on by the court, which were stopped by the trial court. Judge Whitwell has provided Sullivant, Jr. much latitude given that he is acting pro se and, perhaps due to this, Sullivant, Jr. was not as prepared as practicing attorney. Accordingly, in the present case, in addition to a complete lack of merit as no reasonable person would question Judge Whitwell's impartiality, Sullivant Jr.'s Motion for Recusal wasn't remotely timely and showed a disregard of the Uniform Chancery Court Rules and Sullivant, Jr. failed to follow the proper mandated procedure. Instead, it was not until his Motion for Summary Judgment was denied, and then was subsequently denied by this Court following Sullivant, Jr.'s Petition for Interlocutory Appeal, that Sullivant, Jr. filed his Motion for Recusal.

For these reasons, Sullivant, Jr.'s request for Judge Whitwell to recuse should be denied.

This the 29th day of August, 2023.

ROBERT SULLIVANT, SR.,

BY: */s/ Kayla Ware*
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, Kayla Ware, do hereby certify that a true and correct copy of the foregoing has been furnished by E-Mail on this 29th day of August, 2023, to:

Robert Sullivant, Jr.
robert@steelandbarn.com

Honorable Robert Q. Whitwell
sweathersbee@lafayettecoms.com

/s/ Kayla Ware
KAYLA WARE (MSB #104241)