

**IN THE SUPREME COURT
OF THE STATE OF WISCONSIN**

FILED

APR 12 2012

**CLERK OF SUPREME COURT
OF WISCONSIN**

**In the Matter of Judicial Disciplinary
Proceedings Against the
Honorable David T. Prosser, Jr.**

Case No. 12AP566X-5

**Wisconsin Judicial Commission,
Complainant**

v.

**The Honorable David T. Prosser, Jr.,
Respondent.**

**RESPONDENT'S MOTION TO RECUSE
CHIEF JUSTICE SHIRLEY ABRAHAMSON**

The Honorable Justice David T. Prosser, Jr., by his attorneys, GUNTA & REAK, S.C., moves to recuse Chief Justice Shirley S. Abrahamson from the above entitled matter pursuant the Due Process Clause of the Fourteenth Amendment to the United States Constitution; Article I, Section 8 of the Wisconsin Constitution; Wis. Stat. §757.19(2)(b), (f), and (g); and SCR 60.04(4), Wisconsin Code of Judicial Conduct (hereinafter "Judicial Code"). Chief Justice Abrahamson is disqualified because she is not only a material witness with a strong interest in this case, but also clearly biased against Justice Prosser. If she were to participate in any proceedings in the above captioned matter, she would severely compromise the impartial administration of justice. Moreover, her participation would deprive Justice Prosser of due process as guaranteed under the Fourteenth Amendment to the United States Constitution, and Article I, Section 8 of the Wisconsin

Constitution.

BACKGROUND

On March 16, 2012, the Wisconsin Judicial Commission filed a complaint in the Wisconsin Supreme Court accusing Justice Prosser of violating three sections of the Judicial Code. The complaint specifically refers to Chief Justice Shirley S. Abrahamson twice, once in connection with an incident that occurred on June 13, 2011, and once in connection with an incident that occurred on February 10, 2010. Both incidents involve the Chief Justice personally. Both incidents were witnessed by the Chief Justice.

Wisconsin Stat. § 757.19(2) provides six objective standards and one subjective standard disqualifying a judge from participation in “any civil . . . action or proceeding.” The statute provides that “any judge shall disqualify himself or herself . . . when one of the following situations occurs.” Id. (emphasis added). These situations are described in paragraphs (2)(a) to (g). Paragraph (2)(b) states that disqualification is mandatory “when the judge is a party or a material witness.” Paragraph (2)(f) states disqualification is required “when a judge has a significant . . . personal interest in the outcome of the matter.” Paragraph (2)(g) requires disqualification “when a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.” Disqualification must occur “when the factors creating such disqualification first become known to the judge.” Wis. Stat. § 757.19(4).

The Commission filed its complaint in the Wisconsin Supreme Court pursuant to Wis. Stat. § 757.85(5). Commission complaints remain in the Supreme Court until they are referred to the Court of Appeals by order of the Supreme Court. These orders are issued after a decision by all participating members of the court.

Participation by Chief Justice Abrahamson in the decision to issue an order to the Court of Appeals or in any other proceeding in this matter would be in direct violation of Wis. Stat. § 757.19(2)(b), (f), and (g) and would void any decision or judgment in the case. State v. American TV & Appliance of Madison, 151 Wis.2d 175, 443 N.W.2d 662 (1989).

Chief Justice Abrahamson's participation also would be contrary to SCR 60.04(1)(a), (b), (e), and (h); and SCR 60.04 (4)(a), (d), and (e) 3. and 4.; and the due process clauses of the Fifth and Fourteenth Amendments and Article I, Section 8 of the Wisconsin Constitution.

DISCUSSION

Chief Justice Abrahamson was an active participant in the events in Justice Ann Walsh Bradley's chambers on the evening of June 13, 2011. Justice Prosser said to the Chief Justice that he had lost confidence in the Chief Justice's ability to lead the court, which, of course, he had every right to say. The Chief Justice then witnessed the response to that statement from Justice Bradley: she rushed at Justice Prosser and Justice Prosser reacted. Later that evening, Chief Justice Abrahamson discussed the incident with her law clerk, Peter Rank, and with Justice N. Patrick Crooks. She asked Mr. Rank, according to the Dane County Sheriff's Investigation Report ("Investigation Report"), "What would your reaction be if someone got in your space and asked you to leave?" Mr. Rank responded he "might put up an arm block or something if someone tried to get close to his personal space." (Investigation Report, p. 7)

Notwithstanding her implicit acknowledgment to Mr. Rank that Justice Ann Walsh Bradley was the aggressor who provoked the incident, Chief Justice Abrahamson discussed the incident the following day (June 14) with Court Marshal Tina Nodolf, demonstrating a "chokehold" and stating that Justice Prosser was "more of the aggressor." (Investigation Report, p. 11) She also discussed the incident with Justices Bradley and Crooks, Capitol Police Chief Charles Tubbs, Human

Resources Officer Margaret Brady, and possibly additional third parties.

On June 15, Chief Justice Abrahamson presided at a court meeting discussing the incident, demonstrated her version of the incident to justices and third parties, and accused Justice Prosser of being paranoid.

The Chief Justice contacted the Judicial Commission about the incident. She participated in the decision to bring in the Capitol Police Chief, and the decision to refer the matter to Dane County Sheriff's Department for a criminal investigation. She gave an extensive interview to investigators from Dane County Sheriff's Department. She also gave notes she prepared to the investigator. She issued a public statement after a special prosecutor declined to file charges.

These facts make the Chief Justice a "material witness" who "shall" disqualify herself from a civil proceeding on the matter under the statute. Wis. Stat. § 757.19(2)(b). She has demonstrated the most intense "personal interest in the outcome of the matter," because she initiated the complaint. Wis. Stat. § 757.19(2)(f). No rational determination could be made that she can "act in an impartial manner." Wis. Stat. § 757.19(2)(g). See also SCR 60.04(1)(e) and SCR 60.04(4) and (4)(a).

Chief Justice Abrahamson also was a material witness on February 10, 2010, when Justice Prosser is alleged to have said to her, "You are a total bitch." If this statement falls within the jurisdiction of the Judicial Commission, there will be a factual dispute about context -- the facts and circumstances leading up to the statement, the Chief Justice's reaction to the statement, and the actions taken by the Chief Justice in response to the statement, including purported meetings with other Justices, the Director of State Courts, her staff, the Court Marshal, Capitol Police, and a psychiatrist or psychologist.

Chief Justice Abrahamson openly demonstrated her animosity towards the Respondent in Matter of Disciplinary Proceedings Against Humphrey, 2012 WI 32, Case No. 2006AP2842-D, (Mar. 30, 2012). In a concurring opinion the Chief Justice stated among other things, referring to Justice Prosser:

¶77 In spite of the storm and fury and nasty insinuations about the court's actions, it turns out that the concurrence/dissent disagrees only with the imposition of a 30-day suspension.

¶81 When you read the concurrence/dissent and discard the hyperbole, inappropriate inferences, and emotional appeal

These statements clearly indicate that the Chief Justice is prejudiced against Justice Prosser and will not be capable of being impartial.

The right to a fair trial includes the right to be tried by an impartial and unbiased judge. State v. Walberg, 109 Wis.2d 96, 105, 325 N.W.2d 687 (1982); see also State v. Washington, 83 Wis.2d 808, 833, 266 N.W.2d 597 (1978); State v. Bell, 62 Wis.2d 534, 536-37, 215 N.W.2d 535 (1974). In State ex rel. Mitchell v. Bowman, 54 Wis.2d 5, 6-7, 194 N.W.2d 297 (1972), the Court stated: "... under the constitution no person, whether a juvenile or an adult, should be tried by a judge if the person involved can prove that the judge is prejudiced against him. Every person has a right to a fair trial by an impartial judge and jury; due process requires this."¹ Furthermore, the Judicial Code states that "A judge shall perform judicial duties without bias or prejudice." SCR 60.04(1)(e). A judge "shall hear and decide matters assigned to the judge, except those in which recusal is required under sub. (4) or disqualification is required under Section 757.19 of the statutes and except when judge substitution is requested and granted." SCR 60.04(1)(a).

¹ See also State v. Hollingsworth, 160 Wis.2d 883, 893, 467 N.W.2d 555, 559 (Ct. App. 1991) ("A person's right to be tried by an impartial judge stems from his/her fundamental right to a fair trial guaranteed by the due process clause of the fifth amendment of the United States Constitution.").

SCR 60.04(4) reads, in relevant part:

(4) Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial:

(a) The judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.

* * *

(e) The judge or the judge's spouse, or a person within the third degree of kinship to either of them, or the spouse of such a person meets one of the following criteria:

1. Is a party to the proceeding or an officer, director or trustee of a party.
2. Is acting as a lawyer in the proceeding.
3. Is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding.
4. Is to the judge's knowledge likely to be a material witness to the proceeding.

In addition to the Judicial Code, recusal is addressed in Wis. Stat. § 757.19(2), which states, in relevant part:

(2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

(b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

(f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.

(g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

In applying the aforementioned criteria to the instant action, it is evident that recusal is the appropriate and just remedy. The underlying facts in this case indicate that Chief Justice Abrahamson is not capable of remaining neutral and detached while participating in any proceedings in this matter. Chief Justice Abrahamson observed the events that allegedly unfolded between Justice Prosser and Justice Bradley, making her a material witness with personal knowledge of disputed evidentiary facts.² The United States Supreme Court was confronted with this issue in its review of a case in which the judge had been the 'grand jury' and then tried both petitioners in open court, convicted them of contempt and sentenced them for it. See In re Murchison, 349 U.S. 133, 135, 75 S.Ct. 623 (1955). The Court stated, "Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination." Id. at 138. This, in essence, is what would happen in the instant action if the Chief Justice failed to recuse herself. Although this is not a grand jury proceeding, Chief Justice Abrahamson could not remain impartial because she would believe she "was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness." Id.

² ... "Chief Justice Abrahamson recalled that about 6:00 p.m. on Monday, June 13, 2011, she was in Justice Bradley's office ... The Chief Justice said four of the other Supreme Court Justices came into Justice Bradley's assistant's office ... The Chief Justice stated Justice Ziegler was standing in the doorway leading to Justice Bradley's office with Justice Prosser behind her and to her right, then Justice Roggensack next to him on the right, and Justice Gableman in the far back." See Dane County Sheriff's Office Deputy Incident Report for Incident 110176237 at 23.

Aside from witnessing the events unfold in the instant action, Chief Justice Abrahamson must recuse herself because she has a personal bias against Justice Prosser. In a recent case decided by the Wisconsin Supreme Court, Chief Justice Abrahamson, who authored a dissent joined by Justice Bradley and Justice Crooks, criticized Justice Roggensack's failure to recuse herself, stating, "To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered." State v. Henley, 2011 WI 67, 945 n. 4, 338 Wis. 2d 610, 802 N.W.2d 175 (Abrahamson, C.J., dissenting) (citing In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623 (1955)). The operative directive, as explained by the Chief Justice, is "circumstances and relationships must be considered." Murchison, 349 U.S. at 136, 75 S.Ct. 623.

The relationship between Chief Justice Abrahamson and Justice Prosser is strained, to say the very least. For instance, in the interview that was conducted between the Chief Justice and Detective Sims on July 1, 2011, Chief Justice Abrahamson described Justice Prosser's behavior in the past as being disruptive, and said that he often had "outbursts." Investigation Report at 25. She also stated, "you never know what's going to set him off" and that Justice Prosser's outbursts were tantamount to "temper tantrums." Id. Chief Justice Abrahamson also openly admitted to discussing Justice Prosser with colleagues and friends to get an outside opinion on "how to deal" with him. Id. Chief Justice Abrahamson often refuses to speak to Justice Prosser when others are not present, and she reportedly locks her office doors because she is afraid of him.

Furthermore, Justice Bradley, in a conversation with Capitol Police Chief Charles Tubbs, also acknowledged that Justice Prosser said that "Justice Bradley and the Chief Justice have been threatening me for years." Id. at 20. Justice Bradley stated that Justice Prosser had threatened the Chief Justice in the past, and that all of his anger was focused towards her. Id. at 21. The

relationship between Justice Prosser and the Chief Justice had deteriorated so much that Justice Prosser told the Chief Justice, "I have lost confidence in your ability to lead this court." Id. at 39. Justice Prosser is aware of the Chief Justice's opinion of him, and knows that she made statements about him to Chief Tubbs that he was becoming "more and more unstable, how he thinks everyone is against him, and just basically paranoid." Id. at 44. In the Humphrey decision discussed above, the Chief Justice appears to have gone out of her way to insult Justice Prosser. Several other examples could be cited.

In sum, the current situation is the archetype for recusal. The volatile relationship between Chief Justice Abrahamson and Justice Prosser, including the mudslinging and name calling, as described above, only supports the conclusion that the Chief Justice cannot remain impartial. Even if Chief Justice Abrahamson subjectively feels that she could act as an impartial jurist, the relationship between the Respondent and the Chief Justice creates the appearance of bias, which merits recusal. In fact, based on Chief Justice Abrahamson's dissent in State v. Henley, it would be fair to assume that she agrees with this conclusion. In her dissent, Chief Justice Abrahamson (joined by Justice Bradley and Justice Crooks) cites to language from In re Murchison, authored by former United States Supreme Court Justice Hugo Black:

This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Turney v. State of Ohio, 273 U.S. 510, 532, 47 S. Ct. 437 ... (1927). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13 (1954)(emphasis added).

Henley, 338 Wis. 2d 610, ¶ 45 n. 4 (citing In re Murchison, 349 U.S. at 136, 75 S.Ct.623).

The extreme and unique nature of this situation warrants the conclusion that "well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial." See SCR 60.04(4). Chief Justice Abrahamson's failure to remain impartial based upon her bias against Justice Prosser and the fact that she was an eyewitness to the events that allegedly unfolded on June 13, 2011, disqualify her from presiding in any capacity over these proceedings. In conclusion, recusal is not only appropriate, but also imperative to satisfy the appearance of justice, and to ensure that this Court continues to act as an impartial decision maker, avoiding even the appearance of a conflict in this case.

For the forgoing reasons, The Honorable David T. Prosser, Jr., requests that Chief Justice Abrahamson recuse herself, effective immediately.

Respectfully submitted this 9TH day of April, 2012.

Kevin P. Reak

Kevin P. Reak WI State Bar No. 1004316

Gregg J. Gunta Bar Number: 1004322

GUNTA & REAK, S.C.

Attorneys for Respondent Honorable David
T. Prosser, Jr.

9898 West Bluemound Road, Suite 2

Wauwatosa, Wisconsin 53226

Telephone: (414) 291-7979

Facsimile: (414) 291-7960

E-mail: kpr@gunta-reak.com

E-mail: gjg@gunta-reak.com