

Order on  
Motion to  
Recuse

91-005

**Court of Appeals  
of the State of Georgia**

ATLANTA, SEPTEMBER 22, 1999

*The Court of Appeals hereby passes the following order:*

**A00A0120. TIME WARNER ENTERTAINMENT CO., L. P. et al. v. SIX FLAGS  
OVER GEORGIA, LLC. et al.**

Six Flags Over Georgia, LLC. and George Deroy, as Trustee of the Six Flags Claims Trust (appellees), have filed a motion and supporting affidavits moving that Presiding Judge Gary B. Andrews of this Court be disqualified from participation in this appeal. The motion alleges that Judge Andrews should be disqualified because he has a personal bias or prejudice concerning James E. Butler, Jr., a lawyer representing the appellees in this appeal.

COURT PROCEDURES

In addressing the motion, procedures adopted by this Court require the following: Judge Andrews must determine the timeliness of the motion and the legal sufficiency of the affidavits. Even if the facts alleged in the affidavits are not true, Judge Andrews is required, for purposes of making a determination on the motion, to assume that the facts as alleged are true, and to determine whether those alleged facts would warrant his disqualification. If Judge Andrews determines the facts alleged in the affidavits would

warrant his disqualification, the motion shall be assigned to another Judge of this Court who shall rule for the Court on all the facts before the Court whether Judge Andrews should be disqualified. If Judge Andrews determines the facts alleged in the affidavits would not warrant his disqualification, this determination shall constitute the ruling of the Court on the motion.

DETERMINATIONS BY JUDGE ANDREWS

In accordance with these procedures, the following determinations were made by Judge Andrews.

The motion to disqualify was timely filed in accordance with Rule 44 of this Court. It follows that a determination must be made as to the sufficiency of the affidavits and whether, assuming the facts alleged in the affidavits are true, those facts would warrant disqualification of this Judge because they show personal bias and prejudice concerning a lawyer representing the appellees.

The disqualification motion alleges that this Judge made statements to a newspaper reporter - later published in a newspaper article - that expressed personal bias and prejudice against Mr. James E. Butler, Jr., the lead counsel for the appellees in this appeal. A supporting affidavit from the newspaper reporter states that the reporter wrote a profile article on Mr. Butler which was published in the Columbus Ledger-Enquirer on June 24, 1996. The reporter states that she contacted this Judge "to get a quote about the subject of my article, Mr. James E. Butler, Jr." The reporter

further states that this Judge agreed to be interviewed for the article and gave the statements which the reporter quoted in the published article attached to her affidavit. The section of the article containing the quotes attributed by the reporter to this Judge reads as follows: (The statements which the reporter says were made by this Judge are underlined.)

State Appeals Court Judge Gary Andrews tells a different story. Butler made the maximum allowable election contribution of \$5,000 to one of Andrews' opponents in the judicial elections, charging that Andrews is too closely tied to insurance industry lobbyists who serve as his campaign chairman and treasurer.

'I have never had my integrity or fairness questioned before,' Andrews said. 'This opposition is a small clique and you have to look at what their motives are - personal financial gain.'

But Butler, who supported all other incumbent judges, said Mark Merritt, an attorney in Lawrenceville, Ga., is supported by 225 other lawyers and is a better candidate than Andrews because he has amore [sic] diverse practice.

Columbus Ledger-Enquirer, June 24, 1996.

An affidavit given by Mr. Butler in support of the disqualification motion states that he supported this Judge's opponents in the 1996 judicial elections because he believed they were superior judicial candidates to this Judge. Mr. Butler further stated that he is lead counsel for the appellees in this appeal and that his fee agreement gives him a financial interest in the outcome of the appeal.

Based on the statements made in the affidavits supporting the motion, this Judge is required to assume for purposes of making a determination on the motion that he made the quoted statements attributed to him. The appellees contend in the disqualification motion that the statements were expressions by this Judge that Mr. Butler was part of a "small clique" that opposed this Judge in the 1996 judicial elections, and that Mr. Butler's opposition was motivated by "personal financial gain." The appellees claim these statements express a personal bias and prejudice concerning Mr. Butler that requires that this Judge be disqualified under Canon 3E (1) (a) of the Georgia Code of Judicial Conduct (GCJC).<sup>1</sup>

Canon 3E (1) (a) of the GCJC provides that: "Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party or a party's lawyer . . ." This Canon sets forth a rule of reason which is to be applied consistent with constitutional provisions, statutes, and case law, as well as in

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<sup>1</sup>In a supplement to the motion, the appellees claim that it was unfair and further evidence of bias and prejudice by this Judge for this Court to enter an order granting the appellants' motion to extend the page limits for briefs filed in this appeal while the motion to disqualify this Judge was pending. Judicial notice is taken that the records of this Court show that this Judge has taken no action on this appeal other than consideration of the disqualification motion. This claim is legally insufficient as a matter of law to support the motion. Court of Appeals Rule 44.

Appellees also contend that the appellants' opposition to the motion to disqualify demonstrates that this Judge is biased and prejudiced, because opposing the motion shows that appellants believe this Judge's participation in this appeal will give them an advantage over the appellees. This contention is also legally insufficient as a matter of law to support the motion. Court of Appeals Rule 44.

the context of all relevant circumstances. GCJC, Preamble. Case law addressing the disqualification issue provides the following guidance.

In order to be disqualifying the alleged bias must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. The alleged bias of the judge must be of such a nature and intensity to prevent the [movant] from obtaining [appellate review] uninfluenced by the court's prejudgment. To warrant disqualification of [an appellate judge] the affidavit supporting the recusal motion must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.

Birt v. State, 256 Ga. 483, 485-486 (350 SE2d 241) (1986) (punctuation and citations omitted); In Re Shafer, 215 Ga. App. 520-521 (451 SE2d 121) (1994). Furthermore, in determining under Canon 3E (1) of the GCJC whether a judge's "impartiality might reasonably be questioned" under the circumstances, the standard is one of objective reasonableness. "'Impartiality might reasonably be questioned' means a reasonable perception, of lack of impartiality by the judge, held by a fair minded and impartial person based upon objective fact or reasonable inference . . ." Baptiste v. State, 229 Ga. App. 691, 694 (494 SE2d 530) (1997); Kelly v. State, 238 Ga. App. 691, 693 (\_\_\_SE2d\_\_\_) (1999).

Applying these standards, it is the determination of this Judge that, being required to assume the truth of the facts stated in the supporting affidavits, the affidavits are yet legally

insufficient to warrant this Judge's disqualification from participation in this appeal.

The statements made in the newspaper article cannot be reasonably construed to express a personal bias or prejudice concerning Mr. Butler, nor do they raise a reasonable question as to this Judge's impartiality in this appeal. The article in which the statements appear shows that they were made in the context of a contested judicial election and a charge that this Judge was too closely tied to insurance industry lobbyists. The statement that, "I have never had my integrity or fairness questioned before," responds to that charge and cannot be reasonably construed as an expression of personal bias or prejudice against Mr. Butler. The further statement that, "This opposition is a small clique and you have to look at what their motives are - personal financial gain," refers on its face to this Judge's opposition in the 1996 election and makes no direct reference to Mr. Butler.

Neither does the article show any personal bias or prejudice concerning Mr. Butler because he supported this Judge's opposition in the election. The reference to the election opposition as a "small clique" simply expresses a belief that the opposition was not a large group. The additional statement that the opposition was motivated by "personal financial gain" states a perceived motivation for the opposition, but it does not otherwise comment on or characterize the motivation. Neither statement expresses

personal bias or prejudice against Mr. Butler or anyone associated with the election opposition.

ORDER OF THE COURT

Based on the above determinations by Judge Andrews, the appellees' motion to disqualify Presiding Judge Gary B. Andrews from participation in this appeal is denied.

*Court of Appeals of the State of Georgia*

*Clerk's Office, Atlanta*      SEP 22 1999

*I certify that the above is a true extract from  
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court  
hereto affixed the day and year last above written.*

*Will. L. Martin, III*