



Supreme Court of Appeals State of West Virginia

News

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Judicial Investigation Commission dismisses complaint against Justice Robin Davis

For immediate release

CHARLESTON, W.Va. – The West Virginia Judicial Investigation Commission voted unanimously on May 22, 2015, to dismiss a complaint filed against Supreme Court Justice Robin Davis.

The complaint was filed April 16, 2015, by Bill Maloney. The JIC investigation report was given to Mr. Maloney and Justice Davis on June 17. Justice Davis authorized the release of the report today.

The commission found that “there is no evidence to support a finding of probable cause that Respondent violated the Code of Judicial Conduct.”

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BEFORE THE JUDICIAL INVESTIGATION COMMISSION OF WEST VIRGINIA

Complainant: Bill Maloney
340 Morgan Hill Road
Morgantown, WV 26508

Complaint No. 32-2015

Respondent: The Honorable Robin Jean Davis, Justice
Supreme Court of Appeals of West Virginia
Capitol Complex
Building One, Room E-306
Charleston, West Virginia 25305

The matter is before the Judicial Investigation Commission upon a complaint filed on April 16, 2015, setting forth certain allegations against the Honorable Robin Jean Davis, Justice of the Supreme Court of Appeals of West Virginia (hereinafter sometimes referred to as "Respondent"). In the Complaint, it was alleged that the justice violated Canons 2A, 3B(4) and (5), 3E, and 4 of the Code of Judicial Conduct.

Upon receipt of the complaint, an investigation was conducted pursuant to the Rules of Judicial Disciplinary Procedure. After a review of the complaint and attachments, the information and documents obtained by our Counsel, and the pertinent Canons contained in the Code of Judicial Conduct, the West Virginia Judicial Investigation Commission (hereinafter "Commission") voted unanimously to dismiss the matter at its May 22, 2015 meeting for the following reasons.

STATEMENT OF FACTS

Justice Davis was elected as a Supreme Court Justice to an unexpired term in November 1996, and has served in that office since December 1996. After being elected to a full twelve-year term in 2000, she was once again elected to another twelve-year term in 2012. She has

served one-year terms as Chief Justice in 1998, 2002, 2006, 2007, 2010 and 2014, and is, in years served, the senior jurist on the Court. Justice Davis has never been the subject of judicial discipline. Justice Davis has been married to Charleston Attorney Scott S. Segal for approximately 33 years. Scott Segal is a very successful trial lawyer and is the owner of the Segal Law Firm that specializes in personal injury civil actions, with an emphasis on class actions and complex mass litigation.

The information accessible from court records is that on or about September 4, 2009, 87-year-old Dorothy Douglas was admitted to Heartland Nursing Home in Charleston, West Virginia. After spending 19 days in Heartland she was transferred to Cabell-Huntington Hospital and finally to a hospice care facility where she died in mid-October 2009.

On May 27, 2010, Mrs. Douglas' son, Tom, individually and on behalf of her estate (hereinafter "Plaintiffs"), filed a wrongful death lawsuit against various corporate entities related to Heartland (hereinafter "Heartland Defendants") in Kanawha County Circuit Court. The case was styled *Manor Care, Inc. v. Douglas*, Kanawha County Civil Action No. 10-C-952. Plaintiffs were represented by McHugh Fuller Law Group, LLC, of Hattiesburg, Mississippi. The Heartland Defendants were represented by the Charleston law firm of Steptoe & Johnson, PLLC. **Attorney Scott Segal was not involved in the suit.**

When the case went to trial on July 26, 2011, the McHugh Fuller attorneys representing Plaintiffs were Amy J. Quezon, Esquire, and A. Lance Reins, Esquire. On August 5, 2011, the jury returned a verdict in favor of Plaintiffs and awarded \$1,500,000.00 in damages because of violations or deprivations of the West Virginia Nursing Home Act; \$5,000,000.00 each in compensatory damages to the Douglas children and the estate; and \$80,000,000.00 in punitive

damages. When the Circuit Court entered a judgment order on October 20, 2011, it reduced the \$5,000,000.00 award to the Douglas children to \$4,594,615.22 to comply with the Medical Professional Liability Act (hereinafter "MPLA") noneconomic cap.

Plaintiffs then filed a Motion to Alter or Amend the Judgment based upon the MPLA noneconomic cap, but it was denied by the Circuit Court on January 9, 2012. The Heartland Defendants filed a Motion to Alter or Amend the Judgment, challenging the award of Punitive Damages. Defendants also filed a Motion for Judgment as a Matter of Law or in the Alternative for a New Trial. After a hearing on these Motions, on April 10, 2013, the Circuit Court denied Heartlands' motions. **Again, neither Respondent's husband nor any members of his firm were involved in any of the post-trial proceedings.**

On May 9, 2013, the Heartland Defendants appealed the case to the Supreme Court of Appeals of West Virginia. They filed their appeal brief on August 12, 2013. This time, the Heartland Defendants were represented by the Charleston law firm of Bailey & Glasser, LLP. Attorneys Quezon and Reins, Michael J. Fuller and three other attorneys from the McHugh Fuller Law Group continued to represent the Plaintiffs in the appeal. The Plaintiffs' brief was filed on September 25, 2013, and the Heartland Defendants' reply brief was filed on October 16, 2013. The matter was argued before the Court on March 5, 2014. **No member of Attorney Segal's firm participated in the appeal.**

The Court released its decision on June 18, 2014. *See Manor Care, Inc. v. Douglas*, 234 W. Va. 57, 763 S.E.2d 73 (2014). The Court affirmed the lower court decision in part and reversed and remanded in part in favor of the Heartland Defendants. A pertinent part of the opinion stated:

The order is reversed based upon our finding that the NHA portion of the verdict form was fatally vague; the NHA claim is dismissed, and the accompanying \$1.5 million award is vacated. In addition, the circuit court's order is reversed insofar as it recognized a breach of fiduciary duty claim against a nursing home. The breach of fiduciary duty claim is, therefore, dismissed and the accompanying \$5 million award is vacated. Finally, we reverse the punitive damages award and remand with instructions to the circuit court to give Mr. Douglas a period of thirty days from the date the mandate for this opinion is issued to advise the circuit court whether he will accept remittitur in the amount of \$48,021,478.07, which would reduce the punitive damages award to \$31,978,521.93, or submit to a new trial on punitive damages only.

Id. at ___, 763 S.E.2d at 108. Thus, the net effect of the Supreme Court's ruling was to lower the Douglas award from \$91,094,615.22 to \$36,573,137.15 or to just 40% of the original award. The majority opinion was written by Justice Robin Davis.

Meanwhile, another wrongful death nursing home case, styled *AMFM, LLC v. Peggy Sue Davis*,¹ Supreme Court Case No. 14-0319, was pending before the Supreme Court. The nursing home was represented by the Charleston law firm of Flaherty, Sensabaugh & Bonasso, and Ms. Davis was represented by Attorney Fuller. On January 9, 2015, the Clerk of the Supreme Court sent the following letter to the attorneys:

On behalf of Justice Davis and in light of the requirements of Canon 3E(1)(c) of the Code of Judicial Conduct, I am writing to disclose certain information that has recently come to her attention involving [Attorney Fuller]. Justice Davis' husband Scott Segal – who is an attorney in private practice and who is not involved in this matter – previously engaged in a business transaction with [Attorney Fuller] that involved the private sale of an airplane. That business transaction took place several years ago. Justice Davis had no involvement in the transaction, financial or otherwise, and Justice Davis is of the opinion that there is no basis for her disqualification in this matter.

Nevertheless, out of an abundance of caution and in order to avoid the appearance of impropriety, Justice Davis requests that counsel of record inform the Clerk of the Court in writing, no later than noon on Tuesday, January 13,

¹ Peggy Sue Davis is not related to Respondent.

2015, whether there is an objection to Justice Davis' participation in this appeal. If there is an objection, the objecting party must file a motion for disqualification under Rule 33 of the Rules of Appellate Procedure for consideration by Justice Davis.

On January 30, 2015, the nursing home attorneys filed a Motion to Disqualify Justice Davis pursuant to Rule 33 of the West Virginia Rules of Appellate Procedure.² On February 5, 2015, Justice Davis promptly responded by submitting a 29-page response to the Motion to Dismiss. In deciding not to disqualify herself, the Justice reiterated that: (1) she never had a personal, business, financial, or social relationship with Attorney Fuller; (2) her husband had never been involved in the instant case; (3) the sale by her husband of a firm airplane through a broker to Attorney Fuller over three years ago did not create a conflict or the appearance of one; and (4) no perceived bias in favor of Attorney Fuller can be attributed to her given the relatively small amount of the campaign donations at issue when viewed in light of the \$1.3 million in contributions raised for her 2012 re-election.³

On April 16, 2015, Morgantown resident Bill Maloney (hereinafter sometimes identified as "Complainant") filed the instant ethics complaint against the Justice alleging that she violated Canons 2B, 3B(4) and (5), 3E, and 4 of the Code of Judicial Conduct. Specifically, Complainant asserted that Respondent failed to timely disclose any potential conflict in the *Douglas* matter and did not voluntarily recuse herself because her husband had sold his firm's airplane to Attorney Fuller and because Attorney Fuller had donated money to her 2012 re-election campaign.

² Rule 33(b) of the West Virginia Rules of Appellate Procedure covers grounds for disqualification and provides that "[a] Justice shall disqualify himself or herself, upon proper motion or *sua sponte*, in accordance with the provisions of Canon 3E(1) of the Code of Judicial Conduct or, when *sua sponte*, for any other reason the Justice deems appropriate.

³ Two-thirds of this amount was Respondent's personal contribution to the campaign.

Complainant also alleged that Respondent improperly scolded the Heartland Attorney during oral argument by “warning him not to defend his client against the subjective characterizations made by . . . Mr. Fuller and adding emotionally charged language that was not in the case record.” Lastly, Complainant asserted that Respondent did not “act to moderate her or her husband’s extra-judicial activities to minimize the risk of conflict with judicial obligations” as it pertained to her husband’s sale of the airplane.

Immediately after filing the ethics complaint Mr. Maloney issued a press release on his office letterhead that appears to the Commission to be a blatant attempt to garner free publicity for himself.⁴ It gives the impression that Mr. Maloney was motivated by self-seeking political and egotistical purposes because Mr. Maloney, a two-time unsuccessful candidate for Governor of West Virginia, chose to violate the confidentiality Rule for filing complaints when he issued the rapacious press release that was designed to convict Justice Davis in the court of public opinion before any decision on the merits was reached by the Judicial Investigation Commission. Complainant’s press release provided in pertinent part:

Today, Bill Maloney announced that he has filed a complaint with the Judicial Investigation Commission of West Virginia about Justice Robin Davis, her husband, and a personal injury lawyer that purchased a million-dollar Learjet from them and later appeared before the Supreme Court of Appeals of West Virginia. . . .

⁴ Respondent issued the press release despite his understanding that the details of complaints filed are confidential. Page 6 of the Complaint form plainly states: “In filing this complaint, I accept and understand that: Rule 2.4 of the WV Rules of Judicial Disciplinary Procedure provides that the details of complaints filed or investigations conducted by the Office of Disciplinary Counsel shall be confidential . . . unless the judicial officer has been admonished by the Judicial Investigation Commission or a Statement of Charges has issued. The Rule of Confidentiality attaches and becomes effective upon the filing of the complaint.” The confidentiality of the complaints and investigations is also spelled out in the brochure accompanying the Complaint form and at various locations on the Commission website.

"The relationship between personal injury lawyers and the West Virginia judiciary has moved from cozy to unethical. The taxpayers have an expectation of fairness and impartiality from our judges. Without it, we're lost. The West Virginia Rules of Professional Conduct are crystal clear and the facts of the matter are essentially undisputed," concluded Maloney.

Attached to the Complaint against Justice Davis were selected articles focusing upon ABC News stories aired on December 2, 2014, on ABC's nightly news and on Nightline accusing Justice Davis of engaging in unethical behavior for not disqualifying herself from hearing the Douglas case on appeal because her husband had sold his law firm's Lear Jet to Attorney Fuller in December 2011 for approximately \$1,000,000.00 and because the Mississippi attorney and others associated with him in some manner had donated a total of \$35,000.00 to Respondent's 2012 re-election campaign committee.

The Commission is an independent body with authority to charge judges and justices with violations of the Code of Judicial Conduct. However, in exercising that authority to investigate and determine whether probable cause exists to formally charge a justice with a violation of the Code of Judicial Conduct, the Commission does not accept as proof allegations made in the mass media. This is particularly true of the written synopsis of the December 2014 ABC News report, as well as the stories from West Virginia media that repeated the unprincipled allegations made by those involved in creating the so called ABC News story that Mr. Maloney attached to his complaint as his evidence to support the allegations against Justice Davis.

An axiom of journalism is "don't invent." The manner in which ABC News treated our highly respected Justice and our Supreme Court of Appeals causes the Commission to conclude that ABC News is not aware of the rigorous standard implicit in that axiom. Not only did it

make a story without any investigation of the true facts and without an understanding of a justice's ethical obligation to serve on cases and not permit "judge shopping" by those who attempt to manipulate the outcome of cases for their own benefit, but it then recruited a person identified as an expert on judicial ethics at a law school to opine on ABC's version of the "airplane deal." Unfortunately that "expert" felt free to comment -- assuming without questioning whether the accusations were true -- that it was not proper to fail to disclose the airplane purchase. Then, to enhance its noisome attack on our West Virginia judicial system, ABC News felt the need to vilify and debase our highest court by asserting that "[t]he nursing home case is just the latest to prompt questions about the actions of the highest court in the small Appalachian state where intimate bonds in the legal and business community have repeatedly created thorny ethical entanglement." This left little doubt in the minds of the enlightened and fair minded that this was not meant to be an accurate news story.

It is the finding of the Commission that at the time Justice Davis presided over the *Douglas* case and wrote the opinion, she was unaware that Attorney Fuller had donated and caused other donations to be made to her 2012 re-election campaign. In compliance with Canon 5C(2) of the Code of Judicial Conduct,⁵ Respondent had a campaign committee that was responsible for accepting campaign contributions. In an effort to avoid any disqualification issues, Respondent has consistently shielded herself from knowing who contributed to her

⁵ Canon 5C(2) provides that "[a] candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate. . . Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy."

campaigns⁶ since she first ran for office in 1996. Respondent utilized this practice again in her 2012 campaign. She only became aware that Attorney Fuller had contributed to her campaign as a result of the ABC story.

Mr. Maloney accused Justice Davis of not disclosing the airplane "deal." At some point in time Justice Davis learned that her husband's firm had sold the airplane through a broker to Attorney Fuller, but she does not recall when she learned of the sale. However, she did not know any other details regarding the sale -- including the purchase price -- until after the ABC News story aired.

Justice Davis is a highly respected and independent jurist. Her opinions in the many issues before the Court leave no doubt that she is neither pro-plaintiff nor pro-defendant. She is a judge who has grit combined with intelligence and enjoys the reputation of an independent thinker and a leader on our highest Court. Her husband is one of the most successful personal injury attorneys in West Virginia. When she was elected to the Supreme Court of Appeals, both the Justice and her husband -- with a countless number of personal injury cases -- were sensitive of the need to make sure that their positions would not cause any conflict in their responsibility to ethically perform their jobs. Both now enjoy a well-known and acknowledged reputation for taking careful measures to ensure that each does not know about the inner workings and dealings of the others legal work or any business related to that work. The sale of the firm's plane would not have been a significant event in her demanding judicial position.

⁶ The Commentary to Canon 5C(2) strongly discourages judicial officers from knowing who contributed to their campaign. The Commentary states that "[t]hough not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E."

It is also important to know that Attorney Segal's relationship with Attorney Fuller was limited to that single business transaction and that it happened in December 2011. For her part, Justice Davis has no personal, social, or business relationship with Attorney Fuller beyond having presided over cases in which he has appeared before the Supreme Court.

CONCLUSIONS

Even though the Commission questioned Mr. Maloney's motives for filing a complaint that was based in large part on the inaccuracies in the ABC News broadcast, the complaint was treated with the same careful investigation and review that is afforded to all complaints against judges. To address the allegations contained in the instant complaint, the Commission reviewed Canons 2A, 3B(4) and (5), 3E(1)(c) and (d) and Canon 4D(1) of the Code of Judicial Conduct.

The prohibition against behaving with impropriety or the appearance of impropriety contained in Canon 2A applies to both the professional and personal conduct of a judge. *See Commentary, Canon 2A.* Judges must expect to be the subject of constant public scrutiny. *Id.* Therefore, a judge must "accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." *Id.* The test for appearance of impropriety is whether the conduct creates in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired. *Id.*

Whenever a disqualification question occurs that is based upon a relationship, an analysis must be made of when that relationship rises to a level causing a reasonable questioning of a judge's impartiality. In *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994), the Court considered whether the circuit court was correct in holding that a

search warrant issued by a magistrate was void because the magistrate was married to the Chief of Police, whose officer had obtained the warrant. The Court held that in any criminal matter where the magistrate's spouse was involved, the magistrate would be disqualified from hearing that matter. The Court declined to extend a *per se* rule to other members of the police force. The fact that the magistrate's spouse was the chief of police of a small agency did not automatically disqualify the magistrate who could be otherwise neutral and detached from issuing a warrant sought by another member of the police force.

In *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995), the Court held that a judge should disqualify himself or herself from any proceeding in which his impartiality might reasonably be questioned. The Court noted that the avoidance of the appearance of impropriety is as important in developing public confidence in the judicial system as avoiding impropriety and that the judge should take appropriate action to withdraw from a case in which the judge deems himself or herself biased or prejudiced. *Tennant* cited the commentary to Canon 3E(1), which states that a judge should timely disclose on the record information which he or she believes the parties or their lawyers might consider relevant to the question of disqualification. Litigants and counsel should be able to rely on judges complying with the Code of Judicial Conduct. There is no obligation imposed on counsel to investigate the facts known by the judge which could possibly disqualify the judge. Rather, the judge has a duty to disclose any facts even if the judge does not feel that they are grounds for disqualification *sua sponte*.

Tennant also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. In so doing, the Court set forth a balancing test between

the two concepts. While giving consideration to the administration of justice and the avoidance of the appearance of unfairness, a judge must also consider whether cases may be unfairly prejudiced or delayed or discontent may be created through unfounded charges of prejudice or unfairness made against the judge. The Court noted that the standard for recusal is an objective one. Facts should be viewed as they appear to the well-informed, thoughtful, and objective observer rather than the hypersensitive, cynical and scrupulous person.

Canon 4D(1) not only requires a judge to avoid financial and business dealings that involve him or her in frequent transactions or continuing business relationships with persons likely to come before the Court; it also obliges the judge to encourage family members from engaging in similar dealings. *See Commentary, Canon 4D(1)*. This provision is "necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification." *Id.*

In applying the foregoing to the matter at hand, the Commission found that Respondent followed appropriate procedure, was not required to disqualify herself in either nursing home case, and therefore did not violate the Code of Judicial Conduct. The sale of the airplane by the Segal Law Firm to Attorney Fuller occurred in December 2011 while the *Douglas* case was still winding its way through circuit court and an appeal was only a possibility at that time. The transaction was an isolated one. While Respondent became aware that her husband had sold the firm plane to Attorney Fuller and bought another one, she did not know any details of the sale -- including the purchase price -- until ABC News revealed them. Both Respondent and her husband have long established rules in place to ensure that she is not involved in and does not know about the firm's inner workings. Respondent has never had any personal, social,

financial, or business dealings with Attorney Fuller. He is simply another attorney who appears in her Court. Her husband has no personal or social relationship with Attorney Fuller and any business dealings were limited to a single transaction involving the sale of the Segal firm plane to the McHugh Fuller firm. Respondent and her husband had absolutely no economic or other interest whatsoever in or related to the subject matters in controversy – the nursing home litigation set forth above. They were not parties or witnesses to the proceedings, and Respondent's husband did not act as a lawyer in either case.

As for the campaign contributions involving Attorney Fuller, Respondent simply did not know of them at the time she presided over the Douglas case. When she became aware of the campaign contribution and the Lear Jet issues created by the sensationalized ABC News story, she properly disclosed them in the *AMFM* case but was certainly under no obligation to disqualify herself from presiding over that matter. As was noted by the Michigan Supreme Court in *Adair v. Michigan Dept. of Education*, 474 Mich. 1027, 1041-42, 709 N.W. 567, 579-81 (2006):

That a judge has at some time received a campaign contribution from a party, an attorney for a party, a law firm employing an attorney for a party or a group having common interests with a party or an attorney, cannot reasonably require his or her disqualification. For there is no [elected] justice in . . . modern times who has not received campaign contributions from such persons. Nor is there a justice whose opponents have not received campaign contributions from such person. And, increasingly, "opposition" campaigns have arisen in which contributions are specifically undertaken against particular justices. It is simply impossible for the Supreme Court, as well as most other courts . . . to function if a lawful campaign contribution can constitute a basis for a judge's disqualification. . . . There will simply be no end to the alleged "appearance of impropriety" if every contribution to a candidate, or every contribution to an opposing candidate, or every independent opposition campaign, is viewed as raising an ethical question concerning a judge's participation in a case in which a contributor or an opposition contributor is involved. . . . If justices of the

Supreme Court, in particular, were to recuse themselves on the basis of campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would be an increasing number of recusal motions designed to effect essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities.

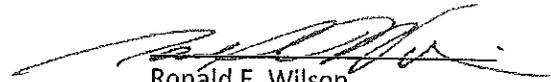
The Commission also finds that Respondent did not violate Canons 3B(4) or (5) during oral argument in the Douglas case or in the subsequent majority opinion. In the appellate arena, attorneys expect judges to ask tough questions. Attorneys also expect judges to play devil's advocate from time to time. It is the nature of the practice. Attorneys also envisage that judges will write persuasive opinions. In order to be persuasive, a judge may sometimes use "emotionally charged" language. As Aristotle once noted:

Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others. This is true generally whatever the question is, and absolutely there where the exact certainty is impossible and opinions are divided.

Based upon the foregoing, it is the unanimous decision of the Judicial Investigation Commission that there is no evidence to support a finding of probable cause that Respondent violated the Code of Judicial Conduct. Accordingly, the Commission has dismissed the complaint against the Honorable Robin Jean Davis, Justice of the Supreme Court of Appeals of West Virginia, and has closed its file in this matter.

A majority of the Commission members also agree that it was necessary to express its feelings in this document in the manner it did to acknowledge the irreparable harm that can occur to a judge's reputation when a baseless complaint is used for a press release in violation of Rule 2.4 of the Rules of Judicial Disciplinary Procedure that provides that the details of

complaints filed or investigations conducted by the Office of Disciplinary Counsel shall be confidential.



Ronald E. Wilson,
Chairperson Judicial
Investigation Commission

Date June 17, 2015

REW/tat