STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LEONARD POZNER,
Plaintiff,

vs.

Case No. 18CV3122

JAMES FETZER;
MIKE PALECEK;
WRONGS WITHOUT WREMEDIES, LLC;
Defendants.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO RECUSE

INTRODUCTION

Plaintiff Leonard Pozner opposes Defendant James Fetzer's baseless Motion to Recuse. Fetzer argues that because the Court keeps denying his motions, the Court must be biased against him. Not surprisingly, Fetzer fails to mention the number of times the Court's rulings have been upheld on appeal. Regardless, ruling against a party does not require a circuit court to recuse.

This Court should deny Fetzer's Motion to Recuse for two reasons. First, Fetzer cannot meet his burden under Wis. Stat. § 757.19(2)(g). This Court has not suggested that it cannot act in an impartial manner and there is not even a suggestion of an appearance of impartiality. Second, Fetzer has no evidence of subjective or objective bias, and thus fails to establish a basis for recusal on due process grounds. Fetzer offers no evidence to support his motion, much less evidence sufficient to meet his burden of proving judicial bias by a preponderance of the evidence. This Court should deny the Motion to Recuse.

ARGUMENT

I. Fetzer Has Not Shown Recusal Is Appropriate Under Wis. Stat. § 757.19(2)(g).

In bringing his Motion to Recuse, Fetzer fails to allege that the Court cannot act in an impartial manner or that there is an appearance that the Court could act in an impartial manner. Under Wis. Stat. § 757.19(2)(g) a court must recuse if the court determines that it could not act in an impartial manner or there would be an appearance that it could not act in an impartial manner. The Court made no such determination. *See State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis.2d 175, 183, 186, 443 N.W.2d 662 (1989) (denying a motion to recuse and noting the moving party failed to allege Justice Bablitch made a subjective determination of actual or apparent bias). A judge must recuse under Wis. Stat. § 757.19(2)(g) only if that judge subjectively determines he or she is actually or apparently biased. *Id.* at 183; *State v. Harrell*, 199 Wis. 2d 654, 664, 546 N.W.2d 115 (1996) (concluding that whether a judge is actually or apparently biased is solely for that judge to decide). Indeed, a reviewing court will not second guess a judge's determination. *State v. Carivou*, 154 Wis. 2d 641, 646, 454 N.W.2d 562 (Ct. App. 1990).

Here, the Court has not determined he was actually or apparently biased, nor should it. Rather than rely on facts, Fetzer "assume[s] any Circuit Court Judge" whose impartiality is questioned would "step aside and recuse himself." Dkt. 630 at 7-8. Fetzer cannot support his motion with an assumption.

II. Even If Defendant Fetzer Argued Due Process Requires Recusal, Fetzer Cannot Meet that Standard Either.

Fetzer makes a number of references to due process issues but fails to establish a basis for recusal on due process grounds. To do so, Fetzer would need to provide evidence under either a subjective or objective standard that this Court is biased against him. *In re Paternity of B.J.M.*, 2020 WI 56, ¶ 21, 392 Wis. 2d 49, 944 N.W.2d 542. With respect to the subjective approach,

Wisconsin courts apply the same standard as that under Wis. Stat. § 757.19(2)(g). *State v. Rochelt*, 165 Wis. 2d 373, 379, 477 N.W.2d 659 (1991). As discussed above, Fetzer cannot meet that standard. As explained below, Fetzer cannot meet the objective standard either.

Under the objective standard, a party can establish judicial bias in two ways. *State v. Goodson*, 2009 WI App 107, ¶ 9, 320 Wis. 2d 166, 771 N.W.2d 385. First, a party can establish objective bias by proving objective facts that demonstrate the judge "in fact treated [the party] unfairly." *Id.* Second, a party can establish objective bias by showing there is an appearance of bias that "reveal[s] a great risk of actual bias." *State v. Herrmann*, 2015 WI 84, ¶ 40, 364 Wis. 2d 336, 867 N.W.2d 772 (quoting *State v. Gudgeon*, 2006 WI App 143, ¶ 23, 295 Wis. 2d 189, 720 N.W.2d 114); *see also In re Paternity of B.J.M.*, 2020 WI 56, ¶ 24. Regardless of reason, parties can only obtain recusal based on due process concerns in extreme circumstances. *State v. Pinno*, 2014 WI 74, ¶ 94, 356 Wis. 2d 106, 850 N.W.2d 207. Indeed, recusals required under due process lie at "the outer boundaries of judicial disqualifications," while "[m]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009)).

For example, in *State v. Herrmann*, the circuit court, during the sentencing hearing of a defendant convicted of killing someone while driving drunk, explained that her sister had been killed by a drunk driver and stated that she "ha[d] to make [the defendant] pay." 2015 WI 84, ¶¶ 48-60. Despite these facts, the Wisconsin Supreme Court found recusal was not warranted. In contrast, a circuit court who failed to disclose a string of social media interactions with a party and subsequently reached a decision entirely in the party's favor introduced serious risk of actual bias and due process required recusal. *See In re Paternity of B.J.M.*, 2020 WI 56, ¶¶ 29–35.

Far from evincing an extreme case in which due process requires recusal, Fetzer fails to offer any objective evidence establishing the Court treated him unfairly or appeared biased to an extent that reveals a great risk of actual bias. Fetzer expends considerable energy on describing three adverse rulings: (1) this Court's Decision and Order Denying Fetzer's Motion for Relief From Judgment (Dkt. No. 615); (2) this Court's denial of Defendant Fetzer's Proposed Order (Dkt. No. 624); and (3) this Court's Order on Motion to Seal or Redact a Court Record (Dkt. No. 619). *See generally* Dkt. No. 630. Fetzer seems to think that this Court is biased against him because he lost these baseless motions but, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (evaluating 28 U.S.C. § 455, the federal recusal statute, under an objective bias standard). And for good reason. If parties could force a judge to recuse by pointing to the number of adverse rulings against them, the recusal rules would incentivize parties to engage in bad-faith papering of a court whenever they want a new judge. Accordingly, "only in the rarest circumstances" do adverse judicial rulings by themselves "evidence the degree of favoritism or antagonism" required to establish objective bias. *Id.* None exist here.

Because a court may opine on a party's legal arguments "without being subject to recusal," Fetzer cannot rely on this Court's statements on his filings to support recusal. *State ex rel. Dressler v. Circuit Court*, 163 Wis. 2d 622, 644, 472 N.W.2d 532 (Ct. App. 1991). This Court described the Motion for Relief from Judgment as "rambling," called Fetzer's so-called experts "not helpful," and concluded that his Proposed Order was "[n]either factually or logically meritorious." Dkt. 630 at 7–9. Unless a party can show that the judge's opinion comes from an extrajudicial source or reveals "such a high degree of favoritism or antagonism as to make fair judgment impossible,"

judicial remarks "critical or disapproving of, or even hostile to, counsel, the parties, or their cases" provide no basis to challenge a judge's impartiality. *Liteky*, 510 U.S. at 555.

For example, in *State v. Pirtle*, the Court of Appeals held a judge's remark that the defendant was a "piece of garbage" did not show the judge was biased. *State v. Pirtle*, 2011 WI App 89, ¶ 35, 334 Wis. 2d 211, 799 N.W.2d 492. The court acknowledged that "expressions of impatience, dissatisfaction, annoyance, or even anger" within the bounds of a judge's "ordinary efforts of courtroom administration" are "immune" from claims of bias or partiality. *Id.* at ¶ 34 (quoting *Liteky*, 510. U.S. at 555–56). The court reasoned that the judge's statement that the defendant was a "piece of garbage" resulted from the judge's "justifiable frustration" with the defendant's disruptive behavior and did not "in any sense of the word, reflect objective bias." *Id.* The court thus rejected the defendant's claim of judicial bias. *Id.*

Like the judge's remark in *Pirtle*, the statements quoted by Fetzer cannot show judicial bias because they do not reveal any extrajudicial source for the Court's opinion. To the contrary, they reveal the Court's evaluation of legal arguments Fetzer advanced throughout this litigation. *Cf. State v. Rodriguez*, 2006 WI App 163, ¶ 36, 295 Wis. 2d 801, 722 N.W.2d 163 (holding a judge's evaluation of a defendant's case and potential arguments on an ineffective assistance of counsel claim did not constitute a basis for recusal). And unlike the judge's remark in *Pirtle*, the Court's statements were not personally directed at Fetzer. This further lowers any possibility the statements show a high degree of antagonism such that fair judgment would be impossible. Fetzer cannot show objective bias with his attempt to cherry-pick statements of this Court.

Lastly, Fetzer appears to argue that the fact this Court did not recuse itself under certain provisions of the Code of Judicial Conduct shows the Court was actually or apparently biased. *See* Dkt. 630 at 7–8. Fetzer misunderstands the Code of Judicial Ethics, which only "governs the ethical

conduct of judges" and "has no effect on their legal qualification or disqualification to act." *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d at 185.

CONCLUSION

Fetzer lacks both legal and evidentiary support for his Motion to Recuse. Fetzer fails to offer any evidence of subjective or objective bias and thus fails to overcome the presumption that a judge acts fairly, impartially, and without prejudice. For the reasons set forth above, Mr. Pozner respectfully requests the Court deny Fetzer's Motion to Recuse.

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QUARLES & BRADY LLP

Electronically signed by Emily M. Feinstein
Emily M. Feinstein (WI SBN: 1037924)
emily.feinstein@quarles.com
33 East Main Street
Suite 900
Madison, WI 53703-3095
(608) 251-5000 phone
(608) 251-9166 facsimile

MESHBESHER & SPENCE LTD.
Genevieve M. Zimmerman (WI #1100693)
1616 Park Avenue South
Minneapolis, MN 55404
Phone: (612) 339-9121
Fax: (612) 339-9188
Email: gzimmerman@meshbesher.com

THE ZIMMERMAN FIRM LLC
Jake Zimmerman (*Pro Hac Vice*)
15 Crocus Hill
Saint Paul, MN 55102
Phone: (651) 983-1896
Email: jake@zimmerman-firm.com

Attorneys for Plaintiff Leonard Pozner