

IN THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

ALBERT LEE ABRAHAM, JR.

PLAINTIFF

VS.

CAUSE NUMBER 2012-0053-CI

R. ARNOLD SMITH, JR., M.D.,
NORTH CENTRAL MISSISSIPPI REGIONAL
CANCER CENTER, and Defendants A Through R,
Being Those Persons or Legal Entities Whose True
Names Have Yet to be Discovered

DEFENDANTS

MOTION FOR RECUSAL OF JUDGE

COMES NOW Ralph Arnold Smith, Jr. ("Dr. Smith") and North Central Mississippi Regional Cancer Center, through counsel, pursuant to Rule 1.15 of the *Uniform Rules of Circuit and County Court*, and files this, his *Motion for Recusal of Judge*, and in support of the motion, respectfully shows to this Court the following.

1. Canon 3(B)(7) of the *Code of Judicial Conduct* provides in relevant part as follows:

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) where circumstances require...for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits...

2. Under Rule 9.06 of the *Uniform Circuit and County Court Rules*, the trial court judge sits as the finder of fact on the issue of competency. A defendant's competency to stand trial is a fundamental constitutional issue that requires a hearing and adjudication by the judge. Rule 9.06 requires that "...trial judges conduct a competency hearing after a mental evaluation is ordered

and conducted.....The Rule requires the court to make its finding a matter of record before the case proceeds to trial...After hearing all the evidence, **the court shall weigh the evidence and make a determination of whether the defendant is competent to stand trial**” (emphasis added). Rule 9.06, *U.C.C.R.*

3. Under Rule 9.06, the trial court judge serves as the finder of fact on the issue of Dr. Smith’s competency to stand trial. Canon 3(B)(7) prohibits the trial judge from engaging in **any** ex parte’ communication. Ex parte’ communication is especially troublesome when the finder of fact (the judge) engages in ex parte’ communication about the very issue for which the judge sits as the finder of fact.

4. Circuit Judge L. Breland Hilburn engaged in ex parte’ contact about the pending competency issue on at least two occasions:

(a) Judge Hilburn sua sponte sought out a forensic psychiatrist in New York, Dr. Roy Lubit, to assist the court with Dr. Smith’s ongoing competency evaluation. Judge Hilburn indicated that Dr. Lubit would conduct a separate competency evaluation, and that Dr. Lubit’s opinion may or may not be the same as the State Hospital or Dr. Gil Macvaugh (Dr. Smith’s privately retained forensic psychologist).

Particularly troubling is that Dr. Lubit claims in his curriculum vitae to have special expertise in challenging the forensic evaluations of others (which would clearly be an adversarial undertaking). Dr. Lubit makes the following claim at the top of page two (2) of his curriculum vitae:

...special expertise in...critiquing forensic evaluations...

See top of page 2 of Exhibit “A” (pages 1 and 2 of Dr. Lubit’s curriculum vitae).

Dr. Lubit advertises the following claim on his “LinkedIn” listing:

“His critiques of the reports of other forensic evaluators (showing that conclusions were based on speculative comments and cherry picking of data) have repeatedly led the reports of others to be withdrawn or ignored.”

Dr. Lubit’s “LinkedIn” listing is attached as Exhibit “B”.

Dr. Lubit also advertises the following claim on his “Jurispro” listing:

He has **special expertise** in evaluating emotional trauma in children and adults (post traumatic stress disorder-PTSD), civil rights cases (section 1983 actions), assessing brain injury, child custody evaluations (including Hague Convention and parental alienation issues), psychological/psychiatric malpractice and **critiquing forensic evaluations** (emphasis added).

Dr. Lubit’s “Jurispro” listing is attached as Exhibit “C”.

Judge Hilburn admits that the judge contacted Dr. Lubit, and that Dr. Lubit “...has agreed to assist the Court in getting the defendant’s mental examination completed.” A true and correct copy of Judge Hilburn’s September 30, 2013 email is attached and is marked Exhibit “D”.

Canon 3(B)(7) clearly prohibits **any** ex parte’ communication with Dr. Lubit. It is clear from Judge Hilburn’s September 30, 2013 email that Judge Hilburn discussed the case with Dr. Lubit at the very time that Judge Hilburn planned to appoint Dr. Lubit as an expert witness.

(b) Judge Hilburn also engaged in ex parte’ communications with the court-appointed forensic psychiatrist at the State Hospital, Dr. Reb McMichael. Apparently, during Judge Hilburn’s communication with Dr. McMichael, the doctor requested assistance with the competency evaluation. Judge Hilburn then proposed the appointment of Dr. James Irby “...at the request of Dr. McMichael...”. A true and correct copy of Judge Hilburn’s October 2, 2013 email is attached and is marked Exhibit “E”. The communications between Judge Hilburn and

Dr. McMichael were conducted without notice to defense counsel and without allowing defense counsel an opportunity to participate in the judge's communications.

5. The trial court judge and the parties concede that Dr. Smith's competency is also an issue in the civil case styled *Albert Lee Abraham, Jr. vs. R. Arnold Smith, Jr., M.D., et al*, cause number 2012-0053. In continuing a prior status conference/hearing in the civil case, Judge Hilburn indicated that the status conference would be rescheduled "...after we get the report from the State Hospital." See attached email from Judge Hilburn dated July 18, 2013, marked Exhibit "F". Judge Hilburn's disqualifying ex parte' communications also require recusal in the civil case.

Ex Parte' Communication Requires Disqualification

6. "Canon 3(B) requires disqualification based upon...ex parte' communications and personal knowledge acquired from the litigants about the cases..." *Mississippi Commission on Judicial Performance v. Lewis*, 913 So.2d 266, ¶11 (Miss.2005). Canon 3 requires that Judge Hilburn disqualify himself from both criminal cases and from the civil case (where Dr. Smith's competency is also an issue).

7. "...For a judge to merely listen to another person involved in pending litigation is a violation of Canon 3 (A)(4)." *Mississippi Commission on Judicial Performance v. Lewis*, ¶12. Canon 3(A)(4) is the predecessor to the current Canon 3(B)(7). Judge Hilburn went further than merely listening—Judge Hilburn apparently initiated and engaged in ex parte' communications with Dr. Lubit (whom the judge proposed to appoint as an expert). Judge Hilburn also engaged in ex parte' communications with Dr. Reb McMichael about Dr. Smith's ongoing evaluation. Judge Hilburn, sitting as the trier of fact on the competency issue, engaged in prohibited ex parte communications about the very issue for which Judge Hilburn sits as the trier of fact.

8. A reasonable person knowing all the circumstances would harbor doubts about the impartiality of Circuit Judge L. Breland Hilburn. When a judge engages in ex parte communication about a pending matter with an expert witness that the court has already appointed, no reasonable person would believe that the judge is impartial. “Judges should disqualify themselves in proceedings in which their impartiality might be questioned...” Canon 3(E)(1) of the *Code of Judicial Conduct*.

9. When a trial court judge engages in ex parte communication with a proposed expert witness picked by the judge, and agrees with the proposed expert that the expert would be appointed in the case, no reasonable person would believe that the judge is impartial. This is especially true when the trial judge’s proposed expert witness clearly touts himself as having expertise in an arena that is clearly adversarial—critiquing and seeking the withdrawal of forensic evaluations of other professionals.

Standard for Recusal

10. Mississippi courts have adopted an objective test to determine whether recusal is warranted. *Brent v. State*, 929 So.2d 952 (Miss.2005). “A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.” *Brent v. State* at 954. Any objective reasonable person would harbor doubts about Judge Hilburn’s ability to be impartial to Dr. Smith—especially in light of the fact that Judge Hilburn has engaged in ex parte communications with the expert witness from the State Hospital, and with a proposed expert from New York that Judge Hilburn chose.

11. “Elementary notions of due process afford a corollary principle: that a judge who is otherwise qualified to preside at trial or other proceeding must be sufficiently neutral and free of disposition to be able to render a fair decision. No person should be required to stand trial before a judge with a “bent of mind.” *Collins v. Dixie Transport*, 543 So.2d 160, 166 (Miss.1989), citing *Berger v. United States*, 255 U.S. 22, 33, 41 S.Ct. 230, 233, 65 L.Ed. 481 (1921). Dr. Smith has a due process right to an impartial judge. This due process right to an impartial judge is guaranteed to Dr. Smith under the 5th and 14th Amendments to the *Constitution of the United States* and Article 3, Section 14 of the *Mississippi Constitution*.

12. The Georgia Court of Appeals reversed and remanded a family law case where the trial judge engaged in ex parte communication with a court-appointed psychologist. The Georgia court held that the judge’s ex parte communication with the court-appointed psychologist were presumptive error. “Ex parte’ communications are presumed to have been in error.” *Arnau v. Arnau*, 207 Ga.App. 696 (1993).

Conclusion

Judge Hilburn’s own actions of engaging in prohibited ex parte’ communication with a proposed expert and with an expert already appointed by the court shows that Judge Hilburn is not “free of disposition and bent of mind”, as required by *Collins v. Dixie Transport*, cited supra.

A reasonable person, knowing all the circumstances, would harbor doubts about Judge Hilburn’s impartiality. The *Code of Judicial Conduct* requires that Judge Hilburn disqualify himself from both criminal cases and from the civil case.

WHEREFORE, PREMISES CONSIDERED, Dr. Smith and North Central Mississippi Regional Cancer Center respectfully request that the court hold a full and complete hearing on this *Motion for Recusal of Judge*, and upon a final hearing, find and order the recusal of the

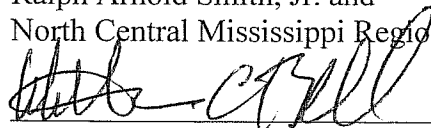
Honorable L. Breland Hilburn from cause number 2012-0208-CR, from cause number 2012-0209-CR, and from cause number 2012-0053 (the civil case styled as *Albert Lee Abraham, Jr. vs. R. Arnold Smith, Jr., M.D. et al.*).

The movants pray for such other relief to which they may be entitled in the premises.

Respectfully submitted, this 25th day of October, 2013.

Ralph Arnold Smith, Jr. and
North Central Mississippi Regional Cancer Center

By:



William C. Bell
Simmons Law Group, PA
240 Trace Colony Park Drive, Suite 200
Ridgeland, MS 39158

FILED

OCT 25 2013

ELMUR STOCKSTILL CIRCUIT CLERK

BY:  D.C.

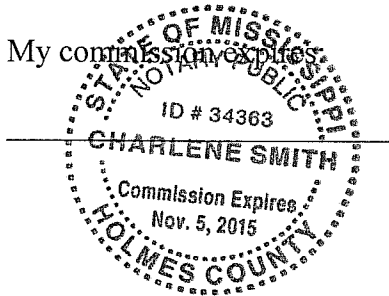
STATE OF MISSISSIPPI

COUNTY OF Madison

Personally appeared before me, the undersigned authority, the within named William C. Bell, who, in his capacity as counsel of record for Ralph Arnold Smith, Jr. and North Mississippi Regional Cancer Center, did state on his oath that the foregoing *Motion for Recusal of Judge* is filed in good faith and the affiant truly believes the facts underlying the grounds stated to be true.

Sworn and subscribed, this 25th day of October, 2013.

Charlene Smith
Notary Public



CERTIFICATE OF SERVICE

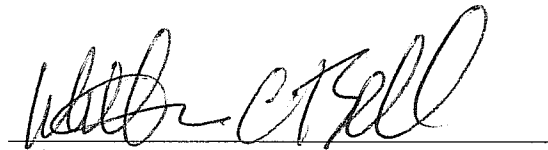
I, William C. Bell, do hereby certify that I have this day served a true and correct copy of the foregoing *Motion for Recusal of Judge* via mail and via email upon the following:

Honorable L. Breland Hilburn
PO Box 2114
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This, the 25th day of October, 2013.



William C. Bell