

BEFORE THE FLORIDA JUDICIAL
QUALIFICATIONS COMMISSION
STATE OF FLORIDA

CASE NO. 07-774

INQUIRY CONCERNING A
JUDGE NO. 06-249 RE: JUDGE
MICHAEL E. ALLEN

**JUDGE MICHAEL ALLEN’S RESPONSE
IN OPPOSITION TO JQC’S MOTION IN
LIMINE TO EXCLUDE EVIDENCE OF
PURPORTED MISCONDUCT OF OTHERS**

The JQC’s motion in limine should be denied. None of the cases cited apply to the situation here because in none of those cases *did the JQC make* a judge’s motivation an essential element of its charges against the judge. In addition, the JQC noticed depositions of Judge Kahn’s fellow judges, and the Court’s Marshal, unanimously questioned Judge Kahn’s honesty and character and in so doing provided evidence that Judge Allen was not motivated by prejudice, but by concern for the integrity of the Court.

**A. THE CHARGES PLACE MOTIVATION AND
JUDGE KAHN’S INTEGRITY IN ISSUE**

The Notice of Formal Charges in this case alleges “prejudice” and “ill will” toward Judge Kahn as the motivation for the opinion on which the charges are

based:

Your concurring opinion, together with your conduct leading up to the publication of the concurring opinion, *reveals that you are prejudiced* against Judge Kahn (Notice of Formal Charges, ¶ 8) (emphasis supplied).

* * *

Your concurring opinion was unnecessary, unjustified and *motivated by ill will*. (Notice of Formal Charges, ¶ 14) (emphasis supplied).

By placing at issue Judge Allen’s motivation and personal feelings about Judge Kahn, the JQC opened the door to all evidence relevant to ascertaining Judge Allen’s view of Judge Kahn and his integrity.¹

Indeed, the Notice of Charges placed Judge Kahn’s integrity at issue by

¹ In its opposition to Judge Allen’s Motion to Dismiss the JQC argued, *inter alia*, that because animus was at issue as a disputed fact in this case, a trial was necessary. *See* JQC Response to Motion to Dismiss, pp. 5-6. It seems odd that the JQC would make that argument in opposition to dismissal, but in this submission seek to foreclose Judge Allen from presenting the facts which would show the valid reasons he had to question Judge Kahn’s integrity and character. That evidence is necessary to put Judge Allen’s defense in context: He may not have liked Judge Kahn, for good reason, but his opinion was not motivated by that dislike, nor was he “prejudiced” against Judge Kahn. Notice of Charges, ¶ 8. “Prejudice” is defined as “an unfavorable opinion or feeling formed beforehand or without knowledge, thought or reason.” Webster’s Encyclopedic Unabridged Dictionary of the English Language, New York (1996). The evidence adduced at the January 28, 2008 depositions was relevant to knowledge, thought and reason, and will be relevant at trial for the same reasons.

alleging that “your disparagement of Judge Kahn’s integrity was contrary to your duty to observe high standards so that the integrity and independence of the judiciary may be preserved.” Notice of Formal Charges, ¶ 4. Thus evidence that Judge Kahn lacked integrity would be relevant to a defense against the charge.

Examples of the integrity questions posed *by JQC counsel* at the depositions of its own witnesses confirmed that the JQC has opened the door to the evidence it now seeks to exclude. Questioning Judge Webster, JQC counsel elicited these responses:

Q. Did anyone approach you about running against Judge Kahn?

A. Yes.

Q. Who did?

A. Judge Allen and Judge Padovano came to my office.

* * *

Q. And did the – did they advance reasons for that [running against Judge Kahn]?

A. They did, and actually Judge Allen was the one having the conversation with me primarily. Judge Allen, the best I can recall, gave three reasons why he felt that Judge Kahn wasn’t fit to be chief judge. The first was he had told – and this was news to me at the time but that he apparently had told

Judge Thomas who had been on the court I think probably about a month at that point, maybe less, I think the exact words were to get the fuck out of his office.

* * *

A. The second was because Judge Kahn was arrogant and couldn't get along with other people.

* * *

A. And the third, as best I can recall, was a third-hand account or second - or third hand account regarding Judge Kahn having made a pass at an employee of the State Court Administrator's office and the employee had been upset about that.

Judge Webster Depo., pp. 6-7. JQC counsel even opened the door to Judge Kahn being "corrupt" with these questions of Judge Webster:²

Q. And do you agree that a reasonable person reading that concurring opinion might conclude that Judge Kahn was corrupt?

The Witness: Yes.

² "Corrupt" is defined as "guilty of dishonest practices, as bribery; lacking integrity; crooked. . . .2. debased in character. . . ." Webster's Encyclopedic Dictionary (1996).

Q. And do you know of any factual basis for any claim that Judge Kahn is corrupt?

A. No.

Id. at 16. The first cross examination question of Judge Webster by Judge Allen's counsel followed up on the *JQC's* introduction of "corrupt" into the case:

BY MR. ROGOW

Q. Do you know of any basis to believe that Judge Kahn is dishonest?

A. The only thing I can think of that would relate to that would be with regard to the liaisons or relationships he was having with an employee of our court and an employee of the State Court Administrator's office. He was not candid when asked about those relationships.

* * *

A. Is it dishonesty?

A. I suppose it is.

Id. at 17.

JQC counsel posed "corrupt" questions to each of the Judges it noticed for deposition and Judge Allen's counsel posed the opposing question. Another example helps to make the point:

Q. [Mr. Pope] Do you know of any factual basis for a claim that Judge Kahn is corrupt?

A. [Judge Benton] I know of no factual basis for such a thing.

CROSS EXAMINATION

BY MR. ROGOW

Q. Is Judge Kahn dishonest?

A. Not in my experience.

* * *

Q. To the best of your knowledge, has he told anyone on the court any lies about his personal conduct?

A. I beg your pardon, yes, he absolutely – thank you. He absolutely lied about his sexual misconduct.

Q. Did Judge Browning tell you that he had confronted him and he denied it?

A. Yes.

Q. Did Judge Wolf tell you that he had asked him and he denied it?

A. Yes.

Q. Is that a lie? Would you consider those –

A. I would consider those lies.

Q. So would you consider him in regard to that at least to have been dishonest?

A. Yes, I would.

Judge Benton Depo., pp. 13-14. *See also* Judge Browning Depo., pp. 18-19, agreeing that Judge Kahn was “duplicitous and untrustworthy;”

In Judge Wolf’s deposition, JQC counsel asked for an “explanation for the root causes of the dislike of Judge Allen for Judge Kahn and Judge Wolf answered “I have no idea.” Judge Wolf, Depo., p. 16. Thus that JQC questioning of Judge Kahn’s “good friend” (*id.* at 19) confirms the relevance of probing relationships on the Court in its prosecution of Judge Allen. The JQC having entered that arena, the cross-examination of Judge Wolf revealed reasons for doubting Judge Kahn’s integrity:

Q. Did Judge Kahn ever lie to you?

A. Yes. Okay, I knew that was going to come. Yes, he did and I was very, very annoyed with him about it. I told him off about it. He’s apologized to me. I think what – yes he did lie to me. And I was very mad at him for doing that.

Id. at 16. *See also* pp. 17-20 relating the sequences of events regarding a series of lies to him by Judge Kahn about his sexual misconduct concluding with “I did not find out about it until the court meeting where it was revealed.” *Id.* at 20.

Judge Wolf’s deposition also revealed a critical conflict between his

testimony and Judge Kahn's regarding the Judge Kahn/Levin relationship and a telephone call. Judge Wolf testified that "*Levin called Kahn* to ask what was going on." Judge Wolf Depo., pp. 22-23 (emphasis supplied). But Judge Kahn testified: "*I called him* [Fred Levin] the day the opinion [was released]. Judge Kahn Depo., p. 28 (emphasis supplied). Judge Kahn's credibility about his conversations with Fred Levin is an issue to be developed because his deposition was vague and peppered with "I don't remember," including this colloquy:

Q. Did you ever talk to Judge Wolf about your conversation?

A. With Levin?

Q. Yes.

A. It's possible, but I do not remember that. I don't remember that. If he says I did, then I couldn't dispute it, but I don't remember that.

Judge Kahn Depo., pp. 18-19. The conversation was much more memorable to Judge Wolf. *See* Judge Wolf Depo., p. 22-23.

The JQC, both in its charges and the evidence it intends to adduce at trial, has made an issue of the relationship between Judge Kahn and Mr. Levin and Mr. Childers (whose assistance Judge Kahn sought in obtaining his appointment to the Court – Judge Kahn Depo., p. 9) by alleging that no evidence supported the notion

of a public perception of inappropriateness. Judge Kahn's conduct, credibility and connections to Mr. Levin, his son Martin, Mr. Childers and the Levin law firm are all relevant to, and probative of, the validity of the charges in this case.

So it is against the unique factual setting of the charges in this case, confirmed by the January 28, 2008 depositions initiated by the JQC in which JQC counsel focused on Judge Allen's feelings about Judge Kahn and whether there was reason to believe that Judge Kahn was "corrupt," that we turn to the cases offered in the JQC Motion in Limine.

B. THE JQC CASES DO NOT SUPPORT ITS MOTION

Judge Allen's Motion to Dismiss relied upon *In re Kelly*, 238 So. 2d 565 (Fla. 1970) to demonstrate the difference between a JQC prosecution for a published written appellate opinion and prosecution of Kelly's "pattern of . . . hostility toward many attorneys, court officials, and fellow judges, as well as a concerted effort to pamper the public and news media by press releases designed to bolster his personal image at the expense of the judiciary." *Id.* at 566. For the JQC to offer *Kelly* as authority is seriously misguided. *Kelly* supported Judge Allen's rationale for dismissing the charges against him. It certainly does not support the JQC Motion in Limine.

Kelly was not charged with being "prejudiced" against the host of people he

attacked. He was not charged with being motivated by personal “ill will” in his continuing vituperative campaigns. Nothing in *Kelly* supports the notion that a judge *who is charged with being “prejudiced” and motivated by “ill will”* cannot advance evidence relevant to his state of mind. State of mind is at issue in this case. There is wide latitude when a party’s state of mind is a fact in dispute, and circumstantial evidence is competent evidence. *State v. Castillo*, 877 So. 2d 690, 693-94 (Fla. 2004); *Slicker v. State*, 941 So. 2d 1191, 1194 (Fla. 2d DCA 2006). The circumstances of Judge Kahn’s conduct, and its effect on Judge Allen’s state of mind is relevant to “prejudice” and “ill will.”

None of the other cases offered by the JQC involve a judge *who has been charged with prejudice and ill will* from adducing evidence relevant to his state of mind. Nor do those cases preclude a judge *who has been charged with prejudice and ill will* from presenting evidence that pertains to his state of mind *vis a vis* prejudice and ill will. ***Judge Kahn’s misconduct is not being introduced to justify Judge Allen’s opinion.*** Judge Kahn’s misconduct is being introduced to show that Judge Allen had reasons separate and distinct from *l’affaire Childers* to question Judge Kahn’s integrity, but that those reasons did not motivate Judge Allen’s opinion in *Childers*.

Thus this case is not *In re Shea*, 759 So. 2d 631, 633 (Fla. 2000) where

Judge Shea, who “engaged in a pattern of vindictive and retaliatory conduct,” sought to justify his conduct as “an attempt to improve the administration of justice” *Id.* at 638. Nor is this case like *In re Graham*, 620 So. 2d 1273 (Fla. 1993) where Judge Graham tried to justify his conduct as an effort to rid the county of political favoritism and corruption. *In re McMillan*, 797 So. 2d 560 (Fla. 2001) is of the same inapposite genre – justifying conduct as a means of breaking up a Manatee County conspiracy. Finally, the JQC’s snippet from *In re Graziano*, 696 So. 2d 744 (Fla. 1997) about the propriety of a motion in limine when Judge Graziano wanted to point to improprieties of other judges as a defense to the litany of charges against her, should have emphasized a portion of the last sentence of the snippet: “We find the information sought in respect to other judges was beyond the scope of permissible inquiry *in this proceeding*.” *That* proceeding is not this one; Judge Graziano was not charged with “prejudice” and “ill will” toward a specific judge. The JQC did not make motivation an essential element of Judge Graziano’s prosecution. Judge Allen is so charged and the evidence he seeks to admit was placed within the scope of the proceeding by the JQC by its Notice of Charges, the deposition testimony it adduced and the summary of evidence it proffered in its Pre-Hearing Statement.

The JQC writes: “whether Judge Kahn is “Peck’s bad boy” is simply

irrelevant to the question of Judge Allen’s animosity, hostility and good will.” Motion in Limine, p. 5. Hennery (Henry) Peck was a fictional star – “a mischievous lad” and “the name Peck’s Bad Boy became a popular term for any incorrigible rule-breaker.” See <http://www.answers.com/topic/peck-s-bad-boy-fictional-prankster?print=true>. The JQC proceeding here is not fictional and the factual incorrigibility of one of the characters in this proceeding is relevant to Judge Allen’s state of mind.

The JQC writes: “The issue is the existence of ill will – not its cause.” Motion in Limine, p. 5. But how can one judge whether one harbors “prejudice” or “ill will,” or whether the state of mind is distrust or disrespect, without knowing the surrounding circumstances? And then, there is a second question – if “prejudice” or “ill will” is clearly and convincingly shown, there must be clear and convincing evidence that those “feelings” motivated the action complained of. Because, the JQC has made the propriety of Judge Allen’s opinion turn on subjective intent or motivation, it cannot preclude him from explaining his feelings and adducing the evidence that supports his defense. The irony of the JQC’s “motivation” theory is that it runs afoul of the principle that a judge “may not be compelled to testify in a cause concerning either (1) the meaning of an order previously entered by the judge in a pending or closed case, or (2) the judge’s

mental process or reasoning in entering such an order.” *Stein v. Professional Center S.A.*, 666 So. 2d 264, 265-66 (Fla. 3d DCA 1996). But since dismissal has been denied, if this case is to be tried, a full and fair defense must not limit the testimony.

CONCLUSION

The JQC’s Motion in Limine should be denied.

Respectfully submitted,

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