

IN THE CHANCERY COURT FOR KNOX COUNTY TENNESSEE

James Gray,)
Plaintiff)
and)
Bee DeSelm and)
John Schmid)
Intervening Plaintiffs)
v.) No. 166649-1
Timothy Hutchison,)
Knox County Tennessee, and)
Knox County Election)
Commission)
Defendants)

MOTION TO DISQUALIFY

Plaintiff respectfully moves this Court and all judges in Knox County are disqualified requests immediate expedited action be taken for a judge from outside Knox County to be designated to hear this case.

This Court has under advisement a third motion by Plaintiff Bee DeSelm in *DeSelm v. Hutchison*, 164615-1.

Although Supreme Court Rule 10, Cannon 3 F. provides for a specific procedure to remit disqualification, the Knox County Law Director, after the April 3rd hearing, filed a motion that Plaintiff DeSelm had "waived" this Court's disqualification by not rearguing that disqualification on April 3rd.

Because of the position taken by the Knox County Law Director the same motions filed in *DeSelm v. Hutchison*, 164615-1 are relied on in this case for this Court to disqualify itself as required by Supreme Court Rule 10, Canon 3 E.

Memorandum

Tennessee Supreme Court Rule 10, Canon 3 E. provides for disqualification of a Court as follows:

E. Disqualification. (1) A judge shall disqualify himself or 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 [FN*] of disputed evidentiary facts concerning the proceeding;
- (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
- (c) the judge knows [FN*] that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household [FN*], has an economic interest [FN*] in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis [FN*] interest that could be substantially affected by the proceeding;
- (d) the judge or the judge's spouse, or a person within the third degree of relationship [FN*] to either of them, or the spouse of such a person:(i) is a party to the proceeding, or an officer, director or

trustee of a party; (ii) is acting as a lawyer in the proceeding;

¹(iii) is known [FN*] by the judge to have a more than de minimis [FN*] interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge [FN*] likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal, fiduciary, and economic interest and make a reasonable effort to keep informed about the personal economic interest of the judge's spouse and minor children residing in the judge's household.

Commentary

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. . . . A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.
. . . ;

(1) This Court, as are all judges in Knox County, are on the May 2, 2006 ballot challenged by Plaintiffs Grays, DeSelms and Schmid.

(2) The last day for a candidate to qualify to get on the May 2, 2006 primary ballot to run against this Court or any other judge in Knox County is April 12, 2006.

¹

(3) This Court, and all judges in Knox County, have a personal interest in this case not being decided prior to April 12, 2006.

(4) Because Knox County Charter § 7.01 requires that a candidate at a general election be elected by a Primary Election, this Court and all judges in Knox County, have a personal interest in the May 2, 2006 primary being held where no candidates will be permitted to be nominated by conventions to run against this Court for re-election.

(5) This Court is running on the Republican Ticket with Defendant Hutchison and shares Republican Party campaign funds for this Court's re-election.

(6) This Court is running on the Republican Ticket with Defendant Hutchison and shares Republican Party campaign funds for this Court's re-election with Sheriff Hutchison creating both a political interest and a financial interest in this Court.

(7) This Court is running on the Republican Ticket with Knox County Law Director Mike Moyers and shares Republican Party campaign funds for this Court's re-election with Mr. Moyers creating both a political interest and a financial interest in this Court.

(8) Knox County Law Director Mike Moyers is the only candidate qualified in the Republican Primary and has no opposition in the Democratic Primary for Part III of this Court creating both a political interest and personal interest in this Court judgment toward an apparent co-judge of this Court.

(9) On April 5, 2006 this Court, after holding that Plaintiff and Bee DeSelms did not have standing on pre-5:00 p.m. March 31, 2006 actions, *sua sponte* and without providing Fifth Amendment/Article 1, § 8 constitutional notice and an opportunity to be heard, prejudged issues in this case.

(10) This case will require a judge to construe the 1994 petition and ballot and determine, as a matter of first impression, which language becomes a part of the Knox County Charter. The 1994 petition expressly excludes judges from term limits. The 1994 ballot does not. Every judge in Knox County has an interest in, and may be affected by, the decision in this case as to the lawfulness and construction of the 1994 Knox County ballot adopting term limits. Issues that may be presented are:

A. Whether Knox County Charter § 4.01 created Knox County offices for Circuit, Criminal and Chancery judges, and if the answer is yes;

B. Whether Knox County can lawfully enact a charter provision to make these judges Knox County officers; and, if the answer is yes;

C. Whether the ballot provision that did not exclude judges from term limits, or the Moyers document that does exclude judges, controls on the issue of exempting judges from term limits; and

D. Whether term limits can be imposed on a Circuit, Criminal or Chancery court by a county Charter.²

(11) Every judge in Knox County has a "direct and immediate" financial interest in this case sufficient to establish that judge's standing to sue;³

(12) Every judge in Knox County has a "direct and immediate" financial interest in this case that would be sufficient to disqualify that judge as a Knox County juror from sitting on this case;⁴

² Discussed separately *infra* at page 5.

³ *Crampton v. Zabriskie*, 101 U.S. 601, 25 L.Ed. 107 (1879); *Frothington v. Mellon*, 262 U.S. 447, 486, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); *Doremus v. Board of Education*, 342 U.S. 429, 433-434, 72 S.Ct. 394, 397, 96 L.Ed. 475 Supreme Court of the United States (U.S. 1952); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *Taub v. Com. of Ky.*, 842 F.2d 912, (C.A.6 (Ky.), 1988)

⁴ *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 971 (4th Cir. 1971); *Getter v. Wal-Mart*, 66 F.3d 1119 (10th Cir. 1995); *United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir., 2000); *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968)

(13) Defendant Hutchison is an officer of this Court and every court in Knox County;⁵

(14) This Court and every judge in Knox County has a staff, except secretary, that are employees at-will of Defendant Hutchison;⁶

(15) This Court and every judge in Knox County permits employees at-will of Defendant Hutchison to have access to the Court's chambers and staff and the potential or appearance of intentional or inadvertent *ex parte* communications by Defendant Hutchison's at-will employees is great;⁷

(16) This Court and every judge in Knox County is dependent on Defendant Hutchison for prompt and efficient service of process of the court and enforcement of the court's orders;⁸

(17) This Court and every judge in Knox County is dependent on Defendant Hutchison for the judge's personal safety;⁹

⁵ T.C.A. § 8-8-201(2)(A); Sup.Ct.Rule 10, Canon 3(C)(2); Sup.Ct.Rule 10, Comments "bailiffs"; *Clark v. State*, 1876 WL 5020, ·2 (Ten.1976); *In re Cameron*, 151 S.W. 64 (1912).

⁶ Plaintiffs the Court take judicial knowledge of this fact.

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(18) The grounds submitted for disqualification under Article VI, § 11 of the Tennessee Constitution and Supreme Court Rule 10, Canon 3 E. impact the fair and efficient administration of justice in Knox County.

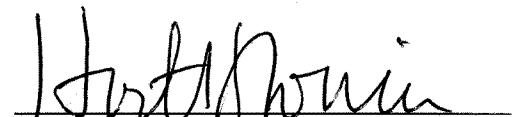
(19) In 1912 the Tennessee Supreme Court in a civil disbarment trial stated, "[I]t is of immense importance, not only that justice shall be administered ..., but that [the public] shall have no sound reason for supposing that it is not administered." *In re Cameron*, 151 S.W. 64, 76 (1912).

The standard for recusal is set out in *Alley v. State*, 882 S.W.2d 810, 820 (Tenn.Cr.App. 1994). When a motion to recuse is made, a judge should grant the motion whenever his or her "impartiality might reasonably be questioned." Code of Judicial Conduct, Canon 3(C), Tenn.Sup.Ct.R. 10, *State v. Jimmy D. Dillingham*, No. 03C01-9110-CR-319, 1993 WL 22155 (Tenn.Crim.App., Knoxville, Feb. 3, 1993). Tennessee, like many jurisdictions, employs an objective rather than a subjective standard. Thus, while a trial judge should grant a recusal whenever the judge has any doubts about his or her ability to preside impartially, *Lackey v. State*, 578 S.W.2d 101, 104 (Tenn.Crim.App. 1978), cert. denied (Tenn. 1979), recusal is also warranted when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality. *State v. Cash*, 867 S.W.2d 741 (Tenn.Crim.App. 1993).

Alley v. State, 882 S.W.2d 810, 820 (Tenn.Cr.App. 1994).

(20) The test is an objective standard whether a person of ordinary prudence in the judge's position, knowing all

of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.



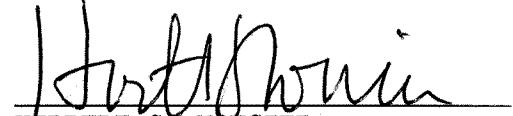
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following:

1. Michael E. Moyers, The Knox County Law Director;
2. Robert H. Watson, Jr., Attorney for Timothy Hutchison;
3. Jerold Becker, personal attorney for Michael E. Moyers;
4. James Murphy, attorney for the Knox County Election Commission;
5. Janet Kleinfelter, Senior Counsel, Tennessee Attorney General's Office, Attorney for Coordinator of Elections for the State of Tennessee.
6. Randall E. Nichols, Knox County District Attorney General.



HERBERT S. MONCIER
Attorney for Plaintiff

